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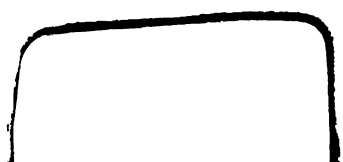
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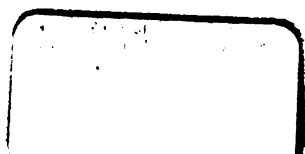
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AMERICAN LAW REPORTS

ANNOTATED

VOL. 18

SAM C. LAMBERT, Plff. in Err.,

v.

G. I. SMITH.

Oklahoma Supreme Court — May 16, 1916.

(53 Okla. 606, 157 Pac. 909.)

Evidence — burden of proof — holder of note.

1. The rule placing the burden of proof on the holder obtains where there is fraud in the inception of the note.

[See note on this question beginning on page 18.]

Bills and notes—holder in due course.

2. The purchaser of a negotiable instrument, in order to be a holder in due course, must come within the requirements of § 4102, Rev. Laws 1910, defining such holder.

[See 3 R. C. L. 1031.]

—knowledge of agent — effect.

3. Where, at the time a note was negotiated to the holder, his attorney, acting for and representing him in the particular transaction, had actual knowledge of an infirmity in the note, such knowledge will be imputed to the holder as though the facts were made known to him in person. In such case the principal is chargeable with notice of all such facts as come to his agent's knowledge while acting within the scope of his agency.

[See 3 R. C. L. 1069.]

—defect in chain of title.

4. When it is shown that the title

of any person who has negotiated a negotiable instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course, except as otherwise provided in § 4109, Rev. Laws 1910.

[See 3 R. C. L. 1033, 1038 et seq.]

Appeal — instructions — error.

5. Instructions placing the burden of proving knowledge of infirmity in a negotiable instrument upon the defendant, except in the class of cases provided for in the latter part of § 4109, Rev. Laws 1910, constitute reversible error. Such instructions relieve the plaintiff holder of making proof of a fact necessary to a recovery, and impose upon the defendant maker the additional duty of establishing to the jury's satisfaction a fact not necessary to his defense.

Headnotes by SHARP, J.

18 A.L.R.—1.

ERROR to the District Court for Alfalfa County (Cullison, J.) to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Titus & Talbot, for plaintiff in error:

When the title is shown to be defective, the burden is on the holder to show his good faith in obtaining the note.

Abmeyer v. First Nat. Bank, 76 Kan. 877, 92 Pac. 1109; *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044; *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347; *Iowa City State Bank v. Claypool*, 91 Kan. 248, 137 Pac. 949; *Ireland v. Shore*, 91 Kan. 326, 137 Pac. 926; *Alt-schul v. Rogers*, 22 Idaho, 512, 126 Pac. 1048; *Holdsworth v. Blyth & F. Co.* 23 Wyo. 52, 146 Pac. 608; *People's Nat. Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 764; *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 493; *Miller v. Marks*, 46 Utah, 257, 148 Pac. 413; *Citizens' Sav. Bank v. Landia*, 37 Okla. 530, 132 Pac. 1101; *McConnel v. Street*, 17 Ill. 253; *Pringle v. Phillips*, 5 Sandf. 157; *Wilder v. Gilman*, 55 Vt. 504; *Cochran v. Fox Chase Bank*, 209 Pa. 84, 103 Am. St. Rep. 976, 58 Atl. 117; *Brooks v. Reynolds*, 37 Okla. 767, 132 Pac. 1091; *Pinkerton Bros. Co. v. Bromley*, 119 Mich. 3, 77 N. W. 307; *Friedrich v. Ferguson*, 16 S. D. 541, 91 N. W. 323.

If the plaintiff took defendant's note with knowledge or notice of facts and circumstances which would constitute such taking as bad faith, then he is not protected as a holder in due course. It was the duty of the court to instruct the jury on this question, and it was error to refuse to do so upon request of defendant.

38 Cyc. 1687; *Leach v. Helper*, 32 Okla. 729, 124 Pac. 68; *Jones v. Joplin & P. R. Co.* 91 Kan. 282, 137 Pac. 796; *Seay v. Plunkett*, 44 Okla. 794, 145 Pac. 496; *State Bank v. Kiser*, 46 Okla. 180, 148 Pac. 685; *Chicago, R. I. & P. R. Co. v. Pitchford*, 44 Okla. 197, 143 Pac. 1146.

Messrs. W. L. Owen, Keith S. Simpson, and Noble & Tincher for defendant in error.

Sharp, J., delivered the opinion of the court:

This case presents error from the district court of Alfalfa county. Plaintiff, Smith, brought action against Lambert, to recover on a negotiable promissory note in the

sum of \$1,000 given by said Lambert, and before maturity indorsed by the payee, Vennum, to plaintiff. Defendant answered, charging, in effect, that said note was without consideration, and was fraudulently procured from him by Vennum and one Ceideburg, and that plaintiff knew at the time, or was in possession of facts and information such that his action in taking the note amounted to bad faith. The trial resulted in a judgment for plaintiff, from which defendant brings error, assigning, among other errors, the giving of instructions numbered 2 and 5, and the failure to give requested instructions numbered 1, 2, and 3, requested by the defendant. Instructions numbered 2 and 5 are as follows:

"No. 2. You are further instructed, however, that the burden of proof is upon the defendant in this case to establish by a preponderance of the evidence: First, the truth of the defense which he has pleaded against the note in suit; second, the fact that the plaintiff, G. I. Smith, purchased the note with notice of such defense, or that he made such purchase after the note became due. And if you so find by a preponderance of the evidence that the defendant has proved and established his defense to said note, your verdict should be for the defendant. . . .

"No. 5. The court further instructs you that in order to defeat a recovery by the plaintiff it is incumbent upon the defendant, Sam Lambert, to establish by a preponderance of the evidence: First, the truth of the defense which he has pleaded against the note in suit; and, second, the fact that the plaintiff, G. I. Smith, purchased the note with a notice of such defense, or that he made such purchase after the note became due. If both these propositions have been so established, then the plaintiff cannot re-

cover; but, if either proposition has not been so established, then plaintiff will be entitled to your verdict for the full amount of the note in suit."

That these instructions do not correctly state the law, and were prejudicial to defendant, is obvious. Neither are they cured by instructions numbered 1 and 4, as claimed by counsel for defendant in error. In short, the objectionable instructions placed upon the defendant the burden of proving by a preponderance of the evidence that, notwithstanding any fraud practised by Vennum in the procurement of said note, Smith purchased the note with actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the note constituted bad faith, and told the jury that unless defendant established these facts by a preponderance of the evidence, they should find for the plaintiff. Plaintiff claimed to be a holder of the note in due course of trade. By § 4102, Rev. Laws 1910, a holder in due course is defined as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"First. That it is complete and regular upon its face;

"Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"Third. That he took it in good faith and for value;

"Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

By § 4105 it is provided that "the title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in

breach of faith, or under such circumstances as amount to fraud."

While § 4106 provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

We have carefully read the entire record, and find abundant evidence to justify the conclusion that the note was fraudulently obtained from Lambert by the payee, Vennum, and his confederate, Ceideburg. "The evidence tending to show that the note was originally obtained by Vennum through fraud was by no means clear, decided, and satisfactory," say counsel for defendant in error in their very excellent brief, thereby admitting there was evidence of fraud in the inception of the note, and denying only its probative value. The facts in respect to the giving of the \$1,000 note, however, are uncontradicted. That Lambert was induced to give the note by fraud practised upon him by the payee thereof, and those acting in conjunction with him, cannot be seriously questioned. Section 4109, Rev. Laws 1910, provides: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

The argument that the instructions complained of constitute error is met in the brief of defendant in error, by this statement: "So it seems that the court, with admirable impartiality, placed upon the plaintiff the burden of proving that he

was the holder in due course as often as he did upon the defendant that of proving his defense," and the claim that, there being no evidence of bad faith, the giving of said instructions did not constitute reversible error. There being evidence of fraud in the procurement of the note, under the statute the burden was upon the plaintiff, and not upon the defendant, to prove that he acquired title to the note in due course, which, as we have seen, includes proof that it was taken in good faith, and that at the time the purchaser had no knowledge of any infirmity in the instrument or defect in Venum's title. While the authorities uphold with much unanimity the rule that neither negligence, nor knowledge of suspicious circumstances, nor failure to make inquiries will in or of itself amount to bad faith in a holder of negotiable paper, who purchases it for value before maturity, yet they are equally consistent in holding that the existence of such facts may be evidence of bad faith sufficient to take the question to the jury; and especially is this so where the burden of proof is upon the holder to establish the innocent character of his purchase. *Arnd v. Aylesworth*, 145 Iowa, 185, 29 L.R.A. (N.S.) 638, 123 N. W. 1000; *Kellogg v. Curtis*, 69 Me. 212, 31 Am. Rep. 273; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857; *Goodman v. Harvey*, 4 Ad. & El. 870, 111 Eng. Reprint, 1011, 6 L. J. K. B. N. S. 260, 6 Nev. & M. 372. Although suspicious circumstances are not notice as a matter of law, yet the jury may find them to be so as a matter of fact, and evidence going to show the existence of such grounds for suspicion is always admissible.

That the owner of a negotiable note who obtains it before maturity for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by title valid against the world, is firmly established in this jurisdiction.

McPherrin v. Tittle, 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 721; *Citizens' Sav. Bank v. Landis*, 37 Okla. 530, 132 Pac. 1101; *First State Bank v. Tobin*, 39 Okla. 96, 134 Pac. 395; *Security Trust & Sav. Bank v. Gleichman*, — Okla. —, 147 Pac. 1009, 50 Okla. 441, L.R.A. 1915F, 1203, 150 Pac. 908. Also that suspicion of defects of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or of circumstances sufficient to put him upon inquiry, will not defeat his title; that result can be produced only by bad faith on his part. *Forbes v. First Nat. Bank*, 21 Okla. 206, 95 Pac. 785; *First Nat. Bank v. Wade*, 27 Okla. 102, 35 L.R.A. (N.S.) 775, 111 Pac. 205; *City State Bank v. Pickard*, 35 Okla. 243, 129 Pac. 38. But it is unnecessary for us to say whether from the proven facts there was evidence of bad faith sufficient to take the case to the jury, as we shall presently see. Some time before Smith secured the Lambert note he had loaned Venum \$300, and Ceideburg \$600. Afterwards an additional loan of \$175 was made Ceideburg, who gave plaintiff his note for \$1,075, which included the amount due Smith and Venum. To secure this note, which matured February 4, 1912, Ceideburg gave Smith a mortgage on a race horse named Blanco Boy. This note and mortgage Smith started to leave with the People's State Bank of Medicine Lodge, but was told by someone there that he had better see a lawyer with reference to it. Smith then went to the office of Mr. Tinchier, and placed the Ceideburg note in his hands for collection. Mr. Tinchier placed the mortgage of record, looked after the security, and advised Venum that he had the note for collection. In the course of time Venum, who was anxious to get possession of Blanco Boy for racing purposes, called to see Mr. Tinchier; Mr. Smith being present on the occasion. In the transaction Mr. Tinchier represented Smith as his attorney. At the conference the following transpired: Smith assigned

over to Vennum both the Ceideburg note and mortgage, and Vennum indorsed to Smith the Lambert note for \$1,000, and agreed to pay Smith the amount due him over and above \$1,000 in cash. At the trial Smith testified positively that at the time of taking the Lambert note he had no knowledge of the circumstances under which it was given, and hence of the fraud practised upon Lambert. Smith's testimony, standing alone, refutes a personal knowledge on his part of the infirmity in the note.

As he was represented in the transaction by his attorney, Mr. Tincher, we must look, then, to ascertain what knowledge, if any, of the transactions between Vennum and Lambert his attorney had.

On cross-examination the following questions were asked and answered by Mr. Tincher while on the witness stand:

Q. You took a purely legal attitude, and that was that you had a right to look at the note, and did not make any further inquiry at all?

A. Yes, I did.

Q. What was the inquiry you made?

A. I made the inquiry as to whether or not Mr. Lambert was financially responsible; I made that inquiry.

Q. You only made the inquiry as to whether or not Mr. Lambert was good for the amount of the note or not? You didn't investigate to ascertain as to whether or not there was any consideration for the note, or whether or not he would pay it?

You depended upon the face of the note?

A. Vennum told me what the note was given for.

Q. You knew that you could not believe a word that Vennum might tell you, didn't you?

A. No sir; I didn't.

Q. You didn't know that you could not believe what Vennum might say about it?

A. No sir. I thought that, if anybody could tell me what the Lambert note was given to him for, Vennum could.

Q. You knew he had lied to somebody else, because you had defended him in a criminal case and criminal prosecutions all over the country?

A. No.

Thus, it appears that Vennum told Tincher what the note was given for, and that Tincher believed Vennum's statement, knowing that Vennum knew the facts. Notice to Tincher was notice Bills and notes
—knowledge of
agent—effect. to Smith, his client. The notice he received was contemporaneous with the consummation of the transaction. Generally speaking, it may be said that, for the purpose of charging a holder with knowledge, notice to an agent is notice to his principal, and that the principal is bound and affected by such knowledge or notice as his agent obtains while acting within the scope of his agency. *Brothers v. Bank of Kaukauna*, 84 Wis. 381, 36 Am. St. Rep. 932, 54 N. W. 786; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *Dickson v. Kittson*, 75 Minn. 168, 74 Am. St. Rep. 447, 77 N. W. 820; *Iowa Nat. Bank v. Sherman*, 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19; 3 R. C. L. 1069. The supreme court of Wisconsin, in the case first cited, of the rule making notice to the agent notice to the principal, said: "Notice to an agent is notice to his principal, and it is conceded that the principal is bound and affected by such knowledge or notice as his agent obtains in negotiating or attending to the particular transaction. But, if the agent acquires his information so recently as to make it incredible that he should have forgotten it, his principal will be bound, although not acquired while transacting the business of the principal."

Evidence of fraud in the procurement of the note from Lambert having been introduced, the burden then shifted to the plaintiff to show that he acquired the note without knowledge —defect in chain
of any infirmity
of title. therein, and in good faith, as was held in *Winfield Nat. Bank v. Mc-*

F. L. STEVENS, Plff. in Err.,
v.
JOSEPHINE PIERCE.

Oklahoma Supreme Court — June 29, 1920.

(79 Okla. 290, 193 Pac. 417.)

Evidence — burden of proving due course.

1. Every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course; and when the holder thereafter establishes that he received the note for value in the usual course of business, and under circumstances that did not operate as constructive notice of the fraud by which the maker was induced to execute the note, then the burden of proof is upon the maker to prove actual notice of the fraud.

[See note on this question beginning on page 18.]

Bills and notes — holder in due course.

2. Under the Uniform Negotiable Instruments Act, a "holder in due course" is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

[See 3 R. C. L. 1031.]

—when title defective — fraud or duress.

3. The title of a person who negotiates an instrument is "defective" within the meaning of the Negotiable Instruments Act when he obtains the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to fraud.

—when defenses good against negotiable instrument.

4. In the hands of any holder other

than the holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

[See 3 R. C. L. 998, 1036.]

—necessity of indorsement.

5. A negotiable note being payable to the order of a specified person, the indorsement of such person is necessary to the further negotiation of the instrument, and when the same is indorsed in blank, not specifying any indorsee, it is thereafter payable to bearer and may be negotiated by delivery.

[See 3 R. C. L. 970.]

—what destroys bona fides.

6. Suspicion of defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or of circumstances to put him upon inquiry, will not defeat the rights of one claiming to be a bona fide holder. That result can be produced only by bad faith on his part.

[See 3 R. C. L. 1072-1074.]

Headnotes by PITCHFORD, J.

ERROR to the District Court for Payne County (Hickam, J.) to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Yerker E. Taylor for plaintiff in error.

Messrs. Springer & Wilson for defendant in error.

Pitchford, J., delivered the opinion of the court:

Plaintiff in error, plaintiff below, instituted this action against defendant in error, defendant below, to recover judgment against the defendant upon a promissory note, executed by the defendant to the Lyon-Taylor Company.

It appears from the evidence that on June 4, 1914, the defendant executed and delivered a certain note, payable to the order of the Lyon-Taylor Company, for the sum of \$298; that, prior to the maturity of the note, the same was indorsed in blank by the Lyon-Taylor Company and delivered to the First National Bank of Iowa City, Iowa. The Lyon-Taylor Company borrowed from the said bank the sum of \$2,000, executing its note to the bank for said sum, and securing payment of the note by hypothecating a number of notes, including the note in controversy. Thereafter, the plaintiff purchased from the bank the note executed by the Lyon-Taylor Company, which was transferred to him, including the collateral security.

The answer of the defendant was to the effect that she was induced to execute the note by fraud, misrepresentation, and deceit practised upon her by the agent of the Lyon-Taylor Company, and further, that the plaintiff was not a holder in due course; that the Lyon-Taylor Company, the First National Bank, and the plaintiff were engaged in a conspiracy to defraud the defendant.

Upon the trial of the case, a verdict was rendered in favor of the defendant. Plaintiff appeals and assigns as error: (1) That the court erred in admitting testimony on the part of the defendant as to the transactions between the defendant and the Lyon-Taylor Company; (2) error in refusing to give the jury peremptory instructions to re-

turn a verdict in favor of the plaintiff; (3) error in giving the jury instruction No. 5.

The contention of the plaintiff is that, the note sued on being a negotiable instrument and the plaintiff being a holder in due course, the trial court permitted error in permitting the witnesses on the part of the defendant, over objection of the plaintiff, to testify concerning the transactions between the defendant and the Lyon-Taylor Company, leading up to the execution of the note, and that, under all the evidence in the case, the plaintiff was entitled to a peremptory instruction for a verdict in his favor.

If the witnesses on behalf of the defendant testified truthfully,—and their credibility was purely a matter for the jury to determine,—the defendant was the victim of a rank imposition, devised and executed by the Lyon-Taylor Company, through its agent, whereby she was induced to sign the note sued on. After the defendant had introduced evidence tending to prove the fraud and imposition practised upon her, the burden was then cast upon the plaintiff to prove that the First National Bank, under whom he claims, acquired the note in due course.

Plaintiff's possession of the note, indorsed by the Lyon-Taylor Company in blank, was prima facie evidence that the bank acquired the note in good faith and for value and in due course. Section 4109, R. L. 1910. But, when the defendant introduced evidence tending to show that the note had been procured by fraud, misrepresentation, and deceit practised upon her by the agent of the Lyon-Taylor Company, then the burden of proof was shifted to the plaintiff to show that the bank from which he purchased had acquired the note in good faith, for value, in the usual course of business, and when the plaintiff thereafter, by uncontroverted evidence, established that the

Evidence—
burden of
proving due
course.

bank had received the note for value in the usual course of business, and under circumstances that did not operate as constructive notice of the fraud by which defendant had been induced to sign the note, then the burden was upon the defendant to prove actual notice of fraud. *Forbes v. First Nat. Bank*, 21 Okla. 206, 95 Pac. 785. There was no proof offered tending to show that the bank had any notice of the fraud in acquiring the note.

Counsel for defendant in their brief say: "If the First National Bank could by any possibility be considered the owner and holder of the note so as to transfer the same, the First National Bank never indorsed the note, and therefore the defendant could not be considered a bona fide holder in due course, so as to cut off the equities existing in favor of the maker"—and cites § 4080, Rev. Laws 1910, which provides: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery."

Evidently counsel overlooked § 4059, Rev. Laws 1910, which provides:

"The instrument is payable to bearer:

"First, when it is expressed to be so payable; or

"Second, when it is payable to a person named therein or bearer; or

"Third, when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or

"Fourth, when the name of the payee does not purport to be the name of any person; or

"Fifth, when the only or last indorsement is an indorsement in blank."

The note sued on, as we have seen, was payable to the Lyon-Taylor Company, or order, and was in-

dorsed in blank when delivered to the bank. After-
ward, the note
could be negotiated
by delivery, which the evidence es-
tablishes was done in the instant
case.

Bills and notes—
necessity of
indorsement.

In *Conqueror Trust Co. v. Bayless Drug Co.* 75 Okla. 288, 183 Pac. 419, it was said: "It may be that the plaintiff was not an innocent purchaser in good faith, but the evidence is conclusive to the contrary. All that the courts can judge by is the evidence. There might be circumstances connected with this transaction that would excite one's suspicion, but the great weight of authority, and particularly the decisions of this court, have followed the rule that suspicion, or the knowledge of circumstances which would ex-
cite such suspicion

—what destroys
bona fides.

in the mind of a prudent man, or of circumstances sufficient to put one upon inquiry, is not sufficient to defeat the rights of one claiming to be a bona fide holder. That result can be produced only by bad faith on his part. The authorities are uniform in holding that the owner of a negotiable promissory note, who obtains it before maturity and for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world."

In *McPherrin v. Tittle*, 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 721, it was said: "We believe it to be a principle now well settled that neither a suspicion nor defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or put him on inquiry, will affect his right, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith."

We have examined instruction No. 5, given by the court, to which plaintiff excepted, and fail to find error in the same, especially when viewed in connection with the other instructions in the cause. Besides,

plaintiff seems to have abandoned this ground as error, as the same is not discussed in his brief, and no authorities cited showing any vice in the instruction.

Under the foregoing authorities, we are constrained to reverse the judgment of the trial court, and remand the cause for further proceedings not inconsistent with the views herein expressed.

Harrison, Vice Ch. J., and Kane, Johnson, McNeill, and Ramsey, JJ., concur.

Petition for rehearing denied November 16, 1920.

NOTE.

The effect of fraud in the inception

of a bill or note to throw upon a subsequent holder the burden of proving that he is a bona fide holder, or a holder in due course, is the subject of the annotation following *STEVENS v. BARNES*, post, 18. The question whether the burden thrown upon the holder includes the necessity of negating notice of the fraud is treated in subd. IV. of that annotation. It will be observed that the reported case (*STEVENS v. PIERCE*, ante, 7) follows Mr. Daniel's rule on that point, which is out of harmony with the view almost uniformly taken under the Negotiable Instruments Law, and is inconsistent with the view taken by the same court in the earlier case of *LAMBERT v. SMITH*, ante, 1.

FRED L. STEVENS, Respt.,

v.

MRS. FRANK BARNES et al., Doing Business under the Firm Name and Style of Barnes & Wrede, Appts.

North Dakota Supreme Court — November 8, 1919.

(43 N. D. 483, 175 N. W. 709.)

Evidence — burden of proof — rebutting fraud.

1. Fraud at the inception of the alleged contract and note having been established, the burden shifted to the indorsee to prove by fair preponderance of the evidence that he was a good-faith purchaser for value, before maturity, without notice. This he has failed to do.

[See note on this question beginning on page 18.]

Bills and notes — effect of fraud.

2. Where a promissory note is procured by fraud and misrepresentation, there is no legal execution or delivery of it, and it is of no legal force or effect.

[See 3 R. C. L. 1103.]

Alteration of instruments — detachment of note from order.

3. Where one, through himself or agent, falsely and fraudulently procures another to sign a paper, purporting to be an order for goods, to which

is attached a promissory note, the two instruments being separated only by a perforation, and the note is, after the delivery of the order, detached from it, such detachment constitutes a material alteration of the note, and destroys its legality if any it had. This is true, even if in the order there are words authorizing said note to be detached, for they only show more clearly the fraudulent purpose of the combination of the two instruments.

[See 1 R. C. L. 977.]

Headnotes by GRACE, J.

(Christianson, Ch. J., and Birdzell, J., dissent.)

APPEAL by defendants from a judgment of the District Court for Ransom County (Allen, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Bangert & Nollman, for appellants:

The purported note is void on account of fraud.

Guild v. More, 32 N. D. 482, 155 N. W. 44; Stevens v. Venema, 202 Mich. 232, L.R.A.1918F, 1145, 168 N. W. 531; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769; Pom. Eq. Jur. § 891; Sweet v. Anderson, 41 N. D. 375, 170 N. W. 869; Pratt v. Duncan, 204 Mich. 632, 171 N. W. 337.

The order and purported note together constitute but one instrument, and detaching the purported note is a material alteration of the instrument and renders it void.

Toledo Scales Co. v. Gogo, 186 Mich. 442, 152 N. W. 1046, Ann. Cas. 1917E, 601; Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382; Stephens v. Venema, 202 Mich. 232, L.R.A.1918F, 1145, 168 N. W. 531; Stephens v. Pearson, 138 Minn. 72, 163 N. W. 769; Bank of Evansville v. Kurth, 167 Wis. 43, 166 N. W. 658; Bothell v. Schweitzer, 84 Neb. 271, 22 L.R.A.(N.S.) 263, 133 Am. St. Rep. 623, 120 N. W. 1129.

The purported note is not negotiable in form.

Bank of Evansville v. Kurth, 167 Wis. 43, 166 N. W. 658; National Bank v. Feeney, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186.

Messrs. Kvello & Adams, for respondent:

The purported note was not void because of fraud.

Pom. Eq. Jur. 4th ed. § 890; Chilson v. Houston, 9 N. D. 499, 84 N. W. 354; Sioux Bkg. Co. v. Kendall, 6 S. D. 543, 62 N. W. 377.

Fraud not having been established, it is presumed as a matter of law that defendants, having signed the contract and note, had previously read them and knew the contents thereof; and, having affixed their signatures, they will not be heard to deny knowledge of the contents of the contract.

Standard Mfg. Co. v. Slot, 121 Wis. 14, 105 Am. St. Rep. 1016, 98 N. W. 923; David Bradley & Co. v. Basta, 71 Neb. 169, 98 N. W. 697; Fulton v. Sword Medicine Co. 145 Ala. 331, 40 So. 393; Slaughter v. Gerson, 13 Wall. 379, 20 L. ed. 627; Andrus v. St. Louis Smelting & Ref. Co. 130 U. S. 643, 32 L. ed. 1054, 9 Sup. Ct. Rep.

645; Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067; Robertson v. Commercial Secur. Co. 152 Ky. 336, 153 S. W. 450.

When the maker expressly consents to the detachment of a contract from a note, he is absolutely liable on the note, both to the payee and a bona fide holder.

Price v. Cockran, 1 Bibb, 570; Weinstein v. Citizens Bank, 13 Ala. App. 552, 69 So. 972; Pratt v. Rounds, 160 Ky. 358, 169 S. W. 848.

A promise or order to pay a definite sum, plus or minus a definite sum of discount, is negotiable.

Loring v. Anderson, 95 Minn. 101, 103 N. W. 722; Farmers Loan & T. Co. v. Planck, 98 Neb. 225, L.R.A.1915E, 564, 152 N. W. 390, Ann. Cas. 1918B, 598.

Grace, J., delivered the opinion of the court:

This action is one which was brought in the county court of Ransom county on a purported promissory note. By stipulation between the parties, the action was tried in the district court of that county. It was tried to a jury, but at the close of the testimony counsel for each of the parties made a motion for a directed verdict. Thus, under the former decisions of this court, the case became a court case.

The complaint states a cause of action upon the promissory note. Before stating the contents of the answer, it may be well to state the substantial facts of the case.

On September 18, 1914, one Edwin Acker, a salesman for Donald-Richards Company, secured an order from the defendant for a certain bill of goods which was signed by Mrs. Frank Barnes. To the order for the goods was attached the promissory note. The order and the note were one piece of paper, the note being separated from the order by perforation.

At the time of the trial, Mrs. Frank Barnes was not present; it being claimed that she was out of the state. The following stipula-

tion was agreed to, by and between the counsel for the respective parties: "It is stipulated and agreed, by and between counsel, that prior to the execution of the instrument in suit in controversy, the Donald-Richards Company, through one of its agents, had sold J. I. Rue, a merchant in Enderlin, North Dakota, goods, wares, and merchandise of the same nature and composition as the articles sold to the defendants for which the instrument in controversy was given in part payment. It is further stipulated and agreed that the witness, Mrs. E. W. Wrede, will testify that at the time of the taking of the order attached to the deposition taken on the part of the plaintiff, and marked 'exhibit C,' and herewith offered in evidence together with the instrument sued upon in this action, the said Acker, agent of said Donald-Richards Company, stated to this witness and her partner, Mrs. Frank Barnes, that the said instruments, taken together, constituted an order for goods, and did not constitute a note, but that the second portion of said instrument, now marked 'exhibit A,' which was attached to exhibit B, was to represent merely the manner in which the goods, or payment for the goods, should mature. It is further stipulated that said instrument, exhibit A, was signed by Mrs. Frank Barnes for the firm of Barnes & Wrede, after said representations had been made in the presence and hearing of both the witness and signer of exhibit A, to each of said parties, said agent addressing the witness and Mrs. Barnes jointly."

The contract and note were sent to Donald-Richards Company, and the testimony by deposition shows that the note was detached from the contract, and afterward delivered to the Iowa State Bank as part of the collateral security for a loan upon \$1,000, which testimony shows to have been on or about the 7th day of September, 1914. Deposition testimony further shows that the note by the bank was indorsed to

Fred L. Stevens on March 5, 1915, who claims that the consideration he paid for the indorsement and delivery of the note was the taking up by him of the \$1,000 loan made by the Iowa State Bank to Donald-Richards Company. Stevens now claims to be the owner of the note, and claims there is nothing paid upon the same.

The answer of the defendants is a general denial, and, in addition thereto, a further and separate defense which is in substance as follows: That on or about the 18th day of September, 1914, at Enderlin, North Dakota, one Edwin Acker, the salesman and agent of the Donald-Richards Company, through fraud and misrepresentations, induced the defendants to execute an order for certain goods sold by the Donald-Richards Company; that in order to induce these defendants to make, and execute said order for said goods, the agent, Acker, stated and represented to these defendants that said company sold goods to but one customer or firm in each city, and that the defendants would have the exclusive sale of said line of goods in the city of Enderlin; that said statements and representations were false, fraudulent, and untrue, and made for the sole and only purpose of inducing these defendants to sign said order; that the defendants believed in and relied upon said statements and representations, and by reason thereof, and not otherwise, and without knowledge of the falsity thereof, executed said order and parted with the possession to said Donald-Richards Company or its agent aforesaid; that such statements and representations were fraudulent and untrue, and were known to be false and untrue at the time they were made. As a further defense, the defendants denied execution of the note, and alleged that attached to, and forming a part of, the order so given, and made by these defendants by reason of the false and fraudulent representations as aforesaid, was a certain printed form, in substance as alleged in the

complaint, and which plaintiff alleges to be a certain note in the sum of \$94.50, due in instalments, but that said form was attached to and formed a part of said order so obtained, and was for the sole and only purpose of indicating the time within which said goods would be paid for, and was not delivered by the defendants, and was not received by Donald-Richards Company, and never became the note of the defendants; that, at the time of delivery of said order and said alleged note, they constituted but one instrument, and the defendants allege that said note was never delivered, and never became an obligation of the defendants, and that the defendants are not liable thereon.

The defendants further allege that since the execution of said order, as aforesaid, the defendants learned that the agent for Donald-Richards Company did sell the same line of goods to others in the city of Enderlin, and that, immediately upon learning this condition, they notified the said Donald-Richards Company that they would not accept the goods, and did then and there offer to restore the goods to the Donald-Richards Company in case it had parted with possession, and did then and there offer to rescind the contract, but alleges that Donald-Richards Company was not then in position to restore to the defendants their said order and alleged note, and did then and there positively refuse to do so.

The defendants further alleged that they never received the goods, and allege that they have never been tendered to them at Enderlin, North Dakota, or any other place, and that they have received nothing for said alleged note.

The principal defense is that the contract and alleged note were procured by a fraud, and never attained any legal existence or standing, and thus never became a contract or promissory note. If this be true, there could be no delivery of the same.

Section 5849, Comp. Laws 1913,

defines "actual fraud." It reads thus:

"'Actual fraud' within the meaning of this chapter consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract:

"1. The suggestion as a fact of that which is not true by one who does not believe it to be true.

"2. The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true.

"3. The suppression of that which is true by one having knowledge or belief of the fact.

"4. A promise made without any intention of performing it; or,

"5. Any other act fitted to deceive."

Mrs. Wrede, one of the defendants in the action, was sworn as a witness in the case. After she had been asked by her counsel several preliminary questions, the plaintiff objected to the introduction of the answers to any of them under the allegations of the answer, which tended to show fraud or misrepresentation, material alteration, lack of consideration, or any other defense alleged in the answer upon the ground that the answer did not state facts sufficient to constitute a defense upon any of the grounds stated; and upon the further ground that it fails to allege that the plaintiff had any knowledge whatsoever of any defect in the title to the instrument in suit in the action, and fails to allege any notice of said defect was ever brought home to him as required by the Negotiable Instrument Act in force in North Dakota; and upon the further ground that the burden is upon the maker of the note to first prove that the plaintiff is not indorsee in good faith, and that, before he can prove any defense, he must first show that plaintiff was not the holder in due course, as due course is defined by the statute of North Dakota; and

upon the further ground that there is no allegation and support of the defense of fraud in the inception of the instrument in dispute, and no allegation that any representation was made that the instrument in suit was not a note.

This motion the court denied. The stipulation above referred to was then made which includes the testimony of Mrs. Wrede. She was a witness in the case, and was apparently testifying when the stipulation was made which set forth what she would testify to.

While this method of procuring testimony may not be entirely improper, it is a practice not to be encouraged, where the witness is present in court and ready to testify. Assuming the testimony of Mrs. Wrede as contained in the stipulation as binding under the stipulation upon the parties, we will examine this evidence which it is stipulated she would give, and determine therefrom if it proves or tends to prove actual fraud. Her evidence in this regard is wholly undisputed and must be accepted as true. According to her testimony as stipulated, Acker, the agent of the plaintiff, stated to this witness and her partner that said instruments, taken together, constituted an order for goods, *and did not constitute a note*, but that the second part of said instrument, now marked "exhibit A," which was attached to "exhibit B," was to represent merely the manner in which the payment for the goods should mature.

If those statements and representations were made by Acker, as the testimony of Mrs. Wrede as stipulated shows, such statements were, under the statute, false and fraudulent representations. Acker must have known that exhibit A, which was attached to exhibit B, was not merely to represent the manner or maturity of payment. He knew that exhibit A constituted a note; he knew that the instruments, taken together, did not constitute an order for goods only, but did constitute an order for goods plus a note. His

representations were such, then, as to induce the defendants to believe that the instrument or instruments did not constitute a note, and that there was no note involved in the transaction; his conduct was such as was well fitted to deceive the defendants; his representations were of such character as to amount to the suggestion of a fact of that which is not true. He could not himself have believed it to be true. In other words, he must have had full knowledge of the intent and purpose of the whole contract, both exhibits A and B, and, in view of the representations to which it is stipulated Mrs. Wrede would testify, he must have suppressed the true condition and intent and purpose of both exhibits A and B.

It appears from the stipulation above set forth that, prior to the execution of the instrument in suit, the Donald-Richards Company, through one of its agents, had sold to J. I. Rue, a merchant in Enderlin, North Dakota, goods, wares, and merchandise of the same nature and composition as the articles sold defendants.

This evidence as stipulated supports the allegation of the answer which, in substance, avers that Acker, the agent of the Donald-Richards Company, represented to the defendants that said company sold goods to but one customer or firm in each city, and that defendants would have the exclusive sale of said line of goods in the city of Enderlin; that said representations were false, fraudulent, and untrue, and relied upon by the defendants; and that they were induced thereby to execute the order for said goods, etc.

The copy of exhibits A and B is in evidence. The copy is in the original form,—in other words, in the same condition it was before exhibit A was detached from exhibit B.

When the instrument as a whole is considered in connection with all the circumstances of the case, the false and fraudulent representations

pleaded, of which there is competent proof, it may well be considered an object of suspicion. Its arrangement is such as to facilitate the very fraud claimed by defendants. It is such an instrument as could easily be used to deceive the defendants and cause them to sign what was represented to them to be an order, when as a matter of fact the same was a note; part of the instrument when detached became a note. Certainly such an instrument is not one the use of which prevails to any great extent in commercial transactions, and as a whole, and considered in connection with all the other evidence, facts, and circumstances, as well as the pleadings in the case, it is some evidence in support of the fraud and the false and fraudulent representations claimed by the defendants.

Promises and representations such as made by Acker, the agent of the Donald-Richards Company, with the intent to deceive and without intention to fulfil, are fraud. *Tamlyn v. Peterson*, 15 N. D. 490, 107 N. W. 1081. A statement in the absence of positive knowledge, with intent to deceive, may be fraud. *Knowlton v. Schultz*, 6 N. D. 417, 71 N. W. 550. The stipulated evidence in the case at bar clearly shows that false and fraudulent representations were made prior to the time of the execution of the alleged contract and note. This being true, neither the alleged contract nor note ever attained a legal existence. They were therefore, as a matter of law, neither executed nor delivered. As stated in the case of *Knowlton v. Schultz*: "The note having been obtained by fraud, the fraud tainted the whole instrument and destroyed it entirely."

The plaintiff herein, however, seeks shelter under the protecting mantle of the Negotiable Instruments Act. He has neither pleaded, nor proved, nor offered any testimony that he is a purchaser for value, before maturity, without notice, and in good faith. If he were such, it would have been a simple

matter to have pleaded it, and equally as simple to have proved it.

The principle was clearly stated in the *Tamlyn v. Peterson* Case, above cited, that "when fraud in the inception of a negotiable instrument is alleged and proved, the burden is upon the indorsee to prove that he is a purchaser for value, before maturity, without notice, and in good faith."

This principle was first laid down in the case of *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, and again in the case of *Knowlton v. Schultz*, above cited. Fraud at the inception of the alleged contract and note having been established, the burden shifted

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burden of proof
—rebutting
fraud.

to the indorsee, the plaintiff in this case, to prove by fair preponderance of the evidence that he was a good-faith purchaser for value, before maturity, without notice. If he could prove each of these elements, the proof was peculiarly within his power. He had an opportunity to plead and prove the same, and has done neither. It was incumbent upon him in this case to prove his good faith; he did not even testify that he had purchased it in good faith. As was said in the case of *Knowlton v. Schultz*: "It may be true in this case that the plaintiff bought before maturity, for value, and without notice of any defense, and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation, lest it would disclose a defense, and therefore he carefully shut his eyes, and bought in the dark. In such a case, he would not be a purchaser in good faith."

This principle was again followed by this court in a very recent case. *Sweet v. Anderson*, 41 N. D. 375, 170 N. W. 869. In that case, in an opinion written by Mr. Justice Bronson, the following language was used: "A holder in due course of a promissory note must establish

his good faith as a matter of law, either by direct and uncontradicted testimony, or by circumstances which show consistently the good faith of his purchase, so that no fair-minded person can draw any other inference therefrom."

It is further contended by the defendants and assigned by them as error that the order and purported note together constituted but one instrument, and that detaching the purported note is a material alteration of the instrument and rendered it void.

It would seem clear that the two instruments should be construed together. Exhibit B was that part of the whole instrument which contained the order for the goods. Exhibit A was, at the time of the procuring of the order in the manner before stated, attached to, and formed a part of, the whole contract. It showed the maturity of the payments; in other words, it was an instalment note attached to the sales contract, was subject to certain conditions or contingencies which appeared in the contract, prominently among which is a special agreement to buy back at the purchase price all the goods in the order remaining on hand at the termination of the agreement if the purchaser so desires, and, if net profits are less than 50 per cent each year for two years, will pay the difference in cash, provided purchaser has kept the goods tastefully displayed for sale in his store, using the advertising system as provided on the reverse side hereof, made payments as agreed, and used reasonable diligence in promoting the sale of goods. There also appeared a warranty as to quality, and the condition under which goods might be exchanged, and the agreement to furnish a bond to protect the purchaser in all the conditions of the sale.

The detaching of the note, thereby making it a negotiable note, and giving to it a new and added value, is a material alteration of the contract, the legal result of which is to avoid the

entire contract. It is contended, however, that the Donald-Richards Company was authorized to detach the note by reason of the following words appearing in the contract, which are as follows, to wit: "That the company is authorized to detach the same when this order is approved and shipped." In the case of *Stevens v. Venema*, 202 Mich. 240, L.R.A.1918F, 1145, 168 N. W. 534, a Michigan case construing the identical words in practically an identical contract, the court used the following language: "This sentence appears in the order just above the perforation for detaching the note, and below the signature in the order. Such expedient only emphasizes the sinister purpose of the combination."

In *Toledo Scale Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046, Ann. Cas. 1917E, 601, it appears from an original record that an unsuccessful attempt was made to validate the note for detachment by two provisions in separate places: One stating, "You are authorized to date above-mentioned note at such time as you may elect to insert such date, either prior to or after the execution of such note," and the other, near the close of the instrument, that the signing or delivering of instalment note shall not be deemed or considered a payment or waiver of any term, provision, or condition of this contract. That opinion then further states: "We regard the decision in that case as well in point and controlling here." We are satisfied that the detaching of the alleged note from the contract was a material alteration of the contract, and the following abundantly sustained that conclusion: *Ibid.*; *Stevens v. Venema*, above cited, as well as the following cases: *Stevens v. Pearson*, 138 Minn. 72, 163 N. W. 769; *Bank of Evansville v. Kurth*, 167 Wis. 43, 166 N. W. 658; *Harrison v. Grier*, 198 Mich. 672, 165 N. W. 854; *Love-land v. Bump*, 198 Mich. 564, 165 N. W. 855.

The plaintiff claims that fraud has not been shown, and that it is not shown that the note in question

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note from order.

was executed and delivered at the time of the false and fraudulent representations. In this claim there is no merit. So far as the testimony is concerned, there is no showing that Edwin Acker, the agent of the Donald-Richards Company, ever had any negotiations with the defendant except the time when the contract and note were procured. The only inference from the testimony that can be drawn is that the contract and note in question were signed at about the time, and after, the false and fraudulent representations were made. If they were made at any other time, the burden was upon the plaintiff to so show, and he has not done so.

The question of the delivery of the goods or articles to the defendants is not, by any means, in this case, a controlling one; it is not really an issue in the case. It is only material, if at all, to show the good faith of the indorsee. He has wholly failed to show by a preponderance of evidence his good faith.

The principal questions in this case are:

(1) Were the contract and note procured by false and fraudulent representations? We think they were, and, being so procured, there was no legal execution or delivery of them.

(2) Was the indorsee a purchaser in good faith, for value, without notice? We think he was not. At least, the proof does not so show; he has failed to prove it by a preponderance of the evidence.

(3) Was the contract altered? The evidence is ample and sufficient to show that the alleged contract and note were procured by false and fraudulent representations, and thereafter were materially altered; and for that reason are of no legal effect.

The judgment appealed from is reversed. The plaintiff's action should be dismissed, and the District Court should enter an order to that effect. The case is remanded to the District Court for further proceed-

ings not inconsistent with this opinion.

The defendants are entitled to statutory costs on appeal.

Robinson and Bronson, JJ., concur.

Birdzell, J., dissenting (December 6, 1919):

The deposition of G. S. Krouth of Iowa City shows that he is cashier of the Iowa City State Bank; that on behalf of the bank he took the note in question before maturity as collateral security for a loan made to the Donald-Richards Company; and that at the time he took it he had no knowledge whatever of the transaction between the Donald-Richards Company and the defendants, and no knowledge of any defenses. Stevens, the plaintiff, who also testified by deposition, stated that he took up the loan of the Donald-Richards Company at the bank, paying the full cash consideration; also, that he obtained the note in suit as collateral and became the owner of both notes. M. H. Taylor, the assistant manager of the Donald-Richards Company, in his deposition, testified that the goods for which the note was given were shipped to the defendants, and that the defendants have never returned them, or any portion thereof, nor offered to do so. No evidence was offered on the part of the defendants to dispute the testimony of Taylor with reference to the goods; nor was there any testimony given or offered with reference to any damages incident to any alleged fraudulent representations; nor did the defendants attempt to make any showing that a rescission had either been made or attempted. In this state of the record, it seems to us that no defense was made out which would defeat the right of the plaintiff, if he be considered merely the assignee of the purchase-price obligation signed by the defendants, and that it is immaterial whether the instrument in suit be regarded as negotiable or not.

The testimony for the plaintiff is nearly all in the shape of depositions,

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effect of fraud.**

which accounts for the fact that it embraces questions and answers going to establish good faith out of the regular order of proof. The evidence for the defendant, with the exception of five preliminary questions and answers in connection with the examination of the witness,

Mrs. Wrede, consists of a stipulation as to what Mrs. Wrede would testify to. Accepting as facts all that it is stipulated she would testify to, there would, in our opinion, be lacking proof of facts sufficient to constitute a defense as hereinbefore indicated.

Christianson, Ch. J., concurs.

ANNOTATION.

Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due course.

I. General rules:

- a. Under law merchant, 18.
- b. Under Negotiable Instruments Act, 25.
- c. Contra decisions, 29.

II. Instrument fraudulently put in circulation, 31.

III. Reasons for rule, 37.

IV. What holder must prove:

- a. Under law merchant, 38.

I. General rules.

a. Under law merchant.

In some cases the position has been taken that when any valid defense, good as between immediate parties, is shown to exist, the holder must show that he is a bona fide holder. *Chambers v. Falkner* (1880) 65 Ala. 448. The court in *Bunting v. Mick* (1892) 5 Ind. App. 289, 31 N. E. 378, says: "The law is undoubtedly well settled in this state that if the holder of paper negotiable by the law merchant, and to which the maker has a valid defense, relies upon the fact that he is a bona fide holder thereof for value, the burden is upon him to aver and prove that he obtained such paper before maturity, without notice of the equities or defenses of the maker, and that he paid a valuable consideration therefor." While the rule is thus stated broadly by the court, the defense in this action was that the payee procured the note from the maker "by means of certain fraudulent representations going to the consideration." It seems probable that the court's statement of the rule was in view of this defense; at least, it seems clear

IV. —continued.

- b. Under Negotiable Instruments Act, 48.

V. What constitutes fraud within the rule:

- a. In general, 52.
- b. Fraud in the execution of partnership and corporate notes, 57.
- c. Illustrative cases of fraud, 58.
- d. Illustrative cases showing no fraud, 61.

from other cases in this jurisdiction that the broad rule that any defense, good as against the payee, casts upon the holder the burden of showing that he is a bona fide holder, does not prevail. It is believed that the theory that any defense destroys the presumption of bona fides rests upon a fundamental error. The character of bona fide holder, or holder in due course, need be invoked only when there is some defense good as between immediate parties; there is use for the presumption, therefore, only when there is some defense. If, therefore, the showing of any defense destroys the presumption, it is destroyed in every case in which there is any use for it. The manifest result of this theory is to destroy the usefulness of the presumption altogether. However this may be, it is apparent that in any case that adheres to the theory a showing of fraud would destroy the presumption of bona fides, not because of its character as fraud, but because it is a defense as between the immediate parties.

Fraud is of various kinds, and may be such as to vitiate entirely the instrument, even in the hands of a bona

fide holder. Under some statutes the defense of fraud is good as against a bona fide holder. *Hubbard v. Rankin* (1873) 71 Ill. 129; *Hewitt v. Jones* (1874) 72 Ill. 218. This statute is again referred to in *Mann v. Merchants' Loan & T. Co.* (1902) 100 Ill. App. 224, and in *Kennedy v. Jones* (1901) — Miss. —, 29 So. 819. If the fraud is such as to render the note void even in the hands of a holder in due course, or bona fide holder, the question annotated herein does not arise, and cases dealing with such fraud have been excluded. The present annotation is concerned with the evidentiary question which arises when, in an action on a note by a subsequent holder, there is shown fraud in the inception such as is a defense as between the immediate parties and those with notice, but which does not avoid the note as against the holder in due course.

Both under the law merchant and under the Negotiable Instruments Act, it appears that, according to the practically uniform line of authorities, when there is shown to have been fraud in the inception of an instrument, the presumption that the plaintiff is a holder in due course is destroyed, and he must then establish his character as a holder in due course by proof.

Taking up, first, the cases decided prior to the Negotiable Instruments Act, it appears that the rule just stated is supported by a multitude of authorities.

United States.—*Smith v. Sac County* (1871) 11 Wall. 139, 20 L. ed. 102; *Marion County v. Clark* (1876) 94 U. S. 278, 24 L. ed. 59; *Collins v. Gilbert* (1877) 94 U. S. 753, 24 L. ed. 170; *Stewart v. Lansing* (1881) 104 U. S. 505, 26 L. ed. 866; *King v. Doane* (1890) 139 U. S. 166, 35 L. ed. 84, 11 Sup. Ct. Rep. 465; *McClintick v. Cummins* (1840) 2 McLean, 98, Fed. Cas. No. 8,698; *Bailey v. Lansing* (1876) 13 Blatchf. 424, Fed. Cas. No. 738; *Tracey v. Phelps* (1885) 22 Fed. 634; *National Exch. Bank v. White* (1887) 30 Fed. 412, reversed on other grounds in (1892) 145 U. S. 513, 36 L. ed. 795, 12 Sup. Ct. Rep. 928; *Ameri-*

can Exch. Nat. Bank v. Oregon Pottery Co. (1892) 55 Fed. 265; *Simons v. Fisher* (1893) 20 L.R.A. 554, 5 C. C. A. 311, 17 U. S. App. 1, 55 Fed. 905; *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contract Co.* (1893) 57 Fed. 42, affirmed in (1899) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Atlas Nat. Bank v. Holm* (1896) 19 C. C. A. 94, 34 U. S. App. 472, 71 Fed. 489; *McVicar Realty Trust Co. v. Union R. Power & Electric Co.* (1905) 136 Fed. 678; *Mills v. Keep* (1912) 197 Fed. 360.

Alabama.—*Wallace v. Branch Bank* (1840) 1 Ala. 565; *Ross v. Drinkard* (1860) 35 Ala. 434; *Wetumpka v. Wetumpka Wharf Co.* (1879) 63 Ala. 632; *Reid v. Bank of Mobile* (1881) 70 Ala. 199; *Gilman v. New Orleans & S. R. Co.* (1882) 72 Ala. 566; *Woodall & Sons v. People's Nat. Bank* (1907) 153 Ala. 576, 45 So. 194; *Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509; *Sample v. Tennessee Valley Bank* (1917) 200 Ala. 578, 76 So. 936; *Deshazo v. Lamar* (1920) — Ala. App. —, 85 So. 586.

Arkansas.—*Tabor v. Merchants Nat. Bank* (1886) 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805; *Roberts v. Padgett* (1907) 82 Ark. 331, 101 S. W. 753; *Arkansas Nat. Bank v. Martin* (1914) 110 Ark. 578, 163 S. W. 795; *Harbison v. Hammons* (1914) 113 Ark. 120, 167 S. W. 849; *Cochran v. Shull* (1914) 115 Ark. 226, 170 S. W. 997.

California.—*Sperry v. Spaulding* (1873) 45 Cal. 544; *Jordan v. Grover* (1893) 99 Cal. 194, 33 Pac. 889; *Eames v. Crosier* (1894) 101 Cal. 260, 35 Pac. 878; *Sinkler v. Seljan* (1902) 136 Cal. 356, 68 Pac. 1024; *Blochman Commercial & Sav. Bank v. Moretti* (1918) 177 Cal. 256, 170 Pac. 419; *Meyer v. Lovdal* (1907) 6 Cal. App. 369, 92 Pac. 322; *Hall v. Wells* (1914) 24 Cal. App. 238, 141 Pac. 53; *Tidewater Southern R. Co. v. Harney* (1916) 32 Cal. App. 253, 162 Pac. 664; *Curran v. Wilson* (1918) 36 Cal. App. 208, 171 Pac. 817; *Burns v. Bauer* (1918) 37 Cal. App. 251, 174 Pac. 346.

Colorado.—*Harrington v. Johnson* (1896) 7 Colo. App. 483, 44 Pac. 368.

District of Columbia.—*Johnson*

County Sav. Bank v. Mendell (1911) 36 App. D. C. 413.

Georgia.—Sheffield v. Jackson County Sav. Bank (1907) 2 Ga. App. 221, 58 S. E. 386 (recognizing the above as the general rule in most of the American states, "and possibly in Georgia." But see Georgia cases, *infra*, I. c).

Illinois.—Wright v. Brosseau (1874) 73 Ill. 381; Charles v. Remick (1895) 156 Ill. 327, 40 N. E. 970; Hodson v. Eugene Glass Co. (1895) 156 Ill. 397, 40 N. E. 971; Warman v. First Nat. Bank (1900) 185 Ill. 60, 49 L.R.A. 412, 57 N. E. 6 (obiter); Finegan v. Green (1906) 130 Ill. App. 445; McClory v. Towne (1912) 173 Ill. App. 113.

Indiana.—Harbison v. Bank of State (1867) 23 Ind. 133, 92 Am. Dec. 308; Zook v. Simmonson (1880) 72 Ind. 83; Baldwin v. Fagan (1882) 83 Ind. 447; Mitchell v. Tomlinson (1883) 91 Ind. 167; Eichelberger v. Old Nat. Bank (1885) 103 Ind. 401, 3 N. E. 127; Tesche v. Merea (1889) 118 Ind. 586, 21 N. E. 316; Giberson v. Jolley (1889) 120 Ind. 301, 22 N. E. 306; Palmer v. Poor (1889) 121 Ind. 135, 6 L.R.A. 469, 22 N. E. 984; First Nat. Bank v. Ruhl (1890) 122 Ind. 279, 23 N. E. 766; Schmueckle v. Waters (1890) 125 Ind. 265, 25 N. E. 281; Citizens Bank v. Leonhart (1890) 126 Ind. 206, 25 N. E. 1099; Shirk v. Mitchell (1894) 137 Ind. 185, 36 N. E. 850; Shirk v. Neible (1900) 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281; Ray v. Baker (1905) 165 Ind. 74, 74 N. E. 619; Johnson v. Harrison (1912) 177 Ind. 240, 39 L.R.A.(N.S.) 1207, 97 N. E. 930; First Nat. Bank v. Rupert (1912) 178 Ind. 669, 100 N. E. 5; Zink v. Dick (1890) 1 Ind. App. 269, 27 N. E. 622; Kain v. Bare (1891) 4 Ind. App. 440, 31 N. E. 205; Bunting v. Mick (1892) 5 Ind. App. 289, 31 N. E. 378, 1055; State Nat. Bank v. Bennett (1893) 8 Ind. App. 679, 36 N. E. 551; Pope v. Branch County Sav. Bank (1899) 23 Ind. App. 210, 54 N. E. 835; Bradley v. Whicker (1899) 23 Ind. App. 380, 55 N. E. 490; Batesville Bank v. Lehner (1909) 43 Ind. App. 457, 87 N. E. 990; Hill v. Ward (1910) 45 Ind. App. 458, 91 N. E. 38; Union Trust Co. v. Adams (1913) 54 Ind.

App. 166, 101 N. E. 741; Bright Nat. Bank v. Hartman (1915) 61 Ind. App. 440, 109 N. E. 846; Bright Nat. Bank v. Hanson (1916) 68 Ind. App. 61, 113 N. E. 435; Brumbaugh v. Mellinger (1918) 68 Ind. App. 410, 120 N. E. 676.

Iowa.—Lane v. Krekle (1867) 22 Iowa, 399; Woodward v. Rodgers (1870) 31 Iowa, 342; Rock Island Nat. Bank v. Nelson (1875) 41 Iowa, 563; Averill v. Boyles (1879) 52 Iowa, 672, 3 N. W. 731; Frank v. Blake (1882) 58 Iowa, 750, 13 N. W. 50; United States Nat.-Bank v. Crosley (1892) 86 Iowa, 633, 53 N. W. 352; Commercial Bank v. Paddick (1894) 90 Iowa, 63, 57 N. W. 687; Galbraith v. McLaughlin (1894) 91 Iowa, 399, 59 N. W. 338; Bennett State Bank v. Schloesser (1897) 101 Iowa, 571, 70 N. W. 705; State Bank v. Gates (1901) 114 Iowa, 323, 86 N. W. 311; State Bank v. Cook (1904) 125 Iowa, 111, 100 N. W. 72; McNight v. Parsons (1907) 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; City Deposit Bank v. Green (1908) 138 Iowa, 156, 115 N. W. 893.

Kansas.—Brook v. Teague (1893) 52 Kan. 119, 34 Pac. 347; Kennedy v. Gibson (1904) 68 Kan. 612, 75 Pac. 1044; Abmeyer v. First Nat. Bank (1907) 76 Kan. 877, 92 Pac. 1109; Tredick v. Walters (1910) 81 Kan. 828, 106 Pac. 1067.

Kentucky.—Early v. McCart (1834) 2 Dana, 414; Breckenridge v. Moore (1843) 3 B. Mon. 629; David v. Merchants Nat. Bank (1898) 103 Ky. 586, 45 S. W. 878.

Louisiana.—Bowen v. Viel (1828) 6 Mart. N. S. 565; Morgan v. Yarrowborough (1839) 13 La. 74, 33 Am. Dec. 553; Louisiana Union Bank v. Ryan (1869) 21 La. Ann. 551.

Maine.—Aldrich v. Warren (1840) 16 Me. 465; Perrin v. Noyes (1855) 39 Me. 384, 63 Am. Dec. 633; Roberts v. Lane (1874) 64 Me. 108, 18 Am. Rep. 242; Kellogg v. Curtis (1879) 69 Me. 212, 31 Am. Rep. 273; Market & F. Nat. Bank v. Sargent (1893) 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192.

Maryland.—Ellicott v. Martin (1854) 6 Md. 509, 61 Am. Dec. 327; Totten v. Bucy (1882) 57 Md. 446; Crampton v. Perkins (1886) 65 Md.

22, 3 Atl. 300; Rhinehart v. Schall (1888) 69 Md. 352, 16 Atl. 126; Griffith v. Shipley (1891) 74 Md. 591, 14 L.R.A. 405, 22 Atl. 1107; Cover v. Myers (1892) 75 Md. 406, 32 Am. St. Rep. 394, 23 Atl. 850; Banks v. McCosker (1896) 82 Md. 518, 51 Am. St. Rep. 478, 34 Atl. 539, s. c. on subsequent appeal in (1896) 84 Md. 292, 35 Atl. 935; Ebert v. Gitt (1902) 95 Md. 186, 52 Atl. 900.

Massachusetts.—Munroe v. Cooper (1828) 5 Pick. 412; Bissell v. Morgan (1853) 11 Cush. 198; Sistersmans v. Field (1857) 9 Gray, 331 (obiter); Tucker v. Morrill (1861) 1 Allen, 528; Smith v. Edgeworth (1861) 3 Allen, 233 (obiter); Smith v. Livingston (1873) 111 Mass. 342; Sullivan v. Langley (1876) 120 Mass. 437; National Security Bank v. Cushman (1877) 121 Mass. 490 (obiter); Bill v. Stewart (1892) 156 Mass. 508, 31 N. E. 386; Conant v. Johnston (1896) 165 Mass. 450, 43 N. E. 192; Holden v. Phoenix Rattan Co. (1897) 168 Mass. 570, 47 N. E. 241 (obiter); Savage v. Goldsmith (1902) 181 Mass. 420, 63 N. E. 918.

Michigan.—Carrier v. Cameron (1875) 31 Mich. 373, 18 Am. Rep. 192; Mace v. Kennedy (1888) 68 Mich. 389, 36 N. W. 187; Ward v. Doane (1889) 77 Mich. 328, 43 N. W. 980; Goodrich v. McDonald (1889) 77 Mich. 486, 43 N. W. 1019; Drovers' Nat. Bank v. Blue (1896) 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; Stevens v. McLachlan (1899) 120 Mich. 285, 79 N. W. 627; Detroit Nat. Bank v. Union Trust Co. (1906) 145 Mich. 656, 116 Am. St. Rep. 319, 108 N. W. 1092; Stouffer v. Fletcher (1906) 146 Mich. 341, 109 N. W. 684; Stouffer v. Clark (1906) 146 Mich. 345, 109 N. W. 685; Merchants' Nat. Bank v. Wadsworth (1911) 166 Mich. 528, 131 N. W. 1108.

Minnesota.—Cummings v. Thompson (1872) 18 Minn. 246, Gil. 228; Merchants Exch. Bank v. Luckow (1887) 37 Minn. 542, 35 N. W. 434; MacLaren v. Cochran (1890) 44 Minn. 255, 46 N. W. 408; Bank of Montreal v. Richter (1893) 55 Minn. 362, 57 N. W. 61; First Nat. Bank v. Holan (1896) 63 Minn. 525, 65 N. W. 952; Dekalb Nat. Bank v. Thompson (1900)

79 Minn. 151, 81 N. W. 765; Robbins v. Swinburne Printing Co. (1904) 91 Minn. 491, 98 N. W. 331, 867; First Nat. Bank v. Person (1907) 101 Minn. 30, 111 N. W. 730 (obiter); First Nat. Bank v. Busch (1907) 102 Minn. 365, 113 N. W. 898 (obiter); Park v. Winsor (1911) 115 Minn. 256, 132 N. W. 264; Cochran v. Stein (1912) 118 Minn. 323, 41 L.R.A.(N.S.) 391, 136 N. W. 1037; First State Bank v. Pederson (1913) 123 Minn. 374, 143 N. W. 980; Cole v. Johnson (1914) 127 Minn. 291, 149 N. W. 467.

Mississippi.—Merchants & Farmers Bank v. Bank of Winoha (1913) 106 Miss. 471, 64 So. 210.

Missouri.—Hamilton v. Marks (1876) 63 Mo. 167; Cass County v. Green (1877) 66 Mo. 498; Johnson v. McMurry (1880) 72 Mo. 278; Henry v. Sneed (1889) 99 Mo. 407, 17 Am. St. Rep. 580, 12 S. W. 663; Famous Shoe & Clothing Co. v. Crosswhite (1894) 124 Mo. 34, 26 L.R.A. 568, 46 Am. St. Rep. 424, 27 S. W. 397; Campbell v. Hoff (1895) 129 Mo. 317, 31 S. W. 603; Keim v. Vette (1902) 167 Mo. 389, 67 S. W. 223; Clifford Bkg. Co. v. Donovan Commission Co. (1905) 195 Mo. 262, 94 S. W. 527; Carson v. Porter (1886) 22 Mo. App. 179; First Nat. Bank v. Stanley (1891) 46 Mo. App. 440; Jones v. Burden (1894) 56 Mo. App. 199; Smith v. Mohr (1895) 64 Mo. App. 39 (obiter); Goodin v. Buhler (1896) 65 Mo. App. 288; Ganz v. Weisenberger (1896) 66 Mo. App. 110; Adams County Bank v. Hainline (1896) 67 Mo. App. 483; Ern v. Rubinstein (1897) 72 Mo. App. 337; Hahn v. Bradley (1902) 92 Mo. App. 399; First State Bank v. Hammond (1904) 104 Mo. App. 403, 79 S. W. 493; Stewart v. Andes (1905) 110 Mo. App. 243, 84 S. W. 1134; First State Bank v. Hammond (1907) 124 Mo. App. 177, 101 S. W. 677; Penfield Invest. Co. v. Bruce (1900) 132 Mo. App. 257, 111 S. W. 888; National Bank v. Romine (1909) 136 Mo. App. 57, 117 S. W. 104; Merchants Nat. Bank v. Brisch (1909) 140 Mo. App. 246, 124 S. W. 76.

Montana.—Thamling v. Duffey (1894) 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363; Harrington v. Butte & B. Min. Co. (1897) 19 Mont. 411,

48 Pac. 758, s. c. on second appeal in (1902) 27 Mont. 1, 69 Pac. 102.

Nebraska.—Haggland v. Stewart (1890) 29 Neb. 69, 45 N. W. 263; Violet v. Rose (1894) 39 Neb. 660, 58 N. W. 216; Fawcett v. Powell (1895) 43 Neb. 437, 61 N. W. 586; National Bank v. Miller (1897) 51 Neb. 156, 70 N. W. 933; Lahrman v. Bauman (1906) 76 Neb. 846, 107 N. W. 1008; Central Nat. Bank v. Ericson (1912) 92 Neb. 396, 138 N. W. 563; People's Trust & Sav. Bank v. Rork (1914) 96 Neb. 415, 148 N. W. 95; Chapman v. Snyder (1901) 1 Neb. (Unof.) 230, 95 N. W. 346.

New Hampshire.—Clark v. Pease (1860) 41 N. H. 414; Perkins v. Prout (1867) 47 N. H. 387, 93 Am. Dec. 449, 2 Mor. Min. Rep. 139; Hallock v. Young (1904) 72 N. H. 416, 57 Atl. 236.

New Jersey.—Duncan v. Gilbert (1862) 29 N. J. L. 521; Haines v. Merrill Trust Co. (1893) 56 N. J. L. 312, 23 Atl. 796.

New York.—First Nat. Bank v. Green (1871) 43 N. Y. 298; Harger v. Worrall (1877) 69 N. Y. 370, 25 Am. Rep. 206 (obiter); Comstock v. Hier (1878) 73 N. Y. 270, 29 Am. Rep. 142; Vosburgh v. Diefendorf (1890) 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801; Canajoharie Nat. Bank v. Diefendorf (1890) 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402, motion for reargument denied in (1890) — N. Y. —, 26 N. E. 750; Joy v. Diefendorf (1891) 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; Grant v. Walsh (1895) 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209; Citizens' Nat. Bank v. Weston (1900) 162 N. Y. 113, 56 N. E. 494; Second Nat. Bank v. Weston (1902) 172 N. Y. 250, 64 N. E. 949; First Nat. Bank v. Weston (1897) 24 App. Div. 230, 48 N. Y. Supp. 403; Second Nat. Bank v. Weston (1898) 31 App. Div. 407, 52 N. Y. Supp. 315, reversed on other grounds in (1900) 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080, s. c. on subsequent appeal in (1901) 62 App. Div. 621, 70 N. Y. Supp. 995; Wright v. Bartholomew (1901) 66 App. Div. 357, 72 N. Y. Supp. 706; Cahen v. Everitt (1901) 67 App. Div. 86, 73 N. Y. Supp. 549; Hale v. Shannon (1890) 57 Hun, 466, 32 N. Y.

S. R. 1079, 11 N. Y. Supp. 129; Benson v. Gerlach (1890) 58 Hun, 610, 12 N. Y. Supp. 595; Pelly v. Onderdonk (1891) 61 Hun, 314, 15 N. Y. Supp. 915; Sanford v. Moss (1892) 63 Hun, 635, 45 N. Y. S. R. 710, 18 N. Y. Supp. 673; Miller v. Boyer (1894) 79 Hun, 131, 29 N. Y. Supp. 479; Flour City Nat. Bank v. Grover (1895) 88 Hun, 4, 34 N. Y. Supp. 496 (obiter); Hunter v. Batterson (1899) 28 Misc. 479, 59 N. Y. Supp. 501; Stifter v. Boggs (1896) 15 Misc. 623, 37 N. Y. Supp. 219; First Nat. Bank v. Gilmor (1896) 18 Misc. 614, 42 N. Y. Supp. 467; Catlin v. Hansen (1852) 1 Duer, 309; New York & V. State Stock Bank v. Gibson (1856) 5 Duer, 574; Ogden v. Pope (1892) 44 N. Y. S. R. 646, 18 N. Y. Supp. 140.

North Carolina.—Meadows v. Cozart (1877) 76 N. C. 450 (obiter); Pugh v. Grant (1882) 86 N. C. 39 (obiter); Commercial Bank v. Burgwyn (1891) 108 N. C. 62, 23 Am. St. Rep. 49, 12 S. E. 952; Commercial Bank v. Burgwyn (1892) 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623; Campbell v. Patton (1893) 113 N. C. 481, 18 S. E. 687; Loftin v. Hill (1902) 131 N. C. 105, 42 S. E. 548.

North Dakota.—Vickery v. Barton (1896) 6 N. D. 245, 69 N. W. 193; Knowlton v. Schultz (1897) 6 N. D. 417, 71 N. W. 550; Mooney v. Williams (1900) 9 N. D. 329, 83 N. W. 237; Ravicz v. Nickells (1900) 9 N. D. 536, 84 N. W. 353; Tamlyn v. Peterson (1906) 15 N. D. 488, 107 N. W. 1081; Walters v. Rock (1908) 18 N. D. 45, 115 N. W. 511.

Ohio.—Allen v. Johnson (1900) 11 Ohio C. D. 42 (obiter).

Oklahoma.—Forbes v. First Nat. Bank (1908) 21 Okla. 206, 95 Pac. 785; Cox v. Kirkwood (1916) 59 Okla. 183, 158 Pac. 930; Voris v. Birdsall (1917) 62 Okla. 286, 162 Pac. 951.

Oregon.—Owens v. Snell (1896) 29 Or. 483, 44 Pac. 827.

Pennsylvania.—Beltzhoover v. Blackstock (1834) 3 Watts, 20, 27 Am. Dec. 330 (obiter); Brown v. Street (1843) 6 Watts & S. 221; Porter v. Gunnison (1854) 2 Grant, Cas. 297; Albrecht v. Strimpler (1848) 7 Pa. 476; Hutchinson v. Boggs & Kuk (1857) 28 Pa. 294;

Albiets v. Mellon (1860) 37 Pa. 367; Hoffman v. Foster & Co. (1862) 43 Pa. 137; Maples v. Browne (1865) 48 Pa. 458; Dingman v. Amsink (1874) 77 Pa. 114; Reamer v. Bell (1875) 79 Pa. 292; Lorch Hardware Co. v. First Nat. Bank (1885) 109 Pa. 240; Gere v. Unger (1889) 125 Pa. 644, 17 Atl. 511; Real Estate Invest. Co. v. Russel (1892) 148 Pa. 496, 24 Atl. 59; Camden Nat. Bank v. Fries-Breslin Co. (1906) 214 Pa. 395, 63 Atl. 1022; Reeper v. Greevy (1897) 5 Pa. Super. Ct. 316, 40 W. N. C. 494; Loeb v. Melinger (1900) 12 Pa. Super. Ct. 592, 17 Lanc. L. Rev. 129; Howie v. Lewis (1900) 14 Pa. Super. Ct. 232; Falconer v. Witzman (1876) 2 W. N. C. 225; Bank v. Cunningham (1877) 4 W. N. C. 414.

Rhode Island.—Millard v. Barton (1882) 13 R. I. 601, 43 Am. Rep. 51; Hazard v. Spencer (1891) 17 R. I. 561, 23 Atl. 729; Third Nat. Bank v. Angell (1892) 18 R. I. 1, 29 Atl. 500 (rule recognized).

South Carolina.—Citizens Trust & Sav. Bank v. Stackhouse (1912) 91 S. C. 455, 40 L.R.A. (N.S.) 454, 74 S. E. 977.

South Dakota.—Kirby v. Berguin (1902) 15 S. D. 444, 90 N. W. 856; Bank of Spearfish v. Graham (1902) 16 S. D. 49, 91 N. W. 340; McGill v. Young (1902) 16 S. D. 360, 92 N. W. 1066; Rochford v. Barrett (1908) 22 S. D. 83, 115 N. W. 522; Mee v. Carlson (1908) 22 S. D. 365, 29 L.R.A. (N.S.) 351, 117 N. W. 1033; Union Nat. Bank v. Mailloux (1911) 27 S. D. 543, 132 N. W. 168; First Nat. Bank v. Harvey (1912) 29 S. D. 284, 137 N. W. 365; Barnard v. Tidrick (1915) 35 S. D. 403, 152 N. W. 690.

Tennessee.—National Bank v. Chatfield (1907) 118 Tenn. 481, 10 L.R.A. (N.S.) 801, 101 S. W. 765 (a case involving warehouse receipts).

Texas.—Blum v. Loggins (1880) 53 Tex. 121; Prouty v. Musquiz (1900) 94 Tex. 87, 58 S. W. 721, 996; Mulberger v. Morgan (1896) — Tex. Civ. App. —, 34 S. W. 148, on second appeal in (1898) — Tex. Civ. App. —, 47 S. W. 379, 738; Johnson County Sav. Bank v. Kemp Mercantile Co. (1908) — Tex. Civ. App. —, 114 S. W. 402; Pope

v. Beauchamp (1913) — Tex. Civ. App. —, 159 S. W. 867; Ruth v. Cobe (1914) — Tex. Civ. App. —, 165 S. W. 530; Daniel v. Spaeth (1914) — Tex. Civ. App. —, 168 S. W. 509; Calfee v. Bryant (1916) — Tex. Civ. App. —, 185 S. W. 323.

Utah.—First Nat. Bank v. Foote (1895) 12 Utah, 157, 42 Pac. 205.

Vermont.—McCasker v. Enright (1892) 64 Vt. 488, 33 Am. St. Rep. 938, 24 Atl. 249; Limerick Bank v. Adams (1897) 70 Vt. 132, 40 Atl. 166; Capital Sav. Bank & T. Co. v. Montpelier Sav. Bank & T. Co. (1904) 77 Vt. 189, 59 Atl. 827.

Virginia.—Vathir v. Zane (1849) 6 Gratt. 246; Fant v. Miller (1866) 17 Gratt. 47; Piedmont Bank v. Hatcher (1897) 94 Va. 229, 26 S. E. 505.

Wisconsin.—Fuller v. Green (1885) 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907.

England.—Heath v. Sansom (1831) 2 Barn. & Ad. 291, 109 Eng. Reprint, 115, 9 L. J. K. B. 246; Berry v. Alderman (1853) 14 C. B. 96, 139 Eng. Reprint, 40, 2 C. L. R. 691, 23 L. J. C. P. N. S. 34; Mather v. Maidstone (1856) 1 C. B. N. S. 273, 140 Eng. Reprint, 114, 26 L. J. C. P. N. S. 58, 8 Jur. N. S. 112, 5 Week. Rep. 163; Hogg v. Skeen (1865) 18 C. B. N. S. 426, 144 Eng. Reprint, 510, 34 L. J. C. P. N. S. 153, 11 Jur. N. S. 244, 11 L. T. N. S. 709, 13 Week. Rep. 383; Fitch v. Jones (1855) 5 El. & Bl. 238, 119 Eng. Reprint, 470, 24 L. J. Q. B. N. S. 293, 1 Jur. N. S. 854, 3 Week. Rep. 507; Harvey v. Towers (1851) 6 Exch. 656, 155 Eng. Reprint, 706, 20 L. J. Exch. N. S. 318, 15 Jur. 544; Bailey v. Bidwell (1844) 13 Mees. & W. 73, 153 Eng. Reprint, 30; Isaac v. Farrar (1836) 1 Mees. & W. 65, 150 Eng. Reprint, 348; Mills v. Barber (1836) 1 Mees. & W. 425, 150 Eng. Reprint, 500, 5 Dowl. P. C. 77, 2 Gale, 5, 5 L. J. Exch. N. S. 204; Whitaker v. Edmunds (1834) 1 Moody & R. 366, 1 Ad. & El. 638, 110 Eng. Reprint, 1351; Reynolds v. Chettle (1811) 2 Campb. 596; Fuller v. Alexander (1882) 47 L. T. N. S. 443, 52 L. J. Q. B. N. S. 103.

Canada.—Lockhart v. Wilson (1907) 39 Can. S. C. 541; Borden v. Stanford (1915) 48 N. S. 532, 21 D. L. R.

209; *Langley v. Joudrey* (1913) 47 N. S. 451, 13 East. L. R. 432, 15 D. L. R. 10; *Exchange Bank v. Carle* (1887) Montreal L. R. 3 Q. B. 61; *Willoughby v. Conover* (1907) 7 West. L. R. 87.

In addition to the foregoing cases there are others that recognize the above rule. In *Brown v. James* (1896) 2 App. Div. 105, 37 N. Y. Supp. 529, an action by a creditor against the accommodation indorser of his debtor's note, the burden was held to be on the plaintiff, upon proof that the debtor represented to the indorser, in order to obtain the indorsement, that he desired the note for another purpose. The holder of a note issued by an agent under an apparent authority, but in fraud of his principal, can recover of the principal only on showing that he took the note for value, before maturity, and bona fide. *Camden Safe Deposit & T. Co. v. Abbott* (1882) 44 N. J. L. 257. Proof by the accommodation indorser of a note that the maker fraudulently inserted the name of a payee other than the name intended by the accommodation indorser casts upon the payee the burden of proving that he is a holder in good faith, and for value. *Kirchoff v. Goezlin* (1889) 30 Ill. App. 190. It is recognized in *Draper v. Cowles* (1882) 27 Kan. 484, that the above "may be" the rule. Where the principal maker of a note perpetrated a fraud upon a surety thereon, the payee must show that he had no knowledge of the fraud. *Bank of Monroe v. Anderson Bros. Min. & R. Co.* (1885) 65 Iowa, 692, 22 N. W. 929. In an action upon a partnership note executed by one of the partners after the dissolution of the firm, the burden was held to be upon a holder thereof to show his bona fides, in *Second Nat. Bank v. Weston* (1900) 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080. See *infra*, V. b, for fraud by partners. A bank which discounts a check drawn by the vice president of another bank, the certification of which was fraudulently made, has the burden of proving its bona fides. *Detroit Nat. Bank v. Union Trust Co.* (1906) 145 Mich. 656, 116 Am. St. Rep. 319, 108 N. W. 1092. The holder of

drafts, the acceptance of which has been obtained by fraud, has the burden of showing that he is the bona fide holder. *Stouffer v. Fletcher* (1906) 146 Mich. 341, 109 N. W. 684; *Stouffer v. Clark* (1906) 140 Mich. 345, 109 N. W. 685. The payee of bank drafts which were fraudulently filled in by a bank clerk, after they had been signed in blank, and intrusted to him by the cashier, was held to have the burden of showing that he had no notice of the fraud, in *Clifford Bkg. Co. v. Donovan Commission Co.* (1905) 195 Mo. 262, 94 S. W. 527. It is stated in the headnote to *Hillebrant v. Ainsworth* (1857) 18 Tex. 307, that, upon proof of fraud in the inception of a note, it would seem that it is not necessary, in the first instance, for the defendant to prove further that the plaintiff, an indorsee, had notice, or received the note without paying value therefor, but that it devolves on the plaintiff to show that the note came into his hands in the regular course of trade, before due, for value. The apparent assumption in *Battles v. Laudenslager* (1877) 84 Pa. 446, that the defendant must produce evidence of knowledge of fraud on the part of the plaintiff, seems to have been a mere accidental statement in a case in which the main question was one of the sufficiency of evidence to justify the court in submitting the question as to the plaintiff's knowledge to the jury. The Pennsylvania cases are not altogether clear upon the question whether fraud in the inception or negotiation of a note casts upon the plaintiff the burden of showing his absence of knowledge of fraud, or whether this burden rests upon the defendant. It may be that the assumption in *Battles v. Laudenslager* is referable to the rule that the burden still rests upon the defendant. Although, in *Camden Nat. Bank v. Fries-Breslin Co.* (1906) 214 Pa. 395, 63 Atl. 1022, the court states that, if the note was procured by fraud, the holder "would be put to proof of consideration that it had acted fairly, paid value, and had no notice of the alleged fraud." The court in *Smith v. Popular Loan &*

Bldg. Asso. (1880) 93 Pa. 19, says that where a negotiable note was obtained from the maker under false pretenses, and fraudulently put into circulation by the payee, the holder of the note, in order to recover, must show a purchase for value, before maturity, "without notice of the fraud." And it is regarded as the well-settled law of Pennsylvania in *Reeper v. Greevy* (1897) 5 Pa. Super. Ct. 316, 40 W. N. C. 494, that, after the defendant has introduced proof that the note in suit was obtained fraudulently, the burden is shifted upon the plaintiff to show "that he had obtained the note without notice of the fraud, for a valuable consideration."

The burden of showing that the holder had notice of the defense was held to be upon the maker in *Cochran v. Priddy* (1908) 49 Tex. Civ. App. 39, 107 S. W. 616, by virtue of an agreement entered into at the time of trial, by which the maker admitted the holder's cause of action save only in event that he could establish his defense of fraud.

In *Griffin v. Boyd* (1898) — Tex. Civ. App. —, 46 S. W. 664, a charge to the jury was given by the trial court as follows: "If the jury believe from the evidence in the case that the note sued on was originally procured from the defendants by fraud, or under circumstances that raise a suspicion of fraud—if the jury so believe—then the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he acquired the note bona fide for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity; and a failure so to do will entitle the defendants to a verdict." This charge was held erroneous, but the court does not point out the error.

Although the defendant in *Swift v. Tyson* (1842) 16 Pet. (U. S.) 1, 10 L. ed. 865, offered to prove that the bill in question was accepted upon fraudulent representations by the payee, the court, after saying that the

plaintiff was a bona fide holder, says that there is no doubt that the holder of any negotiable paper before it is due is not bound to prove that he is the bona fide holder for a valuable consideration, without notice, for the law will presume that he is such, in the absence of all rebutting proof. Apparently, however, Story, J., who rendered the opinion in that case, was not considering the effect of the fraud as an evidentiary question.

This rule has been applied in an equitable action to cancel an obligation thus obtained by fraud. *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contract Co.* (1893) 57 Fed. 42, affirmed in (1899) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Mills v. Keep* (1912) 197 Fed. 360.

The action in *Sullivan v. Langley* (1876) 120 Mass. 437, was in tort by the maker of the note, against the payee and his indorsees, for fraudulently inducing the plaintiff to give his note and an assignment of a savings-bank book, it being alleged that the indorsees were liable for aiding and abetting the payee.

That the burden is on a subsequent transferee to show that he is a bona fide holder was held in *Breckinridge v. Moore* (1843) 3 B. Mon. (Ky.) 629, an action by the maker of a note against whom a judgment had been rendered, to obtain an injunction against the judgment.

b. Under Negotiable Instruments Act.

The Negotiable Instruments Act provides in § 59: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

According to § 55, "the title of a person who negotiates an instrument is defective within the meaning of

this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

The plain provisions of the act have been applied, and the duty is held to rest upon the holder to show that he is a holder in due course, when fraud in the inception is shown.

United States.—*Hickman v. Sawyer* (1914) 132 C. C. A. 425, 216 Fed. 281 (applying North Carolina rule).

Arizona. — *People's Nat. Bank v. Taylor* (1915) 17 Ariz. 215, 149 Pac. 763; *Navajo-Apache Bank & T. Co. v. Wakefield* (1919) 20 Ariz. 335, 180 Pac. 529; *Lentz v. Landers* (1919) 21 Ariz. 117, 185 Pac. 821.

Connecticut.—*Johnson County Sav. Bank v. Walker* (1906) 79 Conn. 348, 65 Atl. 132.

Idaho. — *Winter v. Nobs* (1910) 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302; *Shellenberger v. Nourse* (1911) 20 Idaho, 323, 118 Pac. 508; *Park v. Johnson* (1911) 20 Idaho, 548, 119 Pac. 52; *Vaughn v. Johnson* (1911) 20 Idaho, 669, 37 L.R.A.(N.S.) 816, 119 Pac. 879; *Southwest Nat. Bank v. Lindsley* (1916) 29 Idaho, 343, 158 Pac. 1082; *First Nat. Bank v. Hall* (1917) 31 Idaho, 167, 169 Pac. 936.

Illinois.—*Dunn v. Block* (1915) 192 Ill. App. 486; *Gundlach Advertising Co. v. W. F. Hallam & Co.* (1916) 198 Ill. App. 280; *Nokomis Nat. Bank v. Hendricks* (1917) 205 Ill. App. 54.

Iowa.—*McNight v. Parsons* (1907) 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; *Hawkins v. Young* (1908) 137 Iowa, 281, 114 N. W. 1041; *Cox v. Cline* (1908) 139 Iowa, 128, 117 N. W. 48; *City Nat. Bank v. Jordan* (1908) 139 Iowa, 499, 117 N. W. 758; *Arnd v. Aylesworth* (1909) 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000; *Bank of Bushnell v. Buck Bros.* (1913) 161 Iowa, 362, 142 N. W. 1004; *Stotts v. Fairfield* (1914) 163 Iowa, 726, 145 N. W. 61; *Re Philpott* (1915) 169 Iowa, 555, 151 N. W.

825, Ann. Cas. 1917B, 839; *First Nat. Bank v. Wise* (1915) 172 Iowa, 24, 151 N. W. 495; *Farmers & M. State Bank v. Shaffer* (1915) 172 Iowa, 173, 154 N. W. 485, affirming on this point (1914) — Iowa, —, 147 N. W. 851; *Houge v. St. Paul F. & M. Ins. Co.* (1916) 174 Iowa, 607, 156 N. W. 862; *Lundean v. Hamilton* (1916) — Iowa, —, 159 N. W. 163; *Waukee Sav. Bank v. Jones* (1917) 179 Iowa, 261, 159 N. W. 691; *Scovel v. Monaghan* (1917) 183 Iowa, 581, 164 N. W. 783; *City Nat. Bank v. Mason* (1917) 181 Iowa, 824, 165 N. W. 103; *German American Nat. Bank v. Kelley* (1918) 183 Iowa, 269, 166 N. W. 1053; *Ford v. Ott* (1919) — Iowa, —, 173 N. W. 121; *Underwood v. Leichtman* (1920) 188 Iowa, 794, 176 N. W. 683; *Jones County Trust & Sav. Bank v. Kurt* (1921) — Iowa, —, 182 N. W. 409; *Rinella v. Faylor* (1921) — Iowa, —, 180 N. W. 983; *Connolly v. Greenfield Sav. Bank* (1921) — Iowa, —, 185 N. W. 887.

Kansas.—*Ireland v. Shore* (1914) 91 Kan. 326, 137 Pac. 926; *Security State Bank v. Seaunier* (1919) 104 Kan. 7, 178 Pac. 239; *Beachy v. Jones* (1921) 108 Kan. 236, 195 Pac. 184.

Kentucky. — *Campbell v. Fourth Nat. Bank* (1910) 137 Ky. 555, 126 S. W. 114; *Asbury v. Taube* (1912) 151 Ky. 142, 151 S. W. 372; *Muir v. Edelen* (1913) 156 Ky. 212, 160 S. W. 1048; *Barnard v. Napier* (1916) 167 Ky. 824, 181 S. W. 624; *Mackenzie v. Eschmann* (1917) 174 Ky. 450, 192 S. W. 521; *Commercial Security Co. v. Archer* (1918) 179 Ky. 842, 201 S. W. 479; *Harrison v. Perry* (1919) 184 Ky. 722, 212 S. W. 911; *Lynchburg Shoe Co. v. Hensley* (1920) 186 Ky. 769, 218 S. W. 248.

Louisiana. — *Appalachian Corp. v. Ayo* (1919) 145 La. 201, 82 So. 89.

Maryland. — *Stouffer v. Alford* (1910) 114 Md. 110, 78 Atl. 387; *Wilson v. Kelso* (1911) 115 Md. 162, 80 Atl. 895.

Massachusetts.—*Lewiston Trust & S. D. Co. v. Shackford* (1913) 213 Mass. 432, 100 N. E. 828; *Berenson v. Conant* (1913) 214 Mass. 127, 101 N. E. 60.

Michigan.—*People's State Bank v.*

Miller (1915) 185 Mich. 565, 152 N. W. 257.

Minnesota. — Stevens v. Pearson (1917) 138 Minn. 72, 163 N. W. 769; First Nat. Bank v. Denfeld (1919) 143 Minn. 281, 173 N. W. 661; State Bank v. Missia (1920) 144 Minn. 410, 175 N. W. 614; Albrecht v. Rathai (1921) — Minn. —, 185 N. W. 259.

Missouri. — Hoeley v. South Side Bank (1920) 280 Mo. 336, 217 S. W. 504; Jobes v. Wilson (1910) 140 Mo. App. 281, 124 S. W. 548; Bank of Ozark v. Hanks (1910) 142 Mo. App. 110, 125 S. W. 221; Hill v. Dillon (1910) 151 Mo. App. 86, 131 S. W. 728, s. c. on second appeal (1913) 176 Mo. App. 192, 161 S. W. 881; Link v. Jackson (1911) 158 Mo. App. 63, 139 S. W. 588, s. c. on second appeal in (1912) 164 Mo. App. 194, 147 S. W. 1114; Birch Tree State Bank v. Dowler (1912) 163 Mo. App. 65, 145 S. W. 843; Southwest Nat. Bank v. House (1913) 172 Mo. App. 197, 157 S. W. 809; Scheidel Western X-Ray Co. v. Bacon (1918) — Mo. App. —, 201 S. W. 916; Downs v. Horton (1919) — Mo. App. —, 209 S. W. 595; Lindsay v. Thomas (1919) — Mo. App. —, 213 S. W. 513; Depres, Bridges & Noel v. Galloway (1920) — Mo. App. —, 224 S. W. 998; Ensign v. Crandall (1921) — Mo. App. —, 231 S. W. 675; Bank of Hale v. Linneman (1921) — Mo. App. —, 235 S. W. 178.

Nebraska — Ostenberg v. Kavka (1914) 95 Neb. 314, 145 N. W. 713; Union Nat. Bank v. Moomaw (1921) — Neb. —, 184 N. W. 51.

New Hampshire.—Mechanics' Sav. Bank v. Feeney (1919) — N. H. —, 108 Atl. 295.

New Jersey. — De Jonge & Co. v. Woodport Hotel & Land Co. (1909) 77 N. J. L. 233, 72 Atl. 439.

New Mexico. — Gebby v. Carrillo (1918) 25 N. M. 120, 177 Pac. 894.

New York. — Strickland v. Henry (1901) 66 App. Div. 23, 73 N. Y. Supp. 12 (obiter); Consolidation Nat. Bank v. Kirkland (1904) 99 App. Div. 121, 91 N. Y. Supp. 353; Eisenberg v. Lefkowitz (1911) 142 App. Div. 569, 127 N. Y. Supp. 595; Johnson County Sav. Bank v. Kornhauser (1916) 174 App. Div. 136, 160 N. Y. Supp. 913;

Sproul v. Beskin (1917) 179 App. Div. 275, 166 N. Y. Supp. 606 (see (1921) — App. Div. —, 189 N. Y. Supp. 956, for later proceedings in this case); Security Bank & T. Co. v. Dery (1921) 194 App. Div. 572, 185 N. Y. Supp. 476; Royal Bank v. German-American Ins. Co. (1908) 58 Misc. 563, 109 N. Y. Supp. 822; Rafsky v. Frederick A. Smith Co. (1913) 79 Misc. 353, 139 N. Y. Supp. 1088; Moak v. Twenty-third Ward Bank (1917) 100 Misc. 488, 165 N. Y. Supp. 1055; Packard v. Figliuolo (1909) 114 N. Y. Supp. 753; Midwood Park Co. v. Baker (1910) 128 N. Y. Supp. 954, affirmed without opinion in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1135, which was affirmed without opinion in (1913) 207 N. Y. 675, 100 N. E. 1130.

North Carolina. — American Nat. Bank v. Fountain (1908) 148 N. C. 590, 62 S. E. 738; Myers v. Petty (1910) 153 N. C. 462, 69 S. E. 417; Chadwick v. Kirkman (1912) 159 N. C. 259, 74 S. E. 968; Fidelity Trust Co. v. Ellen (1913) 163 N. C. 45, 79 S. E. 263; Third Nat. Bank v. Exum (1913) 163 N. C. 199, 79 S. E. 498; Fidelity Trust Co. v. Whitehead (1914) 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200; Merchants Nat. Bank v. Branson (1914) 165 N. C. 344, 81 S. E. 410; First Nat. Bank v. Warsaw Drug Co. (1914) 166 N. C. 99, 81 S. E. 993; American Exch. Nat. Bank v. Seagroves (1914) 166 N. C. 608, 82 S. E. 947 (rule recognized); Standard Trust Co. v. Commercial Nat. Bank (1914) 167 N. C. 260, 83 S. E. 474 (rule recognized); Smathers v. Texaway Hotel Co. (1915) 168 N. C. 69, 84 S. E. 47; Wilson v. Lewis (1915) 170 N. C. 47, 86 S. E. 804; J. E. Latham Co. v. Rogers (1915) 170 N. C. 239, 1 A.L.R. 11, 87 S. E. 34; Moon v. Simpson (1915) 170 N. C. 335, 87 S. E. 118 (obiter); Metropolitan Discount Co. v. Baker (1918) 176 N. C. 546, 97 S. E. 495; Dennison v. Spivey (1920) 180 N. C. 220, 104 S. E. 370.

Oklahoma.—LAMBERT v. SMITH (reported herewith) ante, 1; Mangold & G. Bank v. Utterback (1918) — Okla. —, 174 Pac. 542; STEVENS v.

PIERCE (reported herewith) ante, 7.

Oregon.—*Sink v. Allen* (1916) 79 Or. 78, 154 Pac. 415; *Everding & Farrell v. Toft* (1915) 82 Or. 1, 150 Pac. 757, 160 Pac. 1160.

Pennsylvania.—*Schultheis v. Sellers* (1909) 223 Pa. 513, 22 L.R.A. (N.S.) 1210, 72 Atl. 887; *Second Nat. Bank v. Hoffman* (1911) 229 Pa. 429, 78 Atl. 1002; *Grange Trust Co. v. Brown* (1912) 49 Pa. Super. Ct. 274; *Kensington Nat. Bank v. Ware* (1906) 32 Pa. Super. Ct. 247; *Eliel v. Chamberlain* (1912) 48 Pa. Super. Ct. 610; *Horrell v. Reeves* (1919) 72 Pa. Super. Ct. 129; *Rothrock v. Panzera* (1919) 72 Pa. Super. Ct. 349; *Citizens' Nat. Bank v. Stein* (1912) 21 Pa. Dist. R. 1070.

Tennessee.—*Elgin City Bkg. Co. v. Hall* (1907) 119 Tenn. 548, 108 S. W. 1068.

Utah.—*Leavitt v. Thurston* (1911) 38 Utah, 351, 113 Pac. 77; *Miller v. Marks* (1914) 46 Utah, 257, 148 Pac. 412.

Washington.—*Cedar Rapids Nat. Bank v. Myhre Bros.* (1910) 57 Wash. 596, 107 Pac. 518; *City Nat. Bank v. Mason* (1910) 58 Wash. 492, 108 Pac. 1071; *Gottstein v. Simmons* (1910) 59 Wash. 178, 109 Pac. 596; *Scandinavian American Bank v. Johnston* (1910) 63 Wash. 187, 115 Pac. 102; *Wells v. Duffy* (1912) 69 Wash. 310, 124 Pac. 907; *Peterson v. Nichols* (1913) 71 Wash. 656, 129 Pac. 373.

Wisconsin.—*Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192; *Jones v. Brandt* (1921) — Wis. —, 181 N. W. 813.

In *Altschul v. Rogers* (1912) 22 Idaho, 512, 126 Pac. 1048, where the burden of proof was held to have been shifted to a subsequent holder, it seems that the subsequent holder himself had actual notice of the fraud.

In *Keegan v. Rock* (1905) 128 Iowa, 39, 102 N. W. 805, an action by the assignee of a mortgage, title to which had been obtained by the assignor through fraud, the court says that the plaintiff had the burden of proving that he acquired title as a holder in due course—that is, in good faith, and for value, and without notice, under the Negotiable Instruments Act.

The holder of a note obtained by duress was held to have the burden of showing that he was a holder in due course, in *Phillips v. Eldridge* (1915) 221 Mass. 103, 108 N. E. 909.

The holder of a note which was given upon the purchase of a saloon and the stock therein has, upon proof that the vendor fraudulently removed a large part of the stock before delivery to the purchaser, the burden of showing that he had no knowledge of the fraud. *Goldberg v. Berg* (1916) 93 Misc. 498, 157 N. Y. Supp. 209.

Where an agent deposited money belonging to his principal in a bank in his own name, and subsequently obtained a cashier's check from the bank with intent to embezzle and misappropriate the plaintiff's money so deposited, the agent's title to the check thus obtained was held in *Singer Mfg. Co. v. Summers* (1906) 143 N. C. 102, 55 S. E. 522, to be defective, so as to cast upon a subsequent holder the burden of showing his bona fides.

Evidence that a note was executed upon a condition that was never fulfilled throws upon the holder thereof the burden of showing his bona fides. *Raleigh Bkg. & T. Co. v. Clark* (1916) 172 N. C. 268, 90 S. E. 200.

The transferee of a note which had been paid was held to have the burden of showing his bona fides, in *Baade v. Cramer* (1919) 278 Mo. 516, 213 S. W. 121.

In *Hoeley v. South Side Bank* (1920) 280 Mo. 336, 217 S. W. 504, the holder of a note was held to have the burden of showing his bona fides, where the note was executed under the following circumstances: An agent employed to purchase property, being furnished with the money therefor, made the purchase and had the property conveyed to a "straw man," who executed a note secured by a mortgage on the property, subsequently the property was conveyed by the "straw man" to the principal, and, without her knowledge, the conveyance was made subject to the encumbrance.

The note involved in *Merchants' Nat. Bank v. Wadsworth* (1911) 166 Mich. 528, 131 N. W. 1108, was given after the Negotiable Instruments Act was adopted in that state. In adher-

ing to the general rule that the burden was thrown upon a subsequent holder by a showing of fraud by the maker, the court makes no reference to the Negotiable Instruments Act.

Although the note involved in *Central Nat. Bank v. Ericson* (1912) 92 Neb. 396, 138 N. W. 563, seems to have been given after the Negotiable Instruments Law went into effect in that state, the court, in holding the burden of showing his bona fides cast upon a subsequent holder by a showing of fraud in the inception of the note, makes no reference to the statute.

Nor is the Negotiable Instruments Law referred to in connection with the burden of proof in *People's Trust & Sav. Bank v. Rork* (1914) 96 Neb. 415, 148 N. W. 95, although the note involved in that case seemed to have been given after the Negotiable Instruments Law was enacted. It is there held, in accord with the general rule, that upon a showing of fraud the burden is upon the subsequent holder to show his good faith.

It has been stated that the Negotiable Instruments Act does not change the rule of the law merchant as to the burden of proof, where fraud is shown, or where the title of the person negotiating the instrument is defective. *Desharzo v. Lamar* (1920) — Ala. —, 85 So. 586; *Parsons v. Utica Cement Mfg. Co.* (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785; *Downs v. Horton* (1919) — Mo. App. —, 209 S. W. 595; *Mechanics Sav. Bank v. Feeney* (1919) — N. H. —, 108 Atl. 295; *Sutherland v. Mead* (1903) 80 App. Div. 103, 80 N. Y. Supp. 504; *Mitchell v. Baldwin* (1903) 88 App. Div. 265, 84 N. Y. Supp. 1043.

Fraud in the inception of a note results in a defective title, within the meaning of the Negotiable Instruments Law. *Ensign v. Crandall* (1921) 207 Mo. App. 211, 231 S. W. 675.

The title of the payee of a partnership note executed by one of the partners to raise money to pay his individual contribution to the partnership, the payee having knowledge thereof, is defective within the meaning of the Negotiable Instruments Law so as to cast upon a subsequent

holder the burden of showing his bona fides. *Lucker v. Iba* (1900) 54 App. Div. 566, 66 N. Y. Supp. 1019.

Likewise, under the English and Canadian Bills of Exchange Acts, where an instrument is shown to be fraudulent, the burden of proving his bona fides rests upon a holder. *Oakley v. Boulton* (1888) 57 Times L. R. (Eng.) 60; *Farmer v. Ellis* (1901) 2 Ont. L. Rep. 544; *Ridgeway v. Dancesrean* (1899) Rap. Jud. Quebec 17 C. S. 176; *Nicholson v. McKale* (1912) Rap. Jud. Quebec 41 C. S. 340, 5 D. L. R. 237; *Kern v. Tambllyn* (1914) 7 Sask. L. R. 64, 16 D. L. R. 529, 27 West. L. R. 608; *Merchants Bank v. McLeod* (1910) 14 West. L. R. (Can.) 461 (rule recognized); *Merchants Bank v. Grimshaw* (1904) 4 Ont. West. Rep. 179. Others of the Canadian cases cited above were decided after the Bill of Exchange Act was adopted, but there is no reference to the act in those cases.

That the assignee of a note has the burden of showing his bona fides was held in *Lundean v. Hamilton* (1916) — Iowa, —, 159 N. W. 163, in an action in equity to cancel the note and the mortgage securing it.

An early statute in Georgia, referred to in *Robenson v. Vason* (1867) 37 Ga. 66, provided that "the holder of a note is presumed to be such bona fide and for value; if either fact is negated by proof the defendants are let in to all their defenses; such presumption is negated by proof of any fraud in the procurement of the note."

c. Contra decisions.

In Georgia, the presumption of bona fides which arises in favor of the holder of an instrument negotiable by delivery is rebutted by a showing of procurement in fraud of the rights of a previous holder. *Merchants' & P. Nat. Bank v. Masonic Hall* (1879) 62 Ga. 271. The rule of *Merchants' & P. Nat. Bank v. Masonic Hall* (1879) 62 Ga. 272, was followed in *Walden v. Downing Co.* (1908) 4 Ga. App. 534, 61 S. E. 1127, in the case of a note which was transferred by indorsement. This case is, of course, overruled by the decision in *Brantley v. Merchants & F. Bank* (Ga.) *infra*.

But the presumption of bona fides which arises in favor of an indorsee of an instrument is not so rebutted. *Brantley v. Merchants & F. Bank* (1918) 22 Ga. App. 667, 97 S. E. 109, affirmed in (1919) 149 Ga. 88, 99 S. E. 41. That the presumption is not rebutted by a showing that the note was fraudulently taken possession of by the cashier of the payee bank is stated, also, in *Harrell v. National Bank* (1907) 128 Ga. 504, 57 S. E. 869, where the court, after referring to the fact that the subsequent holder in that case offered evidence to show that he had purchased the note in good faith in the usual course of business, for a valuable consideration, before due, without notice of any dishonor, says: "It [the subsequent holder] could have relied upon the presumption afforded by the Code section above quoted, and required of the defendant proof that it was not a bona fide holder in order to defeat its right to recover." In *Brantley v. Merchants & F. Bank* (1918) 22 Ga. App. 667, 97 S. E. 109, affirmed in (1919) 149 Ga. 88, 99 S. E. 41, the reasoning by which the court arrives at this conclusion is as follows: The Code of Georgia contains the following provision: "The holder of a note is presumed to be such bona fide and for value; if either fact is negated by proof, the defendants are let in to all their defenses; such presumption is negated by proof of any fraud in the procurement of the note." It has uniformly been held in this state that "fraud in the procurement," as used in this statute, means fraud in the procurement of the note by the holder thereof, and has no reference to fraud in the contract out of which the note arose, or fraud of an intervening indorser. The Georgia Code contains no such provision as is contained in the Negotiable Instruments Act set out in § IV. b, supra, and the court argues: "Since the only rule upon the subject which it does contain appears to so plainly contemplate that the legal presumptions in favor of the holder shall continue to hold in his favor until combated by proof,—not that the original payee or an interven-

ing indorser fraudulently obtained the note, but that the holder himself did,—we are disinclined to recognize any extension of the exception to this rule further than that literally prescribed by the language of the decision in the *Merchants' & P. Nat. Bank Case*. There would seem, in fact, to be a rational ground for distinction between a case where the holder comes into possession of an instrument capable of being passed merely by delivery, and where the holder comes into possession thereof by virtue of the solemn indorsement of the payee therein named. In the former case there is nothing except naked possession to indicate that the holder took it in good faith; whereas, in a case where the payee has entered his solemn indorsement thereon and thereby guaranteed its validity to subsequent transferees, there exists this manifest additional reason, as shown by the face of the instrument, whereby the subsequent taker should be held as having acted in good faith."

It is expressly denied in *Morgan v. Yarborough* (1839) 13 La. 74, 83 Am. Dec. 553, that the form of the transfer makes any difference as to the burden of proof.

There is a suggestion in *Kelly v. Ford* (1856) 4 Iowa, 140, and *Clapp v. Cedar County* (1857) 5 Iowa, 15, 68 Am. Dec. 678, that the presumption of bona fides is not rebutted by showing fraud; but in *Lane v. Krekle* (1867) 22 Iowa, 399, the Iowa court aligned itself with the majority rule, and, although there may be a slight implication to the contrary from the form of a part of an instruction to which the court's attention was not directed, in *Lake v. Reed* (1870) 29 Iowa, 258, 4 Am. Rep. 209, and also in *Loomis v. Metcalf* (1870) 30 Iowa, 382, in *Woodward v. Rodgers* (1871) 31 Iowa, 342, the court again announced the majority rule, and, with the exception of a case briefly reported in an appendix (*Billingsly v. Craddock* (1891) 82 Iowa, 721, 47 N. W. 893), has consistently adhered thereto. In *Callendar Sav. Bank v. Loos* (1909) 142 Iowa, 1, 120 N. W. 317, where there was an attempt to show duress in the procure-

ment of a note, the court says it was incumbent on the maker to show that the indorsee was not an innocent purchaser of the note. This statement was made casually and without any discussion.

In the early case of *Howard v. Shaw* (1846) 9 Ir. L. Rep. 335, the view is taken that the indorsee of a note need not show his bona fide character until he is shown to have had notice of the fraud.

Apart from these few cases, the authorities are unanimous, as above stated, that fraud in the inception of a negotiable instrument casts upon one who claims to be a bona fide holder, or holder thereof in due course, the burden of proving his character as such.

II. Instrument fraudulently put in circulation.

In dealing with cases in which a note or other negotiable instrument was diverted or put into circulation fraudulently, this annotation has been confined to cases in which the instrument had no prior inception. Cases involving the theft of negotiable instruments from the holder thereof, or diversion by an agent or person intrusted with the physical possession of the instrument after its inception, have in general been excluded. The decision in *Knight v. Pugh* (1842) 4 Watts & S. (Pa.) 445, 89 Am. Dec. 99, illustrates the diversion of a note after inception, a class of cases excluded from this annotation. In that case a note was given for the purchase price of land which the vendor covenanted to convey to the purchaser by deed of general warranty. After the agreement, a judgment was obtained against the vendor which became a lien on the land, and no conveyance of the land was made, and the encumbrances prevented the owner from making good title. The maker pleaded these facts and added that no consideration therefor passed to the maker from the vendor for the note, and that its "transfer to the plaintiff was a fraud on defendant." In holding that the plaintiff did not have the burden of showing consideration

(which seemed to be the only point of dispute in this case), the court says: "In cases other than those of negotiable notes obtained or put in circulation by fraud or undue means, the maker, by its negotiable character, agrees that the payee shall put it in circulation. He has no right, therefore, to complain of his own act, and a holder placing confidence in such paper ought not to be compelled to prove consideration. In many cases it would be exceedingly difficult to do so, and to require it would throw a serious impediment in the way of the circulation of negotiable paper. It is otherwise where there is fraud, because there the maker gives no such authority. He is in the light of an unfortunate rather than an imprudent man, and protection will be given to him so far as to require of the holder proof of a valuable consideration." Commenting on the facts of the case at bar, the court says: "Here the note was negotiable. It was to the order of Jackson without defalcation. Knight gave it on a contract deliberately made, and Jackson was authorized to pass it by indorsement. There is no suspicion cast on the means by which Jackson got it. It was all fair and according to contract. The indorsement was according to the tenor of the note, and to require a holder in such a case to prove the consideration would, we think, be putting a cloud on the circulation of negotiable securities which would tend to impair their use and employment."

Within the limits above indicated, it is a rule adhered to in a large number of cases, both prior to the Negotiable Instruments Act and under that act, that, where a note is put in circulation or diverted in fraud of the maker's rights, the burden is upon the holder to show his bona fide character.

United States.—*Thompson v. Sioux Falls Nat. Bank* (1898) 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94.

Arkansas.—*Bertrand v. Barkman* (1852) 13 Ark. 151.

Iowa.—*Iowa Nat. Bank v. Carter* (1909) 144 Iowa, 715, 123 N. W. 237; *Connelly v. Greenfield Sav. Bank* (1921) — Iowa, —, 185 N. W. 887.

Maine.—Perrin v. Noyes (1855) 39 Me. 384, 63 Am. Dec. 633.

Maryland.—Gwyn v. Lee (1849) 1 Md. Ch. 445; Williams v. Huntington (1888) 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336.

Massachusetts.—J. Register's Sons Co. v. Reed (1904) 185 Mass. 226, 70 N. E. 53; Merchants' Nat. Bank v. Marden, O. & H. Co. (1919) 234 Mass. 161, 125 N. E. 384.

Michigan.—City Bank v. Dill (1891) 84 Mich. 549, 47 N. W. 1109.

Minnesota.—Cummings v. Thompson (1872) 18 Minn. 246; Merchants' Exch. Bank v. Luckow (1887) 37 Minn. 542, 35 N. W. 434; Robbins v. Swinburne Printing Co. (1904) 91 Minn. 491, 98 N. W. 331, 867; Mendenhall v. Ulrich (1905) 94 Minn. 100, 101 N. W. 1057; State Bank v. Missia (1920) 144 Minn. 410, 175 N. W. 614.

New York.—Woodhull v. Holmes (1813) 10 Johns. 231; Vallett v. Parker (1831) 6 Wend. 615; Wardell v. Howell (1832) 9 Wend. 170; Ocean Nat. Bank v. Carll (1874) 55 N. Y. 440; Nickerson v. Ruger (1879) 76 N. Y. 279; Davis Sewing Mach. Co. v. Best (1887) 105 N. Y. 59, 11 N. E. 146; American Exch. Nat. Bank v. New York Belting & Packing Co. (1896) 148 N. Y. 698, 43 N. E. 168; Grocers' Bank v. Penfield (1876) 7 Hun, 279, affirmed in (1877) 69 N. Y. 502, 25 Am. Rep. 231; McCammon v. Schantz (1900) 49 App. Div. 460, 63 N. Y. Supp. 611; Sutherland v. Mead (1903) 80 App. Div. 103, 80 N. Y. Supp. 504; Mitchell v. Baldwin (1903) 88 App. Div. 265, 84 N. Y. Supp. 1043; German-American Bank v. Cunningham (1904) 97 App. Div. 244, 89 N. Y. Supp. 836; Peterson v. Fowler (1914) 162 App. Div. 21, 147 N. Y. Supp. 280; Western Nat. Bank v. Wood (1892) 64 Hun, 635, 19 N. Y. Supp. 81; Marine v. Peyser (1894) 6 Misc. 540, 27 N. Y. Supp. 226; Mundy v. Pritchard (1897) 22 Misc. 22, 47 N. Y. Supp. 1013; Berman v. Zuckerman (1898) 22 Misc. 744, 49 N. Y. Supp. 1070; Wisner v. Osteyee Bros. (1898) 24 Misc. 704, 53 N. Y. Supp. 793; Hall v. Whiton (1902) 37 Misc. 756, 76 N. Y. Supp. 509; National Bank v. Foley (1907) 54 Misc. 126, 103 N. Y. Supp. 553; Ginsberg v. Shurman

(1911) 71 Misc. 463, 128 N. Y. Supp. 653; Kennedy v. Spilka (1911) 72 Misc. 89, 129 N. Y. Supp. 390; Steinberger v. Huttelman (1915) 93 Misc. 105, 156 N. Y. Supp. 320; Zwerdling v. Kitrosser (1914) 148 N. Y. Supp. 99; Title Guarantee & T. Co. v. Pam (1915) 155 N. Y. Supp. 333; Ross v. Bedell (1856) 5 Duer, 462; Pool v. Watson (1884) 18 Jones & S. 53; Iver v. Jacobs (1888) 21 Abb. N. C. 151, 1 N. Y. Supp. 330.

North Dakota.—American Nat. Bank v. Lundy (1910) 21 N. D. 167, 129 N. W. 99.

Ohio.—McKesson v. Stanberry (1854) 3 Ohio St. 156; Davis v. Bartlett (1861) 12 Ohio St. 534, 80 Am. Dec. 375.

Oklahoma.—Gourley v. Pioneer Loan Co. (1915) 51 Okla. 434, 151 Pac. 1072.

Pennsylvania.—Brown v. Street (1843) 6 Watts & S. 221 (rule recognized); Smith v. Popular Loan & Bldg. Asso. (1880) 93 Pa. 19; Real Estate Invest. Co. v. Russel (1892) 148 Pa. 496, 24 Atl. 59; Keystone Bank v. Rollins (1874) 1 W. N. C. 5; First Nat. Bank v. Furman (1897) 4 Pa. Super. Ct. 415; Grange Trust Co. v. Brown (1912) 49 Pa. Super. Ct. 274; United Shoe Mach. Co. v. Winston (1914) 58 Pa. Super. Ct. 526; Halmowich v. McLaughlin (1914) 58 Pa. Super. Ct. 535; McChesney v. Guernsey (1915) 61 Pa. Super. Ct. 490; Cochran v. O'Connor (1915) 43 Pa. Co. Ct. 202.

Rhode Island.—Hazard v. Spencer (1891) 17 R. I. 561, 23 Atl. 729.

South Dakota.—Landauer v. Sioux Falls Improv. Co. (1897) 10 S. D. 205, 72 N. W. 467; Jamison v. McFarland (1898) 10 S. D. 574, 74 N. W. 1033.

Texas.—Rische v. Planters Nat. Bank (1892) 84 Tex. 413, 19 S. W. 610; Hart v. West (1897) 91 Tex. 184, 42 S. W. 544; Mulberger v. Morgan (1898) — Tex. Civ. App. —, 47 S. W. 738; People's Nat. Bank v. Mulkey (1901) — Tex. Civ. App. —, 61 S. W. 528; Johnson County Sav. Bank v. Kemp Mercantile Co. (1908) — Tex. Civ. App. —, 114 S. W. 402; Boyce v. Bickford (1912) — Tex. Civ. App. —, 145 S. W. 1082; Word v. Bank of

Menard (1914) — Tex. Civ. App. —, 170 S. W. 845; National State Bank v. Ricketts (1915) — Tex. Civ. App. —, 177 S. W. 528; El Fresnal Irrigated Land Co. v. Bank of Washington (1916) — Tex. Civ. App. —, 182 S. W. 701.

Vermont. — Pierson v. Huntington (1909) 82 Vt. 482, 29 L.R.A. (N.S.) 695, 137 Am. St. Rep. 1029, 74 Atl. 88.

Wyoming.—Holdsworth v. Blyth & F. Co. (1915) 23 Wyo. 52, 146 Pac. 603.

England.—Smith v. Braine (1851) 16 Q. B. 244, 117 Eng. Reprint, 872, 20 L. J. Q. B. N. S. 201, 15 Jur. 287; Hall v. Featherstone (1858) 3 Hurlst. & N. 284, 157 Eng. Reprint, 478, 27 L. J. Exch. N. S. 308, 4 Jur. N. S. 813, 6 Week. Rep. 496.

Canada.—Noble v. Boothby (1912) 22 West. L. R. 232, 2 Aust. Week. Rep. 1103, 7 D. L. R. 1.

Likewise, under the English Bills of Exchange Act, the burden of proving that he is a holder in due course rests upon the holder, when fraud in the negotiation of the instrument is shown. Tatam v. Hasler (1889) 5 Times L. R. (Eng.) 593, 58 L. J. Q. B. N. S. 432, L. R. 23 Q. B. Div. 345, 38 Week. Rep. 109.

In Union Trust Co. v. McClellan (1895) 40 W. Va. 405, 21 S. E. 1025, it is stated to be the settled rule of commercial law that where an accommodation note, given for a specific purpose, is indorsed and used by the payee for an entirely different purpose without the knowledge or consent of the maker, the burden of proof is on the holder of such note to show that he received it in the ordinary course of business, before maturity, for a valuable consideration and without notice of its misuse by the payee, before he can recover from the maker.

According to the court in Kinney v. Kruse (1871) 28 Wis. 183, the fraudulent putting in circulation of a negotiable instrument which operates to change the burden of proof and call upon the plaintiff to prove his title as a bona fide holder is where this is done fraudulently as to the defendant or maker, and not where it is done as

to the payee or some intermediate holder or party to the paper.

In Perrin v. Noyes (1855) 39 Me. 384, 63 Am. Dec. 633, the holder of a note was held to have the burden of showing his bona fides in an action thereon against the maker, where evidence was introduced to show that the note was intended as collateral security for paper held by the plaintiff against a party for whose accommodation the note was given, and that it was fraudulently negotiated absolutely, and not for the specific purpose.

Seemingly the burden of proof was thrown upon a subsequent holder in Market & F. Nat. Bank v. Sargent (1893) 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192, where it appeared that the note was executed by the maker in blank and intrusted to one who exceeded his authority in filling up and transferring it. It is not altogether clear, however, that the facts in this case called for a decision on this point.

Fraud in procuring an accommodation note from the payee thereof was held to cast upon the subsequent holder the burden of showing his bona fides, in Hart v. Potter (1855) 4 Duer (N. Y.) 458 (an action against the maker).

An accommodation note procured from an indorser on the representation that the parties thereto would be the same as those to a note of which the note in question was to be a renewal, and that in violation of this agreement the note was fraudulently filled in without obtaining certain parties who were on the original note, shows a defective title so as to cast upon the subsequent holder the burden of proving that he is a holder in due course. Sproul v. Beskin (1917) 179 App. Div. 275, 166 N. Y. Supp. 606. See (1921) — App. Div. —, 189 N. Y. Supp. 956, for later proceedings in this case.

The holder of a note which is obtained by the payee without any consideration whatever, and by him transferred fraudulently, without authority, and contrary to the express protest of the maker, has the burden of establishing his bona fides. Wil-

liams v. Huntington (1888) 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336.

The diversion of a note by the payee from the purpose for which it was given seems to have been regarded in *Gwyn v. Lee* (1849) 1 Md. Ch. 445, as casting the burden upon a subsequent holder of showing his bona fides.

The holder of a note which was procured by a member of a partnership to be made to his firm as accommodation paper, and transferred by him, for his sole benefit, in the partnership name, must show that he received the note bona fide and for a valuable consideration. *Bank of St. Albans v. Gilliland* (1840) 23 Wend. (N. Y.) 311, 35 Am. Dec. 566.

That the holder of an accommodation note which has been diverted to some purpose other than that for which it was given must show himself to be a bona fide holder is stated in *Schepp v. Carpenter* (1873) 51 N. Y. 602. In *Comstock v. Hier* (1878) 73 N. Y. 270, 29 Am. Rep. 142, an action involving an accommodation note, it is stated that, if the note has been wrongfully diverted from its purpose and fraudulently negotiated, the party suing on it is bound to show himself a bona fide possessor.

Where an accommodation note was delivered to a person in order to have it discounted at a bank, and such person, instead of offering it at the bank, put it in the hands of a broker for sale, and neither the maker nor the payee received any consideration for the note, the holder is bound to show himself a bona fide holder. *Woodhull v. Holmes* (1813) 10 Johns. (N. Y.) 231. A showing that a bill was drawn for the defendant's accommodation and intrusted by him to another to get it discounted, and that such other, in violation of his trust, indorsed it to a third party without accounting for the proceeds, was also held, in *Smith v. Braine* (1851) 16 Q. B. 244, 117 Eng. Reprint, 872, 20 L. J. Q. B. N. S. 201, 15 Jur. 287, to cast upon the holder the burden of showing his bona fides. It is said that the evidence was such as might reasonably have led to the inference

that when the party intrusted with the bill obtained possession thereof, although he promised to discount it and pay the proceeds for the benefit of the drawer, he meant from the beginning to misappropriate it to his own use.

Evidence that a note was delivered as an escrow, and that it was fraudulently put in circulation, casts upon a holder thereof the burden of proving that he came fairly by the note and paid value for it. *Vallett v. Parker* (1831) 6 Wend. (N. Y.) 615.

The burden was cast upon the holder to prove consideration in *Hall v. Featherstone* (1858) 3 Hurlst. & N. 234, 157 Eng. Reprint, 478, 27 L. J. Exch. N. S. 308, 4 Jur. N. S. 813, 6 Week. Rep. 496, where a bill was indorsed and delivered by the indorser to another to have discounted, and such other failed to account for the proceeds.

The holder of a corporate note, or bond, which was fraudulently put into circulation by an agent of the corporation intrusted therewith, was held to have the burden of proving his bona fide character, in *Davis Sewing Mach. Co. v. Best* (1887) 105 N. Y. 59, 11 N. E. 146, an action by the maker to recover the note.

The diversion of a note indorsed by a firm was held to cast upon the holder the burden of showing his bona fides in an action against the indorser. *Smith v. Weston* (1899) 159 N. Y. 194, 54 N. E. 38.

Where the maker of a note executed a renewal and sent it to the payee upon the assumption that the payee still held the original note, and, upon discovering that he did not, settled with the actual holder and took up the original note, and secured the promise of the payee to return the renewal, the negotiation of such renewal by the payee amounts to a fraudulent diversion of the note which casts upon a subsequent holder the burden of showing his bona fides. *McCammon v. Schantz* (1900) 49 App. Div. 460, 63 N. Y. Supp. 611.

The inclusion by the payee of notes, on making an additional loan to the maker, of the amount of the old notes,

and the amount of the new loan in a new note, and his promise to cancel and return the old notes, when in fact one of them, at least, had been transferred by him, was treated as such fraud as cast the burden upon the subsequent indorsee in *Ford v. Ott* (1919) — Iowa, —, 173 N. W. 121. The court, however, seems to have regarded as an essential to the existence of fraud, the representation, either expressed, or implied from the promise to surrender the note, that the payee still had the note.

But see *First Nat. Bank v. Getz* (1895) 96 Iowa, 139, 64 N. W. 799, *infra*, V. d.

Proof by the payee of a note, who had indorsed it and had neglected to strike his name off the note when it was returned to the maker upon payment, and who, upon discovering this neglect, sent immediately to have it done and was told by the maker that the note had been destroyed, when in fact it was put in circulation by the drawer fraudulently, of these facts, casts upon the plaintiff the burden of proving the manner in which he came into the possession of the note, and what he paid for it. *Holme v. Karsper* (1813) 5 Binn. (Pa.) 469.

In *Mendenhall v. Ulrich* (1905) 94 Minn. 100, 101 N. W. 1057, a note was given to a life insurance agent under an agreement that it was to be left at a designated bank until a life insurance policy was procured by the agent, and submitted to the maker for his inspection, whereupon the maker was to have the right to accept or reject the policy, and in case he rejected it the note should be of no force or effect whatever. The life insurance agent fraudulently put the note in circulation, instead of placing it in the bank in accordance with the agreement.

In *State Bank v. Missia* (1920) 144 Minn. 410, 175 N. W. 614, notes were executed by the purchaser of land under an agreement that the vendor should hold them until title to the land should be vested in the purchaser, and in case title did not vest it was agreed that the cash paid and the notes were to be returned to the

purchaser. The notes had been executed in blank, and were completed by the vendor and negotiated in fraud of this agreement. It was also found that the original transaction was entered into by the vendor with intent to defraud the purchaser.

The negotiation of a note in violation of an agreement that, if the maker at any time within one year from said date desired to cancel a water right for which the note was given, he should have the right to do so and have the note returned to him, was held to be fraud, casting upon a subsequent holder the duty of showing his character as a holder in due course under the Negotiable Instruments Law, in *Shellenberger v. Nourse* (1911) 20 Idaho, 323, 118 Pac. 508.

The transfer of a note in violation of an agreement that it would be returned if the property for which it was given did not give satisfaction was held to be a fraud which cast upon the transferee the burden of showing that he took the note in good faith, which includes proof that he paid full value for it, in *Pierson v. Huntington* (1909) 82 Vt. 482, 29 L.R.A.(N.S.) 695, 137 Am. St. Rep. 1029, 74 Atl. 88.

The failure of the payee of notes, executed under an agreement that the maker could elect to cancel the same under certain circumstances, and have the notes returned to him, to return the notes upon the maker's exercising such election, was held to make the payee's title defective within the meaning of the Negotiable Instruments Act, in *Dunn v. Block* (1915) 192 Ill. App. 486.

The fraudulent negotiation of a note which has been executed by the maker upon the express condition that the person who obtained its execution was to hold the same until the payee named in the note, a corporation, was duly incorporated and had issued stock to be placed on the market for sale, and upon the delivery to the maker of twenty shares of stock the said person was to deliver said note to the corporation, was held to cast the burden upon a subsequent

holder, where the corporation was never organized, never became a corporation or had any legal existence whatever, and the maker never received any stock of the company for the note, which was payable to the corporation, was indorsed with the corporate name, followed by that of the person who had obtained it, signing himself as president. *Union Trust Co. v. Adams* (1913) 54 Ind. App. 166, 101 N. E. 741.

The negotiation of notes by the payee, after the contract in consideration of which the notes were given was canceled and an agreement entered into that the notes should be returned, makes the title of the payee defective within the meaning of the Negotiable Instruments Law, so as to throw upon a subsequent holder the burden of proving that he is a holder in due course. *Re Philpott* (1915) 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839.

The delivery as a binding instrument of a note which was executed only for the purpose of evidencing certain transactions between the payee and maker is such fraud as casts upon a subsequent holder the duty of showing his bona fides. *Sperry v. Spaulding* (1873) 45 Cal. 544. In this case the note in question was given under an agreement that the payee should not put it into circulation, and that it should never be used by him excepting only as evidence to sustain an assignment of certain notes, accounts, and bills receivable which the payee had assigned to the maker for collection, should a suit be brought by the creditors of the payee to set aside the assignment, and that the notes should be surrendered after the maker had accounted with the payee for the proceeds of the notes, accounts, and bills receivable.

Representations by an agent for jewelry, who had obtained an order from a merchant that drafts signed by the merchant were merely memoranda for the use of his firm and would not pass out of the hands of the firm, and were to be paid only as sales of jewelry were actually made, that if at any time the maker desired

to ship the jewelry he should have the privilege of doing so, and the draft would thereupon be returned to him,—representations which were not true and the promises of which were not kept,—were held to show such a defective title in the payee as to amount to fraud, and cast upon the holder the burden of showing that he was a holder in due course under the Negotiable Instruments Law. *McChesney v. Guernsey* (1915) 61 Pa. Super. Ct. 490.

Where a draft drawn and accepted by the local agent of an insurance company in payment of premiums was indorsed, apparently for his accommodation, by the defendant, and sent to a general agent to enable him to have the paper discounted and deduct his commission, but while the draft was still in the general agent's hands, the maker, learning that the insurance company was insolvent, instructed the acceptor not to pay the draft, and demanded its return from the general agent, who promised to return it, and, upon the indorser's request to have his name erased from the draft, the general agent promised to do so, but instead of doing so circulated the draft, the court held that the draft was put into circulation in fraud of the indorser, and thus the burden of showing that he gave value was cast upon a subsequent holder, in *Keystone Bank v. Rollins* (1874) 1 W. N. C. (Pa.) 5.

The delivery of a note signed by several sureties, without compliance with a condition that other sureties should sign the note, is such fraud as destroys the presumption of the bona fide character of a subsequent holder. *Tabor v. Merchants Nat. Bank* (1886) 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805.

Where it has been shown that an instrument has been delivered in violation of the terms of an escrow agreement, the burden is on the holder to show his character as a holder in due course. *Deshazo v. Lamar* (1920) — Ala. App. —, 85 So. 586. This is true under the Negotiable Instruments Act. *Ibid.*

As to an unlawful diversion, see

Hale v. Shannon (1890) 57 Hun, 466, 32 N. Y. S. R. 1079, 11 N. Y. Supp. 129.

A contrary decision in *Tradesmen's Nat. Bank v. Ertell* (1890) 31 N. Y. S. R. 256, that a showing of diversion of a note does not cast upon the holder the burden of showing his bona fides, is based upon a previous New York case which was dealing with the failure of consideration.

The action in *J. Regester's Sons Co. v. Reed* (1904) 185 Mass. 226, 70 N. E. 53, was one in equity by the maker, to obtain possession of the note from the holders.

In *Walbutton v. Lenthall* (1848) 12 L. T. (Eng.) 275, an action by the indorsee of a bill of exchange against the acceptor, in which the defendant pleaded that the bill had been accepted without consideration for the purpose of being discounted, and not of being put into circulation, and that it had been circulated in contravention of that agreement, and without full consideration, the court says that it does not lie in the mouth of those engaged in accommodation bill transactions to dispute the consideration on the part of the holder, "unless they show fraud and connect him with it." It is further said that the facts pleaded are not enough, in the absence of fraud, to call on the holder of a bill to prove consideration.

In *Brown v. Philpot* (1840) 2 Moody & R. (Eng.) 285, a plea that the defendant accepted a bill for the accommodation of the drawer, that the drawer indorsed it to A. B. without consideration, in order that he might get it discounted for him, but that A. B. fraudulently indorsed it to C. D. without any consideration, and that C. D. afterwards indorsed it to the plaintiff without any consideration, was held not to cast the burden upon the plaintiff of showing consideration; but, on the contrary, it was held necessary for the defendant, in support of his plea, to prove his averment, by showing that there was no consideration.

In *Flour City Bank v. Connery* (1898) 12 Manitoba L. R. 305, where

the defense set up by the maker was that he had handed the note to another to hold in escrow until the settlement of certain accounts between the maker and a third person, and that the note was delivered over to the payee without the consent of the maker, the court says that, without entering into the question whether the handing of a bill to the payee and the subsequent indorsement constituted a fraud under the Bills of Exchange Act, as the person to whom the bill was handed was an agent of the person with whom settlement was to be made, and this person was in turn the agent of the payee, and as the maker could not be expected to have possessed knowledge of the circumstances under which the note was handed over, he should not be precluded from defending.

See *Snelling State Bank v. Clasen*, 6 A.L.R. 1663, and note appended thereto, at page 1667.

III. Reasons for rule.

The reason most commonly given for the rule that, upon a showing of fraud in the inception of a negotiable instrument, the subsequent holder must show that he is a holder in due course, or bona fide holder, is that the guilty party would transfer the note thus affected with fraud in order that he might recover on it for his own use, but in the name of a third person. *American Exch. Nat. Bank v. Oregon Pottery Co.* (1892) 55 Fed. 265; *Sperry v. Spaulding* (1873) 45 Cal. 544; *Zook v. Simonson* (1880) 72 Ind. 83; *Carrier v. Cameron* (1875) 31 Mich. 373, 18 Am. Rep. 192; *Cummings v. Thompson* (1872) 18 Minn. 252, Gil. 228; *Bank of Montreal v. Richter* (1893) 55 Minn. 362, 57 N. W. 61; *First Nat. Bank v. Holan* (1896) 63 Minn. 525, 65 N. W. 952; *First Nat. Bank v. Green* (1871) 43 N. Y. 298; *Vosburgh v. Diefendorf* (1890) 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801; *Hodge v. Smith* (1907) 130 Wis. 326, 110 N. W. 192.

A few of the many variations in statement follow. It is stated in *Jordan v. Grover* (1893) 99 Cal. 194, 33 Pac. 889, that a presumption exists

that a fraudulent payee would be likely to shield himself by placing the note in the hands of another person to sue upon it, and such presumption operates against the holder. According to the court in *Kellogg v. Curtis* (1879) 69 Me. 212, 31 Am. Rep. 273, the reason for this distinction is "that a presumption exists that a fraudulent payee would be likely to shield himself by placing the note in the hands of another person to sue upon it." This rule "proceeds upon the presumption that the person who has been guilty of fraud or illegality in obtaining the instrument would dispose of it and would place it in the hands of another person to sue upon it; and it is because of such presumption that the proof of fraud, illegality, or loss casts upon the holder the burden of showing that he is the bona fide holder for value, or under what circumstances, or for what value, he became the holder of the note." *Totten v. Bucy* (1882) 57 Md. 446. The fact that a negotiable instrument has been obtained by fraud affords the presumption that the person guilty of the illegality would place the note in the hands of another person to sue upon it. *Smith v. Livingston* (1873) 111 Mass. 342. It is stated in *Hamilton v. Marks* (1876) 63 Mo. 167, that the presumption is natural that an instrument obtained by fraud would be quickly transferred to another. This statement is approved in *Link v. Jackson* (1911) 158 Mo. App. 63, 139 S. W. 588, s. c. on second appeal (1912) 164 Mo. App. 194, 147 S. W. 1114. The court in *Cummings v. Thompson* (1872) 18 Minn. 246, Gil. 228, cites with approval the rule of *Fitch v. Jones* (1855) 5 El. & Bl. 238, 119 Eng. Reprint, 470, 24 L. J. Q. B. N. S. 293, 1 Jur. N. S. 854, 3 Week. Rep. 507, as follows: "Proof that a negotiable instrument was affected with fraud or illegality in the hands of a previous holder raises a presumption that he would indorse it away to an agent without value, and consequently calls on the plaintiff for proof that he gave value." The reason assigned for this rule in *Tabor v. Merchants' Nat. Bank*

(1886) 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805, is that "where there is fraud the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it." This statement is approved in *Harbison v. Hammons* (1914) 113 Ark. 120, 167 S. W. 849.

After proof that an instrument was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character until the contrary be proved. *Parsons v. Utica Cement Mfg. Co.* (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785.

IV. What holder must prove.

a. Under law merchant.

There was a sharp divergence of opinion prior to the Negotiable Instruments Act as to just what the subsequent holder must prove, when fraud in the inception is shown, in order to entitle him to protection as a bona fide holder. There are, speaking generally, three elements to the character of bona fide holder. They are that the holder (1) took before maturity, (2) for value, and (3) in good faith, without notice of any defense. To these is sometimes added the requirement that he must have taken in the usual course of business. The contest above mentioned has raged about the third element. According to one line of authorities, the holder need not prove that he had no notice of defenses, where fraud in the inception is shown. He satisfies the burden thus cast upon him by showing that he took for value before maturity, and under circumstances which did not operate to charge him with notice of the defense. According to the other line of authorities, he must show affirmatively that he had no notice of the defense.

Although there has been a quite uniform tendency, under the Negotiable Instruments Act, to adopt the latter theory and thus render the

prior state of the law of mere academical interest because of the quite general adoption of that act, that it is not wholly academical is shown by the few decisions represented by *STEVENS v. PIERCE* (reported herewith) ante, 7, and the question will, therefore, be discussed. It is not possible to align all cases with one theory or another. Although many of the courts have explicitly said that, upon a showing of fraud in the inception or diversion of an instrument, the burden is upon the person who claims to be a holder in due course to show, among other things, that he took without notice, strange as it may seem, no safe conclusion can be reached from this language that the court will not presume that he took without notice, if he shows that he took for value and before maturity. For example, the North Dakota decisions have repeatedly stated that upon a showing of fraud the person who claims to be a holder in due course must show, among other things, that he took without notice, and yet have held in other decisions that the absence of notice will be presumed upon his showing that he took for value before maturity. The latest case in that state (*STEVENS v. BARNES* (reported herewith) ante, 10), decided under the Negotiable Instruments Law, seems to take a view in accord with practically all of the cases decided under that law. The difficulty of interpreting the cases arises from the impossibility of determining the meaning with which the courts have used such terms as "good faith," "bona fide," "usual course of business." Unless, therefore, a case directly discusses the question under consideration in this subdivision, it will not be included.

There is a difference of opinion as to whether, in order to prevent the transferee of a note becoming a holder for value, actual notice of the defense is necessary, or whether knowledge of facts from which the defense might be inferred is sufficient. With this question this annotation does not deal. It has been necessary, however, in the course of this annota-

tion, to refer in a general way to the things necessary for the plaintiff to prove, where the burden is cast upon him, and doubtless throughout there will be found expressions that the plaintiff must prove that he had no knowledge of facts, or that he had no knowledge of circumstances from which knowledge of facts might be inferred. By these statements, however, it is not intended to express any opinion upon the question just stated.

There is a class of cases which will be noticed before proceeding to a discussion of the above question. Some cases say that the presumption that the holder gave value for the note is rebutted by the showing of fraud, without referring to the other elements making up the character of a bona fide holder; in other words, it is stated merely that the holder must prove that he gave value for the instrument.

United States.—*Smith v. Sac County* (1871) 11 Wall. 139, 20 L. ed. 102; *Marion County v. Clark* (1877) 94 U. S. 278, 24 L. ed. 59; *King v. Doane* (1891) 139 U. S. 166, 35 L. ed. 84, 11 Sup. Ct. Rep. 465; *McClintick v. Cummins* (1840) 2 McLean, 98, Fed. Cas. No. 8,698.

Arkansas. — *Tabor v. Merchants Nat. Bank* (1886) 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805; *Harbison v. Hammons* (1914) 113 Ark. 120, 167 S. W. 849.

California. — *Sperry v. Spaulding* (1873) 45 Cal. 544.

Massachusetts. — *Tucker v. Morrill* (1861) 1 Allen, 528.

Michigan. — *Carrier v. Cameron* (1875) 31 Mich. 373, 18 Am. Rep. 192.

Missouri.—*Cannon v. Moore* (1885) 17 Mo. App. 92.

North Carolina.—*Meadows v. Cozart* (1877) 76 N. C. 450.

Virginia. — *Vathir v. Zane* (1849) 6 Gratt. 246.

England. — *Berry v. Alderman* (1853) 14 C. B. 95, 139 Eng. Reprint, 40, 2 C. L. R. 691, 23 L. J. C. P. N. S. 34; *Mather v. Maidstone* (1856) 1 C. B. N. S. 273, 140 Eng. Reprint, 114, 26 L. J. C. P. N. S. 58, 3 Jur. N. S. 112, 5 Week. Rep. 163; *Hogg v. Skeen*

(1865) 18 C. B. N. S. 426, 144 Eng. Reprint, 510, 34 L. J. C. P. N. S. 153, 11 Jur. N. S. 244, 11 L. T. N. S. 709, 13 Week. Rep. 383; *Smith v. Braine* (1851) 16 Q. B. 244, 117 Eng. Reprint, 872, 20 L. J. Q. B. N. S. 201, 15 Jur. 287; *Harvey v. Towers* (1851) 6 Exch. 656, 155 Eng. Reprint, 706, 20 L. J. Exch. N. S. 318, 15 Jur. 544; *Hall v. Featherstone* (1858) 3 Hurlst. & N. 284, 157 Eng. Reprint, 478, 27 L. J. Exch. N. S. 308, 4 Jur. N. S. 813, 6 Week. Rep. 496; *Bailey v. Bidwell* (1844) 13 Mees. & W. 73, 153 Eng. Reprint, 30; *Fuller v. Alexander* (1882) 47 L. T. N. S. 443, 52 L. J. Q. B. N. S. 103.

Canada. — *Exchange Bank v. Carle* (1887) *Montreal L. R.* 3 Q. B. 61. The court in *Carrier v. Cameron* (Mich.) *supra*, says that upon a showing of fraud the holder, in order to establish a right to recover, "would then have been compelled to rebut by showing that in fact he gave or parted with value, or received the notes upon such consideration as to give him the actual position of a bona fide holder."

A holder was required to prove value merely in *Uther v. Rich* (1839) 10 Ad. & E. 784, 113 Eng. Reprint, 297, 2 Perry & D. 579, where the payment of value was the only thing that was denied in the pleading.

In the English cases the necessity of proving the payment of a consideration seems only to have arisen from the form of pleading. How far that is true in the American cases is problematical. It seems possible, however, that, in some of the foregoing cases which speak only of proving value, that was the only point in dispute.

In *Davies v. Willats* (1836) 5 L. J. K. B. N. S. (Eng.) 94, 1 Harr. & W. 679, an action by a principal who alleged that his agent had defrauded him by drawing bills in a way in which he was not authorized, to recover from the defendant who had discounted those bills the amount thereof as money had and received to the use of the plaintiff, the court says that, even supposing the rule to be the same in an action for money had and received as in an action upon the

bill, there was no sufficient fraud proved so as at all to raise any suspicion that the defendant had any knowledge of the matter and to make it necessary for him to give evidence of the consideration given by him for the several bills; thus seemingly indicating an idea that, unless the defendant had knowledge, it was not necessary for him to give evidence of the consideration paid.

We come now to a discussion of the cases which take a position upon the necessity of proof by the holder that he had no notice of the fraud.

Daniel, in his work on *Negotiable Instruments*, vol. 1, 6th ed. § 819, says: "Fourth, that when the holder responds by showing that he did acquire the instrument bona fide for value in the usual course of business, while it was current, and under circumstances which do not operate as constructive notice of the facts which impeached the original validity, the defendant must then prove that he had actual notice of such facts; otherwise the holder's right to a recovery against him is perfected. This principle is obviously correct, for to require the plaintiff to show absolutely that he had [no] knowledge of facts would be to burden him with the necessity of proving an impossible negative. He makes out a prima facie case by proving that the instrument was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of the fraud, because it is not likely that he would give full value for a note which he believed to be fraudulent, taking the hazard upon himself, and because it would be difficult to prove good faith in any better way." This learned authority thus squarely adopts the first theory, and his position finds support in a number of cases which hold that the holder meets the burden cast upon him by the showing of fraud in the inception of the bill or note, by showing that he purchased the instrument for value before maturity; that the burden of proving that he took without notice does not rest upon him.

United States. — *King v. Doane* (1890) 139 U. S. 166, 35 L. ed. 84, 11 Sup. Ct. Rep. 465; *First Nat. Bank v. Moore* (1906) 78 C. C. A. 581, 148 Fed. 953.

Alabama. — *Woodall & Sons v. People's Nat. Bank* (1907) 153 Ala. 576, 45 So. 194.

Arkansas. — *Harbison v. Hammons* (1914) 113 Ark. 120, 167 S. W. 849.

California. — *Eames v. Crosier* (1894) 101 Cal. 260, 35 Pac. 873; *Hart v. Church* (1899) 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296; *Sinkler v. Seljan* (1902) 136 Cal. 356, 68 Pac. 1024; *Blochman Commercial & Sav. Bank v. Moretti* (1918) 177 Cal. 256, 170 Pac. 419; *Meyer v. Lovdal* (1907) 6 Cal. App. 369, 92 Pac. 322; *Curran v. Wilson* (1918) 36 Cal. App. 208, 171 Pac. 817.

Colorado. — *Harrington v. Johnson* (1896) 7 Colo. App. 483, 44 Pac. 368.

Maine. — *Kellogg v. Curtis* (1879) 69 Me. 212, 31 Am. Rep. 273; *Market & F. Nat. Bank v. Sargent* (1893) 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192.

Missouri. — *Johnson v. McMurry* (1880) 72 Mo. 278, approved in *Carson v. Porter* (1886) 22 Mo. App. 179.

North Dakota. — *First Nat. Bank v. Flath* (1901) 10 N. D. 281, 86 N. W. 867; *Walters v. Rock* (1908) 18 N. D. 45, 115 N. W. 511.

Ohio. — *Davis v. Bartlett* (1861) 12 Ohio St. 534, 80 Am. Dec. 375.

Oklahoma. — *Forbes v. First Nat. Bank* (1908) 21 Okla. 206, 95 Pac. 785. See *STEVENS v. PIERCE* (reported herewith) ante, 7 (decided under the Negotiable Instruments Law).

South Carolina. — *Citizens Trust & Sav. Bank v. Stackhouse* (1912) 91 S. C. 455, 40 L.R.A.(N.S.) 454, 74 S. E. 977.

Texas. — *Prouty v. Musquiz* (1900) 94 Tex. 87, 58 S. W. 721, 996; *Daniel v. Spaeth* (1914) — Tex. Civ. App. —, 168 S. W. 509.

Utah. — *First Nat. Bank v. Foote* (1895) 12 Utah, 157, 42 Pac. 205.

Virginia. — *Piedmont Bank v. Hatch* (1897) 94 Va. 229, 26 S. E. 505. See New York cases discussed infra.

Harlan, J., delivering the opinion in *King v. Doane* (1890) 139 U. S. 166,

35 L. ed. 84, 11 Sup. Ct. Rep. 465, says: "If in an action by an indorsee against the maker a negotiable note is shown to have been obtained by fraud, the presumption arising merely from the possession of the instrument, that the holder in good faith paid value, is so far overcome that he cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he in fact purchased for value. . . . In the case supposed he must show that he paid value. That fact being established, he will be entitled to recover, unless it is proved that he purchased with actual notice of defect in the title, or in bad faith implying guilty knowledge or wilful ignorance."

The court in *First Nat. Bank v. Moore* (1906) 78 C. C. A. 581, 148 Fed. 953, regarded the rule of the Federal courts as settled "that a person who takes negotiable paper before maturity, for value, is entitled to recover as against the maker unless it is shown that, in the transaction by which title was acquired, the indorsee had knowledge of facts which would render the same invalid as against the maker, or was guilty of bad faith." And it is held that the burden of proving such knowledge or bad faith lies on the defendant.

In England, prior to the Bills of Exchange Act, there was some doubt as to whether the holder had to prove that he took the bill bona fide, in addition to proving that he gave value. *Jones v. Gordon* (1877) L. R. 2 App. Cas. 617, 47 L. J. Bankr. N. S. 1, 37 L. T. N. S. 477, 26 Week. Rep. 172, 4 Eng. Rul. Cas. 416.

Where there are circumstances in evidence tending to show bad faith in the acquisition of the note by the holder who is suing thereon, the burden of showing that he had no notice of the defense rests upon him. *Taylor v. Trussell* (1911) — Tex. Civ. App. —, 139 S. W. 660.

Other courts have cited *Daniel's* general statement with approval, but it may be doubted whether some of the courts intended to approve the full import of the statement. For

instance, the statement is cited with approval in *Brook v. Teague* (1893) 52 Kan. 119, 34 Pac. 347, to the effect that the holder, upon proof of fraud, must respond by showing "that he acquired it bona fide for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeached its validity." This case is approved in *Kennedy v. Gibson* (1904) 68 Kan. 612, 75 Pac. 1044. But in the syllabus by the court the rule is stated thus: "An answer alleging illegality and fraud in the inception of a note sets up a defense, and the presumptions in favor of the right and title of the holder are overcome, and to meet such a defense it devolves upon the holder to show that he or some antecedent holder took the note before maturity, in good faith, for value, and in the usual course of business." The same is true in *Abmeyer v. First Nat. Bank* (1907) 76 Kan. 877, 92 Pac. 1109, where in the opinion the rule is stated as it is stated in *Daniel*, but in the headnote by the court it is said: "Where it is shown that a note has its inception in fraud, the burden of proof is shifted to the indorsee or holder to show that he acquired it for a valuable consideration, and without notice of defenses or of circumstances which should have put him upon inquiry." It is said in *Hodson v. Eugene Glass Co.* (1895) 156 Ill. 397, 40 N. E. 971, citing *Daniel*, that the holder must show that he acquired the instrument in good faith, for value, in the usual course of business, and in such a way as not to create a presumption of knowledge of its invalidity. This case is approved in *Pinegan v. Green* (1906) 130 Ill. App. 445. The rule as stated in this case (130 Ill. App. 445) is again stated in *McClory v. Towne* (1912) 173 Ill. App. 113, which cites the same from *Daniel on Negotiable Instruments*.

That the holder need not show that he had no notice seems to be the opinion of the court in *Commercial Bank v. Burgwyn* (1892) 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623. Although the court in that case says that, upon

fraud being shown in the inception of an instrument, the prima facie case of the plaintiff is so far rebutted "as to shift the burden of proof, and to make it necessary for it to show that it was a bona fide purchaser for value and without notice," it continues: "When, however, the plaintiff responded by showing that it acquired the notes bona fide for value, in the usual course of business, and while they were still current, the prima facie case of the plaintiff was restored, and, unless the circumstances under which the purchase was made were of such a character as to amount to constructive notice, the jury should have been instructed that the burden of proof was upon the defendants to establish knowledge on the part of the plaintiff at the time of its purchase of the impeaching facts alleged in the answer." This statement is approved in *Campbell v. Patton* (1893) 113 N. C. 481, 18 S. E. 687.

In *Wright v. Hardie* (1895) 88 Tex. 653, 32 N. W. 885, the burden of showing notice on the part of the indorsee of a note was held to be upon the defendant by virtue of statute.

The theory upon which these courts proceed may be understood best by the language used in the opinions. The court in *Kellogg v. Curtis* (1879) 69 Me. 212, 31 Am. Rep. 273, discusses the question as follows: "The inquiry naturally occurs, What must the indorsee show in order to sustain the burden cast upon him, where the note originated in fraud? He makes out a prima facie case by proving that the note was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith without notice of the fraud. This presumption exists because it is not likely that he would give full value for a note which he knew or believed to be fraudulent, taking the hazard attending it upon himself; and because it would be difficult to prove his good faith in any better way than that he gave value for it. To show, except by inference and

presumption, that he did not have notice of the fraud, would be to establish a fact negative in its character. This presumption stands instead of direct proof, till overcome by rebutting evidence. Where there is evidence on both sides affecting the several points or propositions necessary to be shown, then the general burden of proof is upon the plaintiff to make them out." Practically the same rule is stated in *Market & F. Nat. Bank v. Sargent* (1893) 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192, as follows: "Proof of fraud in the inception of the note undoubtedly casts upon the indorsee the burden of showing that he took the note for value before maturity, without notice of the fraud. . . . But proof that he paid full value for the note before maturity raises a presumption that he purchased it in good faith without notice of the fraud, and, until overcome by rebutting evidence, this presumption stands in lieu of direct proof." In this case a *prima facie* case was held to be made out for the subsequent holder by his testimony that the note in question was discounted in the usual course of business, before maturity, for its face value less a discount, and it is added that this is made out for the plaintiff without the aid of the affirmative statement of the discount clerk that the plaintiff's bank did not know of any equities between the maker and the indorser. In *Johnston v. Suburban Realty Co.* (1895) 62 Mo. App. 156, where there seems to have been no question but that the note was purchased by the plaintiff before maturity, the court says that, upon a showing of fraud, the plaintiff was bound to show that he paid consideration for the note, and continued: "Good faith in paying the consideration is presumed, unless rebutted by the circumstances. Plaintiff's knowledge of a breach of trust on the part of his vendor necessarily rebuts the presumption of good faith."

According to the other line of cases, the burden is cast upon the holder to show all the elements which make a bona fide holder. *Giberson v.*

Jolley (1889) 120 Ind. 301, 22 N. E. 306; *First Nat. Bank v. Ruhl* (1890) 122 Ind. 279, 23 N. E. 766; *Schmueckle v. Waters* (1890) 125 Ind. 265, 25 N. E. 281; *Kain v. Bare* (1891) 4 Ind. App. 440, 31 N. E. 205; *Union Trust Co. v. Adams* (1913) 54 Ind. App. 166, 101 N. E. 741; *Thamling v. Duffey* (1894) 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363; *Cahen v. Everitt* (1901) 67 App. Div. 86, 73 N. Y. Supp. 549. (But see discussion of New York cases, *infra*.) *Landauer v. Sioux Falls Improv. Co.* (1897) 10 S. D. 205, 72 N. W. 467. See *Abmeyer v. First Nat. Bank* (1907) 76 Kan. 877, 92 Pac. 1109, *supra*.

In *Charles v. Remick* (1895) 156 Ill. 327, 40 N. E. 970, it is stated that the burden is upon the subsequent holder of establishing that he is a bona fide assignee or purchaser of the note sued on.

Compare with *Wright v. Brosseau* (1814) 73 Ill. 381, and *Hodson v. Eugene Glass Co.* (1895) 156 Ill. 397, 40 N. E. 971, *supra*.

At least, the holder must prove that he had no knowledge of the fraud. *Munroe v. Cooper* (1828) 5 Pick. (Mass.) 412; *MacLaren v. Cochran* (1890) 44 Minn. 255, 46 N. W. 408; *Bank of Montreal v. Richter* (1893) 55 Minn. 362, 57 N. W. 61; *Lahrman v. Bauman* (1906) 76 Neb. 846, 107 N. W. 1008; *Limerick Nat. Bank v. Adams* (1897) 70 Vt. 132, 40 Atl. 166.

Upon a showing of fraud, the holder must, in order to entitle himself to the peculiar protection enjoyed by bona fide purchasers, show that he purchased the note for a valuable consideration, and without notice of the fraud. *MacLaren v. Cochran* (1890) 44 Minn. 255, 46 N. W. 408.

That the holder must prove that he took the note for value, and without notice of the fraud, is held, also, in *Bank of Montreal v. Richter* (1893) 55 Minn. 362, 57 N. W. 61.

Although it is expressly stated in *Bank of Montreal v. Richter* (Minn.) *supra*, that, upon fraud being shown, it devolves upon the holder to prove that he took without notice of the fraud, in the subsequent case of *First Nat. Bank v. Holan* (1896) 63

Minn. 525, 65 N. W. 952, the court, although relying upon the Richter Case, approves an instruction to the jury in the following language: "He must ordinarily show under what circumstances and for what value he became the holder. The reason of this rule is, where there is fraud, the presumption is he who is guilty of it will part with the note thereby acquired for the purpose of enabling some third party to recover on it. Such presumption operates against the holder, and suspicion follows the note into his hands and fastens to his title." In approving of this instruction, the court in the Holan Case says: "This instruction was given in connection with an instruction to the effect that, if the jury found that the note was obtained by fraud and artifice, the burden of proof would shift to the plaintiff to show that it took the note in good faith, before maturity, in the regular course of business"—and adds that this instruction was correct,—citing the Richter Case.

In *Mendenhall v. Ulrich* (1905) 94 *Minn.* 100, 101 N. W. 1057, where the burden of proving his bona fides was cast upon the subsequent holder of a note because it was fraudulently put into circulation, the court says that the holder must show "not only that he purchased the note for value, but that he did so in good faith, without notice or knowledge of the fraud."

The court in *Cochran v. Stein* (1912) 118 *Minn.* 323, 41 L.R.A.(N.S.) 391, 136 N. W. 1037, says that, upon the concession that the note had been obtained by fraud from the maker, "the burden was placed upon him [the plaintiff] to establish his claim that he purchased the note from the payees for value, before maturity, in due course of business and without notice. . . . And the phrase 'in due course of business' required proof on his part sufficient to fairly satisfy the jury that the note was indorsed to him by O'Connell & White before its maturity, to entitle him to recover in this action; for one who takes negotiable paper, payable to order, otherwise than by indorse-

ment, does not take it in due course of business, and hence is not a bona fide holder."

The New York rule under the law merchant was in some doubt. The court in *Vosburgh v. Diefendorf* (1890) 119 N. Y. 357, 16 Am. St. Rep. 837, 23 N. E. 801, says: "The plaintiff did not satisfy this rule by showing that he paid full value for the note. It was necessary, in order to entitle him to recover, to go further, and show that he had no knowledge or notice of the fraud with which the instrument was tainted from its origin." In *Canajoharie Nat. Bank v. Diefendorf* (1890) 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402, the holder contended that, upon proof that he paid value for the note before maturity, he conclusively established its character as a bona fide holder, and was entitled to recover, in the absence of proof showing that he had no notice or knowledge of facts constituting a defense to the action. In answer to this contention, the court says: "The plaintiff's contention eliminates the element of good faith from the transaction, and assumes that the language, 'a holder for value,' as used in the authorities, is satisfied by proof that the notes were purchased before maturity, and value paid therefor. We think this contention is contrary to the weight of authority in this state, even if it is not wholly unsupported by it. The payment of value for negotiable paper is a circumstance to be taken into account with other facts in determining the question of the bona fides of the transaction, and when full value is paid is entitled to great weight. But that fact is never conclusive except in the absence of evidence tending to show notice or bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills or negotiable paper must bring themselves within the condition which that law prescribes to establish the character of a bona fide holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual

course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. . . . The fact that they took the paper before maturity and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction. But where it further appears that such property has been fraudulently or illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go farther and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction." But these cases are commented upon in *American Exch. Nat. Bank v. New York Belting & Packing Co.* (1896) 148 N. Y. 698, 43 N. E. 168, and it is there stated that there were sufficient circumstances in both of those cases, indicating that the plaintiff knew of the fraud; and the court in the *Exchange Nat. Bank Case* affirms the decision of the trial court, which is reported in (1893) 74 Hun, 446, 26 N. Y. Supp. 822, where the rule is stated as follows: "But when it is shown that full value was paid for a note taken in the usual course of business, and there is no circumstance which tends to show that the purchaser had notice that it had been diverted, it is to be presumed that it was acquired in good faith and without notice of the diversion." The evidence in this case showed that the plaintiff acquired the note for value, and in the usual course of business, and no fact or circumstance was called to the attention of the court or found in the record which rebuts the presumption, or which made the question of notice—good faith—one for the jury. This case involved a fraudulent diversion of the note, and not a fraudulent inception, but no stress is put upon this fact. In *Hart v. Potter* (1855) 4 Duer (N. Y.) 458, it was held not necessary for the holder to prove that he had no notice of the fraud, that proof that he

purchased it for value, before maturity, was sufficient, and that the burden of proving facts sufficient to charge him with notice then rested on the defendant. A similar conclusion is reached in *Catlin v. Hansen* (1852) 1 Duer (N. Y.) 309, and *Ross v. Bedell* (1856) 5 Duer (N. Y.) 462.

The decisions in Iowa require the subsequent holder to show that he had no notice of the fraud. *State Bank v. Gates* (1901) 114 Iowa, 323, 86 N. W. 311 (and this court adds that he must show payment of consideration). That the indorsee must show that he took without knowledge of the fraud in the inception of the note, or of facts putting him upon inquiry which if pursued would have disclosed the fraud, is held in *Galbraith v. McLaughlin* (1894) 91 Iowa, 399, 59 N. W. 338.

The theory of the courts which require the holder to show lack of notice can best be understood by reference to their own language. The court in *Giberson v. Jolley* (1889) 120 Ind. 301, 22 N. E. 306, says: "It is not easy to conceive how one can be a bona fide holder of a note if he had notice of fraud, and all the courts agree that the plaintiff who sues upon a note must, when evidence that it was obtained from the maker by fraud is given, prove that he is a bona fide holder. It would seem clear, therefore, that, to be consistent, they should hold that he must prove not one, but all, of the essential elements of the character of a bona fide holder. This cannot be done without showing that the note was acquired by the plaintiff without notice, since if not so acquired it is not possible for him to be a bona fide holder within the meaning of the law. In support of his adoption of the rule which relieves the plaintiff of the burden of proving that he did not have notice, Mr. Daniel gives this reason: 'To require the plaintiff to show absolutely that he had no knowledge of facts would be to burden him with the necessity of proving an impossible negative.' 1 Dan. Neg. Inst. 3d ed. § 819. The learned and usually very accurate author has fallen into more errors than one in

this brief statement. The courts which hold that the burden is on the plaintiff to show that he is, in all the term implies, a bona fide holder, have never so much as hinted that absolute evidence is required. In no civil case is so high a degree of evidence demanded. It is, therefore, a mistake to assume that such evidence is meant by the cases which declare that the plaintiff must show that he is a good-faith holder of the bill or note. Nor do these cases require the proof of 'an impossible negative,' as the author assumes. The negative required is far from being an impossible one; on the contrary, it is not only possible, but easy, for the plaintiff to prove the facts within his own knowledge, since if he knows that he bought the note he cannot very well be ignorant of the facts attending its acquisition. Nor is it unusual to require a plaintiff to prove a negative; it is, indeed, always required of him where the facts are peculiarly within his own knowledge and essential to his right of recovery. 'Whenever,' says Mr. Wharton, 'whether in a plea, replication, rejoinder, or surrejoinder, an issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or a negative proposition, he must make good his assertion.' 1 Whart. Ev. § 354. In *Goodwin v. Smith* (1880) 72 Ind. 113, 37 Am. Rep. 144, this question received full consideration, and a great number of authorities were cited in proof of the proposition that the general rule is that negative propositions must be proved, and these cases, as well as those collected by Mr. Wharton, conclusively show that the rule is a common, and not an extraordinary one, and is, indeed, one of almost universal application. In holding a party who assumes that he is the bona fide holder of a promissory note bound to prove all the facts essential to invest him with that character, no more is done than to apply to the particular instance a familiar general rule of wide sweep."

In holding that the plaintiff must prove absence of knowledge of fraud, the court in *Tamling v. Duffey* (1894)

14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363, says: "It might frequently occur that a defendant in such a case would be powerless to allege or prove knowledge in the plaintiff of the fraud which tainted the note sued on at its inception,—this knowledge being peculiarly within the breast and possession of the plaintiff,—whereas it would very rarely be a hardship upon an indorsee to require him to show his bona fides, by proving the circumstances and facts under which he became the owner and holder of the paper on which he sues."

In *Parsons v. Utica Cement Mfg. Co.* (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785, where the fraud was not connected with the original inception of the paper, but occurred subsequently to the prejudice of an intermediate holder, the court says that, upon proof of the fraud, the presumption of the subsequent holder's bona fide character no longer availed her, "and her original burden of proof, only temporarily satisfied by its aid, rested upon her again and now required her to show a title by affirmative evidence that she obtained the instrument both in good faith and for a valuable consideration." And the court adds: "Her good faith she could only show by proof that when the bond came to her she had no knowledge of such fraud, and was not equitably chargeable with notice of it." And further the court said: "The defendant, it is true, had the burden, for certain purposes, of proving that she took the bond with such notice and without consideration; but these purposes were accomplished when the fact was established of its fraudulent abstraction from the assets of the insurance company by her grantor. One legal presumption established by the law merchant was thus met with another legal presumption established by the same law, which by that law was sufficient to destroy it."

According to the court in *Aldrich v. Warren* (1840) 16 Me. 465, when a note is shown to have been fraudulent in its inception, or to have been fraudulently put into circulation, the burden is thrown upon the holder to

prove that he came by the possession fairly, without any knowledge of the fraud, and it is held, further, not enough merely to show that it was negotiated before its maturity. It must appear to have been done fairly in the due course of business, unattended with any circumstances justly calculated to awaken suspicion. A similar statement appears in *Perrin v. Noyes* (1855) 39 Me. 384, 63 Am. Dec. 633. But these cases are overruled, in so far as they lend any support to this view, by *Kellogg v. Curtis* (1879) 69 Me. 212, 31 Am. Rep. 273. See *supra*.

There arises in this connection an interesting question that is, except in so far as the case holds that lack of notice must be proved, beyond the scope of this annotation, as to proving absence of notice where a partnership or corporation is involved; that is, whether it must be shown that all members were free from notice. Notwithstanding that it is beyond the scope, it has seemed that it may be helpful to discuss the few cases on this point that have come to the attention of the writer, without attempting to exhaust the cases. It has been held, where the subsequent holder is a partnership, that not only must it be shown that the member of the partnership who bought the note was ignorant of any defenses thereto, but it must also be shown that all other members were ignorant thereof. *Frank v. Blake* (1882) 58 Iowa, 750, 13 N. W. 50, followed in *Commercial Bank v. Paddick* (1894) 90 Iowa, 63, 57 N. W. 687. It is held in *McCosker v. Banks* (1896) 84 Md. 292, 35 Atl. 935, that whenever it becomes necessary for the members of a co-partnership to show that they acquired a promissory note by indorsement in good faith, without knowledge or notice of its imputed original infirmities, such want of knowledge must be shown as to all the partners; and as one partner cannot give evidence that his copartner was ignorant of a particular fact, except by receiving or testifying to the copartner's declaration, which would be clearly inadmissible, it results that each part-

ner must show his want of knowledge by his own testimony, or that other facts must be submitted to the jury from which they may legitimately infer the absence of such knowledge.

In *Bennett State Bank v. Schloesser* (1897) 101 Iowa, 571, 70 N. W. 705, it was recognized as necessary for a bank which had purchased a note and was suing thereon, to show that none of its officers had any notice of the matters pleaded by the defendant in defense of the note, and it was held that the testimony of the cashier that neither he nor the other officers of the bank had any notice of the matters was not conclusive. The mere testimony of the cashier of a bank that he had no knowledge or notice of equities against a note was held not conclusive proof that the bank was without such knowledge or notice in *First Nat. Bank v. Wise* (1915) 172 Iowa, 24, 151 N. W. 495.

In *German American Nat. Bank v. Kelley* (1918) 183 Iowa, 269, 166 N. W. 1053, where the cashier of a bank which had purchased a note asserted that the bank was without notice, the court says that no consideration is to be accorded this statement, for in the nature of things that was a mere opinion, since it is equally clear that the bank might be affected with knowledge of its president or assistant cashier, both of whom were dealing actively with the public in behalf of the bank, and no evidence was given negating the possession of such knowledge by those officers.

But in *Perry Sav. Bank v. Fitzgerald* (1914) 167 Iowa, 446, 149 N. W. 497, where the evidence was undisputed that the cashier of a bank was the only officer purchasing notes, and that he was the only one who had to do with the purchase of the note in suit, it was held that the burden of showing absence of notice of defenses was met by his testimony. The bank in this case was a corporation.

In *Johnson County Sav. Bank v. Walker* (1906) 79 Conn. 348, 65 Atl. 132, a case in which the cashier who purchased the note for his bank testified that he had no knowledge of any fraud, or illegal consideration, an in-

struction that this testimony was not sufficient to discharge the burden for the plaintiff, since the plaintiff, like all corporations, doubtless had other officers, like a president, secretary, treasurer, board of directors, or board of trustees, and if all of these officers had the required knowledge of the fraud or illegal consideration, the fact that its cashier had no such knowledge would make no difference, was held error, where no evidence had been introduced as to what officers, other than the cashier, the plaintiff had, nor as to the powers or duties of any other officer. The court further says that the only evidence as to the manner in which the bank acquired the acceptances was that they were discounted by the cashier on his own responsibility, and if this were true, notice of fraud in obtaining them, to a president who knew nothing of the offer of them for discount and had no duties to perform with reference to such an offer, would be unimportant.

In *National Bank v. Palmer* (1914) 56 Pa. Super. Ct. 82, a bank was held to have discharged the burden of showing that it had no notice of defenses, where the cashier and two of the directors testified to this effect, although it appeared in this case that the discount involved was submitted to the board of directors for approval, and that the board met with six directors present, including the cashier. It was held not necessary to call every officer in any way connected with the administration of the bank's affairs, through whom some knowledge of defect in the delivery of the note might have been brought home to the bank.

It is stated in *National Secur. Bank v. Cushman* (1877) 121 Mass. 490, that the mere fact that one of the directors of a bank discounting a note knew of the fraud or illegality will not prevent the bank from recovering thereon, but it is held in that case that, if the director who had such knowledge acted for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge.

And in *Ward v. Doane* (1889) 77

Mich. 328, 43 N. W. 980, an action on a note belonging to a partnership, it was held that if it be shown that only two members of the firm took any part in the purchase of the note, and that they were the only ones shown to have known anything about this purchase until after it was bought, the presumption would obtain, in the absence of any proof to the contrary, that the remaining members were ignorant of its consideration.

b. Under Negotiable Instruments Act.

The Negotiable Instruments Law provides in effect, in § 52, as above shown (subd. I. b), that, where it is shown that the title of any person who negotiated the instrument was defective, "the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course." According to the law, "a holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." It has been expressly held that fraud in the inception of an instrument casts upon the holder the duty of proving the four conditions set forth in the law. *Shellenberger v. Nourse* (1911) 20 Idaho, 323, 118 Pac. 508; *Re Philpott* (1915) 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839; *Commercial Secur. Co. v. Archer* (1918) 179 Ky. 842, 201 S. W. 479; *Merchants Nat. Bank v. Branson* (1914) 165 N. C. 344, 81 S. E. 410; *Leavitt v. Thurston* (1911) 38 Utah, 351, 113 Pac. 77.

Many cases have omitted reference to the first of the enumerated conditions, but have held that it is necessary for the holder to prove the last three to establish the burden thrown upon him by proof of fraud in the inception.

Iowa.—*Arnd v. Aylesworth* (1909) 145 Iowa, 185, 29 L.R.A. (N.S.) 638, 123 N. W. 1000.

Kentucky.—*Lynchburg Shoe Co. v. Hensley* (1920) 186 Ky. 769, 218 S. W. 243.

Nebraska.—*Ostenberg v. Kavka* (1914) 95 Neb. 314, 145 N. W. 713.

New Mexico.—*Gebby v. Carrillo* (1919) 25 N. M. 120, 177 Pac. 894.

North Carolina.—*American Nat. Bank v. Fountain* (1908) 148 N. C. 590, 62 S. E. 738; *Smathers v. Toxaway Hotel Co.* (1915) 168 N. C. 69, 84 S. E. 47; *Wilson v. Lewis* (1915) 170 N. C. 47, 86 S. E. 804; *J. E. Latham Co. v. Rogers* (1915) 170 N. C. 239, 1 A.L.R. 11, 87 S. E. 34; *Moon v. Simpson* (1915) 170 N. C. 335, 87 S. E. 118 (obiter); *Metropolitan Discount Co. v. Baker* (1918) 176 N. C. 546, 97 S. E. 495.

North Dakota.—*STEVENS v. BARNES* (reported herewith) ante, 10.

Oklahoma.—*Gourley v. Pioneer Loan Co.* (1915) 51 Okla. 434, 151 Pac. 1072; *LAMBERT v. SMITH* (reported herewith) ante, 1. But see *STEVENS v. PIERCE* (reported herewith) ante, 7; *Miller v. Marks* (1914) 46 Utah, 257, 148 Pac. 412.

Still other cases hold merely that the holder must prove he had no notice of the fraud. *Link v. Jackson* (1911) 158 Mo. App. 63, 139 S. W. 588, s. c. on second appeal in (1912) 164 Mo. App. 195, 147 S. W. 1114; *First Nat. Bank v. Warsaw Drug Co.* (1914) 166 N. C. 99, 81 S. E. 993; *Thompson v. Citizens Nat. Bank* (1909) 32 Ohio C. C. 131, 13 Ohio C. C. N. S. 515; *Regan v. Sherman* (1913) 1 Ohio App. 273, 34 Ohio C. C. 214, 17 Ohio C. C. N. S. 523; *Mangold & G. Bank v. Utterback* (1918) — Okla. —, 174 Pac. 542; *Brown v. Feldwert* (1905) 46 Or. 363, 80 Pac. 414 (obiter); *Second Nat. Bank v. Heffman* (1911) 229 Pa. 429, 73 Atl. 1002.

In *Southwest Nat. Bank v. Lindsley* (1916) 29 Idaho, 343, 158 Pac. 1082, it is stated that the holder is required to show that at the time he purchased the note he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it.

In *Mackenzie v. Eschmann* (1917) 18 A.L.R.—4.

174 Ky. 450, 192 S. W. 521, where the holder failed to testify that when he purchased the note he had no knowledge of the fraud, the court concluded that plaintiff did not sustain the burden of showing that he was a holder in due course.

The fact that a holder claiming to be a holder in due course paid a consideration for the note is insufficient of itself to show that he did not have actual knowledge of the fraud entering into the consideration of the note, when it is nowhere stated that the holder did not have knowledge of the fraud. *Commercial Secur. Co. v. Archer* (1918) 179 Ky. 842, 201 S. W. 479.

In England and Canada, under the Bills of Exchange Act, the holder must prove that he had no notice of the fraud. *Tatam v. Hasler* (1889) 5 Times L. R. (Eng.) 593, 58 L. J. Q. B. N. S. 432, L. R. 23 Q. B. Div. 345, 38 Week. Rep. 109; *Noble v. Boothby* (1912) 22 West. L. R. (Can.) 232, 2 West. Week. Rep. 1103, 7 D. L. R. 1.

Various statements of what the holder must prove appear in the cases. The court in *Beachy v. Jones* (1921) 108 Kan. 236, 195 Pac. 184, says that, when fraud is shown, the holder of the note must prove that "he acquired it before maturity, for value, and in good faith, and that he had no notice of any defect in the title of the person negotiating it." It is stated in *Appalachian Corp. v. Ayo* (1919) 145 La. 201, 82 So. 89, that, upon fraud being shown, the burden rested upon the subsequent holder to prove that he "was a bona fide holder before maturity, and without notice of such fraud." The holder must, according to the court in *Stouffer v. Alford* (1910) 114 Md. 110, 78 Atl. 387, show that he acquired the instruments "bona fide, for value, before maturity, and without notice of any facts impeaching their validity." In *Wilson v. Kelso* (1911) 115 Md. 162, 80 Atl. 895, it is held that, upon proof of fraud, it is incumbent on the holder to show that he took the note "in good faith, for value, and before maturity, and without any actual knowledge of any infirmity or defect in the instrument." In *Lewiston Trust & S. D. Co. v.*

Shackford (1913) 213 Mass. 432, 100 N. E. 828, the court expressly says that, upon the showing of fraud, the burden is on the holder to prove that he acquired title to the note in due course; that is, to prove, among other things, not only that he had taken the note in good faith and for value, but also that he had no notice of any defect in the title of the person negotiating it. In *Merchants' Nat. Bank v. Marden, O. & H. Co.* (1919) 234 Mass. 161, 125 N. E. 384, it is held that a showing that a note was fraudulently put in circulation casts the burden on the holder to show that, on all the evidence, he had no actual notice or knowledge of the fraud. In *People's State Bank v. Miller* (1915) 185 Mich. 565, 152 N. W. 257, upon a showing of fraud, the burden is stated to rest upon the holder to prove that he acquired the title as a holder in due course, and it is further added that it is incumbent upon him to show affirmatively that as a holder in due course, under the conditions enumerated in the above section, he took the check in good faith and for value. Upon showing that the instrument was obtained by fraud, the burden is upon the holder to prove that he took it in good faith, for value, and without actual knowledge either of any infirmity in it, or defect in the title to it. *Johnson County Sav. Bank v. Walker* (1906) 79 Conn. 348, 65 Atl. 132. That upon a showing of fraud, the holder must show by affirmative evidence that he obtained the instrument both in good faith and for a valuable consideration, and that good faith can only be shown by proof that when the instrument came to him he had no knowledge of such fraud, and was not equitably chargeable with notice of it, is held, also, in *Parsons v. Utica Cement Mfg. Co.* (1909) 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785. In *Bank of Ozark v. Hanks* (1910) 142 Mo. App. 110, 125 S. W. 221, an instruction to the jury was approved which stated the law to be that, upon a showing of fraud, the plaintiff must show by greater weight of testimony "that it bought said notes in good faith, in due course of business, with-

out notice of the fraud by which Lowthorp obtained said notes." According to the court in *First Nat. Bank v. Warsaw Drug Co.* (1914) 166 N. C. 99, 81 S. E. 993, it is not sufficient for the holder to show simply that he purchased before maturity and paid value, but he must show that he had no knowledge or notice of the fraud.

The court in *Leavitt v. Thurston* (1910) 38 Utah, 351, 113 Pac. 77, thus discusses the question: "The appellant, however, urges that the burden cast upon him when fraud was shown in the inception of the note was discharged by the giving of his testimony that he purchased the note in good faith, for value, before maturity, in the usual course of business, and without notice of the fraud; and that the burden then shifted to the defendant to show that the plaintiff took the note with knowledge or notice of the fraud. Here counsel confuse the term, 'burden of proof,'—the *onus probandi*,—which does not shift, with that of the 'burden or duty of proceeding,' or going forward, which in the course of the trial upon various facts may, and frequently does, shift from one party to the other. Whenever the existence of any fact or facts is necessary in order that a party may make out his case or establish a defense, the burden of proof—the *onus probandi*—is on such party to show the existence of such fact or facts. That burden does not shift, and is unaffected by the evidence as the trial proceeds. After all the evidence is in, the one having the burden will lose unless the evidence bears more heavily in his favor. Upon proof of fraud in the inception of the note, the statute undoubtedly casts on the holder not only the mere duty or burden of proceeding, or of going forward, but the burden of establishing the existence of facts showing that he, or some person under whom he claims, acquired title as a holder in due course, and as defined in § 1604, which includes the fact that, at the time the note was negotiated, he, or the person through whom he acquired title, had no notice of the fraud or infirmity. If evidence is given by him tending to show that he was such a holder in due

course, that does not then shift the burden of proof to the defendant to establish the fact that he, or the person from whom he acquired title, had notice or knowledge of the fraud, or that no value was paid for the note, or that it was purchased overdue, but merely the duty of proceeding in the production of evidence, if he desires to meet or overcome the effect or weight to be given the evidence so adduced by the holder. But, upon all the evidence on such issue, the holder will lose, unless the evidence bears more heavily in his favor. We think the charge in this particular was right."

The view has been taken, however, even under the Negotiable Instruments Law, that the holder makes out a prima facie case after proof of fraud in the diversion of a note, by showing a purchase for full value and before maturity. *American Nat. Bank v. Lundy* (1910) 21 N. D. 167, 129 N. W. 99. Although the decision in *Walters v. Rock* (1908) 18 N. D. 45, 115 N. W. 511, was rendered after the adoption of the Negotiable Instruments Law in that state, nothing is said in the opinion as to that law; the holding in that case, that payment of value on a purchase before maturity is prima facie evidence that the purchase is in due course, is expressly based upon *First Nat. Bank v. Flath* (1901) 10 N. D. 281, 86 N. W. 867, a case involving a note given before the Negotiable Instruments Law was adopted. But this view is seemingly repudiated in *STEVENS v. BARNES* (reported herewith) ante, 10.

In *STEVENS v. PIERCE* (reported herewith) ante, 7, the court says: "But when the defendant introduced evidence tending to show that the note had been procured by fraud, misrepresentation, and deceit practised upon her by the agent of the Lyon-Taylor Company, then the burden of proof was shifted to the plaintiff to show that the bank from which he purchased had acquired the note in good faith, for value, in the usual course of business, and when the plaintiff thereafter, by uncontroverted evidence, established that the bank

had received the note for value, in the usual course of business, and under circumstances that did not operate as constructive notice of the fraud by which defendant had been induced to sign the note, then the burden was upon the defendant to prove actual notice of fraud." In the previous case of *Mangold & G. Bank v. Utterback* (1918) — Okla. —, 174 Pac. 542, an instruction in almost the identical language of that used in the opinion in *STEVENS v. PIERCE* was given, and by the supreme court held not to state the law of the jurisdiction. The instruction was as follows: "The jury is instructed that when the holder of a negotiable instrument proves by competent testimony that he acquired the instrument bona fide, for value, in the usual course of business, before due, and under circumstances which do not operate as constructive notice of facts which impeach the original validity, the defendant must then prove that the plaintiff had actual notice of such facts; otherwise your verdict should be for the plaintiff." The supreme court says of this: "This instruction is not the law in this jurisdiction. This court in a number of cases has said that where the defense to a note is that the same was obtained by the fraud of the payee, and when this fraud is established, the burden rests upon the plaintiff to show that it purchased the note in question without notice of the fraud, or, in other words, the title of the payee in the notes being defective, the burden to show want of notice, if fraud is established, is upon the plaintiff. . . . But the trial court here placed the burden of proof upon the defendant to show that the bank took the notes with knowledge of the fraud practised upon it."

In *Citizens' State Bank v. Snelling* (1919) 55 Mont. 476, 178 Pac. 744, where the plaintiff produced and identified the note, and showed its purchase for value the day following its execution, the court says that the maker, in order to defeat a recovery, must show fraud in the procurement of the note, and that the "plaintiff had knowledge thereof." There is no dis-

cussion. It cannot be said that the cases adhering to this view are convincing of its correctness. It does not appear that the question was given much consideration. Moreover, the great number of cases adhering to the opposite theory, together with the wording of the Negotiable Instruments Act, makes the opposite conclusion seem the correct one.

V. What constitutes fraud within the rule.

a. In general.

Fraud, as it is known in the law, is well summed up by the supreme court of Washington as follows: "The essential elements of representations to constitute fraud, whether as a defense or as a cause of action, are undoubtedly the same. They are these: The representations must have been made as to a material matter; they must be false; it must appear that the maker knew them to be false, or made them recklessly as facts, without knowledge of their truth; they must have been made with the intention that they should be acted upon by the other party; the other party must have acted in reliance upon them, and he must have thereby suffered injury." *Hamilton v. Milhills* (1916) 92 Wash. 675, 159 Pac. 887.

When the foregoing elements are present in a transaction, fraud exists, and if the action taken by the defrauded party is the execution and delivery of a negotiable instrument, there is such fraud in the inception of the instrument as casts upon a subsequent holder thereof the burden of showing that he is a holder in due course, if he relies upon his character as such to cut off defenses. The following pages show that fraud has arisen in a great variety of transactions. While for convenience the cases have been grouped according to the transaction in which the fraudulent representations were made, it must be understood that it is the fraudulent representations that constitute the fraud, and not the character of the transaction, that is, whether a sale of land, or a sale of horses, etc. In many of the cases in

which fraud was held to exist, the facts constituting the fraud have been so involved that setting them out would serve no useful purpose. In other cases the courts have not clearly stated the representations constituting the fraud, and no exhaustive discussion of these cases has been attempted. However, for the purpose of furnishing representative cases dealing with various states of facts, a number of cases have been listed under a brief statement of the facts out of which the fraud arose. See V. c, *infra*.

There are, of course, certain questions of law as to whether certain representations or the creation of certain appearances constitute fraud, and these questions will be noticed. It must be remembered, however, in this connection, that this note deals primarily with an evidentiary question, and the evidentiary question is confined to bills and notes, so that no exhaustive presentation of any representations or states of facts will appear. Obtaining a check in payment of a bet on a fake horse race has been held such fraud as casts upon a subsequent holder the burden of proving his bona fides. *Arkansas Nat. Bank v. Martin* (1914) 110 Ark. 578, 163 S. W. 795. The execution of a note by a client to his attorney within the time of the employment and the existence of the confidential relation, for a fee which was agreed upon at the time, was presumed to have been fraudulent in *Shirk v. Neible* (1901) 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281. In *Asbury v. Taube* (1912) 151 Ky. 142, 151 S. W. 372, the failure of a vendor of horses to whom the purchaser had given a check for the amount of the purchase price, to deliver the horses as agreed, the explanation being offered that one of the horses had become sick and could not be delivered, whereupon the purchaser demanded a return of the check, which was refused, was treated as fraud casting upon one to whom the check had been transferred the burden of proving his bona fides. Nothing is said as to an intention on the part of the vendor at the time of ob-

taining the check, of failing to deliver the horses, and there is little discussion of the question. In *Ganz v. Weisenberger* (1896) 66 Mo. App. 110, the holder of a note was held to have the burden of proof where it appeared that the maker signed a contract with an agent to put up lightning rods which he supposed called for the payment of \$5; but where in a few days another person drove to his home and told him that the contract called for \$150 for his house alone, and that, unless he would sign a note for this amount, the person would obtain a United States marshal and turn him out of house and home, whereupon he, being frightened, signed the note; the court says that this was evidence showing that the note originated in fraud. The receipt by an insolvent bank for deposit, of a check drawn by the depositor on another bank in his own favor without knowledge of the insolvent condition of the bank of deposit, seems to be treated as a fraud which will cast upon a subsequent holder of the check the burden of showing his bona fides, in *Grant v. Walsh* (1895) 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209. The obtaining of a check surreptitiously and without authority from the drawer, and filling in the name of the person thus obtaining the check as payee, was treated as such fraud as cast the burden upon the subsequent holder, in *Ern v. Rubinstein* (1897) 72 Mo. App. 337.

It has been argued that the fraud which casts upon a subsequent holder the burden of proving that he is a holder in due course under the Negotiable Instruments Law consists of some trick or device that induces the giving of the negotiable instrument under the belief that some instrument of a different kind is being given. There is some indication in *Kellogg v. Hale* (1914) 190 Ill. App. 15, that this is the view of the court in that case, but it seems that the attention of the court was directed more to the substantive question as to what fraud would defeat recovery by a bona fide holder, than to the evidential question as to the burden of proof. It seems

clear that such fraud does cast upon the subsequent holder the burden of providing his bona fides. And so it has been held such fraud as casts upon the holder the burden of proving his bona fide character that the person who took a bill of exchange, knowing it to be such, procured it by the false statement that it was an ordinary note, and the parties who gave the bill did it in ignorance of its true character and in reliance upon the false statement made to them. *Ross v. Drunkard* (1860) 35 Ala. 434. In *Baldwin v. Fagan* (1882) 83 Ind. 447, the fraud consisted in falsely reading to the payee of a note, who was illiterate and almost blind, and misrepresentation of its contents. A note procured by the representation of the payee that it was merely a recommendation required by an insurance company to enable the payee to become their agent, on which the maker relies in signing the note, is tainted with fraud in its inception, so as to throw upon a subsequent holder the burden of showing his bona fides. *Cahen v. Everitt* (1901) 67 App. Div. 86, 73 N. Y. Supp. 549.

But generally the view that the fraud which casts upon the holder the burden of proving that he is a holder in due course is confined to fraud as to the character of the instrument has not been followed. Fraud relating to the consideration of a note is held to cast the burden upon the holder. *First Nat. Bank v. Denfeld* (1919) 143 Minn. 281, 173 N. W. 661. It has been held that the burden of showing his bona fides rests upon the holder of a note when there is fraud in the inception, even though the fraud affected the consideration. *City Deposit Bank v. Green* (1908) 138 Iowa, 156, 115 N. W. 893. This rule that fraud relating to the consideration casts the burden of proving his bona fides upon the holder is supported by the great majority of the cases, although not directly discussing it, for in most cases the fraud consisted in misrepresentations concerning the goods or articles for which the note was given. It must be remembered in this connection that,

while fraud may arise from misrepresentations as to the consideration for the instrument, not every failure of consideration amounts to fraud. It is perhaps true that no consistent rule of distinction can be formulated. Facts which are regarded by one court as showing a failure of consideration are regarded by another as showing fraud.

The broader distinction between the two things is illustrated by the decision in *Violet v. Rose* (1894) 39 Neb. 660, 58 N. W. 216, that the representation by the payee of a note to the maker concerning a deed of assignment given to secure the maker for executing the note, that the name of the payee's wife appearing on the assignment was her genuine signature, when in fact it was not, is fraud, casting the burden of proof upon a subsequent holder, if the maker relied upon such representation in executing the note. If, on the contrary, the deed of assignment failed merely because the wife refused or failed thereafter to acknowledge the instrument, as the payee of the note agreed she would do, there would be merely a failure of consideration, and not fraud which would cast upon a subsequent holder the burden of showing his bona fides. Another illustration is furnished by the decision in *McKinley v. Beggs* (1902) 17 Colo. App. 23, 67 Pac. 1019, an action by a subsequent holder upon a note given for services rendered or supposed to have been rendered, by the payee, a subsequent holder, the mere fact that the services were not rendered was held not to show that the note was secured by fraud, where there was no offer to show that the payee had falsely stated any facts to the maker for the purpose of inducing the execution of the note.

A failure of title to the object which constituted the consideration has been held to cast the burden on the holder. For instance, the sale of mules which had been stolen by the vendor was, in *Famous Shoe & Clothing Co. v. Crosswhite* (1894) 124 Mo. 34, 26 L.R.A. 568, 46 Am. St. Rep. 424, 27 S. W. 397, treated as such fraud

as to cast upon the subsequent holder of a check given for the purchase price the burden of proving his bona fides. Evidence supporting a charge that the payee of the note assumed to be the owner of a right to sell a certain wire-fence machine, and agreed in writing with the maker of the note to appoint him general agent, which agreement, together with the sale of certain machines, furnished the sole consideration for the execution of the note, when in fact the payee did not own the right, but had sold it previously to another person, was held to raise the issue of fraud which cast the burden upon the purchaser to show his good faith, in *Stewart v. Andes* (1905) 110 Mo. App. 243, 84 S. W. 1134. Notes given in payment for certain shares of stock which the person to whom the notes were given represented belonged to him, when in fact they did not and he knew they did not, were held to have been obtained by fraud, so as to cast the burden upon a subsequent holder of showing his bona fides, in *Hale v. Shannon* (1890) 57 Hun, 466, 32 N. Y. S. R. 1079, 11 N. Y. Supp. 129. It further appeared in this case that the person obtaining the notes agreed to hold them and to part with them only to the maker, and on their gradual payment by the profits to be derived from the stock. In *Pelly v. Onderdonk* (1891) 61 Hun, 314, 15 N. Y. Supp. 915, the maker of a note pleaded that the person to whom the note was given claimed to be the owner and inventor of processes for the manufacture of different articles of paint, and also for the manufacture of a liquid called pyrodene. These articles of paint and this liquid were alleged to have been falsely represented to the defendants as to their quality and utility, and the profits that could be derived from their manufacture and sale, and it was further alleged that the representations were fraudulently made for the purpose of inducing the defendants and others to associate together and form a corporation, in the organization of which the note in question was given. It was urged that the mere failure of

consideration did not cast upon a subsequent holder the burden of showing his bona fides. In answer to this contention the court says that the defense in this case did not depend upon a failure of consideration, but was placed upon the ground that the note had been fraudulently obtained.

Fraudulent representations as to value have also been held to cast the burden on the subsequent holder. Thus, notes induced by false representations as to the value and character of lands have been held to be fraudulent in inception, so as to cast the burden of showing bona fides on a subsequent holder. *Eames v. Crozier* (1894) 101 Cal. 260, 35 Pac. 873. Representations by the vendor of a secondhand X-ray machine who knew its value, as to the value thereof, in negotiations leading up to a sale to one who had no such knowledge, were held to amount to fraud in *Scheidel Western X-Ray Co. v. Bacon* (1918) — Mo. App. —, 201 S. W. 917. The court here recognizes the difficulty of determining when a representation as to value is a mere expression of opinion, or is one of fact, but concludes in this case that the representation was not a mere opinion. In *Vickery v. Burton* (1896) 6 N. D. 245, 69 N. W. 193, where, in an action by a subsequent holder of a note given for certain machinery, the maker pleaded certain false and fraudulent representations concerning the quality of the machinery, and alleged that it was not worth a greater sum than was paid down in cash, and that the notes were wholly without consideration, the court says: "There is much conflict of judicial opinion as to whether, where fraud in a sale of property as between the vendor and vendee is shown, such showing operates to shift the burden of proof to the plaintiff in a case where negotiable paper given for the property by the purchaser is sued on by an indorsee of the paper. We think the better reason and the weight of authority support the view that proof of such fraud does shift the burden of proof, and that in such cases, after proof of fraud, the plain-

tiff has the burden of showing a good-faith purchase of such paper in due course and without notice." An affidavit of defense that the note was procured by false and fraudulent representations, in the first instance, in reference to the value of the property in part payment of which the note was given, and that the defendants had a full, just, and legal defense to the payment of the note, in this, that the consideration therefor had failed, coupled with the denial of the plaintiff's title, was held sufficient to put the latter upon proof that he was a bona fide holder, in *Reamer v. Bell* (1875) 79 Pa. 292. The fraudulent representations which were held to cast the burden upon the holder of the note of showing his bona fides, in *Zook v. Simonson* (1880) 72 Ind. 83, were fraudulent representations as to the skill and ability of the payee in grafting fruit trees, in consideration of certain work of which kind the note was given. Fraudulent representations by the payee of a note given for the purchase price of a buggy that the buggy was new and of the value named in the note, when in truth the property was old and secondhand, but had been newly painted and varnished so that its real condition could not be observed, were held to be fraud casting the burden upon a subsequent holder, where the maker of the note relied upon the false and fraudulent representations so made, and believed them to be true. *Bradley, H. & Co. v. Whicker* (1899) 23 Ind. App. 380, 55 N. E. 490. Representations by a vendor of cigars as to the number and quality of the cigars, which were false, and upon which the purchaser relied in executing a note, were held to cast upon the holder of the note the burden of showing his bona fides, in *Owens v. Snell* (1896) 29 Or. 483, 44 Pac. 827.

Fraudulent representations as to quantity have also been held to cast the burden on the subsequent holder. The representation of a vendor of corn to the purchaser as to the quantity was held to be fraudulent, casting upon the subsequent holder of a note given for the purchase price of the

corn the burden of showing his bona fides, where the vendor was a farmer accustomed to growing and measuring corn, and assumed to know and stated the quantity, and the purchaser, on the other hand, was a merchant tailor wholly without knowledge or experience in measuring corn in the field, whose ignorance and inexperience in the matter were well known to the vendor, if the misrepresentations were made with intent to deceive, and the purchaser relied thereon to his injury. *Abmeyer v. First Nat. Bank* (1907) 76 Kan. 877, 92 Pac. 1109.

See *Owens v. Snell* (1896) 29 Or. 483, 44 Pac. 827, *supra*.

Even failure to keep an agreement has been held to be evidence of a fraudulent intent. Where the agent for a fence machine procured the note in question upon his agreement that it should not be used by his principal, but deposited in a bank selected by the defendant, who thereafter assisted him in securing a subagent, who in turn gave a note for \$100, a part of which was to be paid to the defendant for his commission, and subsequently the agent sold both notes and appropriated the entire proceeds, such evidence tends to prove a fraudulent intent on the part of the agent in obtaining the note. *Rochford v. Barrett* (1908) 22 S. D. 83, 115 N. W. 522.

See, in this connection, *supra*, II. and also *infra*, V. d.

Fraudulent representations as to a material fact have been frequently held the source of fraud. Evidence that the payee of a note given for corporate stock represented that the corporation held certain patents, and that the shares of stock were worth what the purchaser paid therefor and would rapidly increase in value,—representations that were untrue, the company having no patent and the stock being of no substantial value,—was held sufficient to authorize a submission of the case to the jury upon the question of fraud in procuring the notes, in *Lentz v. Landers* (1919) 21 Ariz. 117, 185 Pac. 821. A further promise was made by the seller of the stock that, if the purchaser at the end of a year so desired, he would repur-

chase the stock at a considerable advance over the purchase price, a promise which he did not intend to keep. The holder of a check given to a stockbroker upon a purchase of stock which the broker represented had been ordered transferred to the purchaser's name on the books of the corporation, whereas in fact it was not so transferred,—the broker at the time the check was delivered to the subsequent holder being insolvent, and having taken proceedings looking to the appointment of a receiver,—was held to have the burden of showing his bona fides on the theory that the transaction between the broker and the drawer of the check was a fraudulent one, and that the title to the check by reason thereof was defective within the meaning of the Negotiable Instruments Law. *People's State Bank v. Miller* (1915) 185 Mich. 565, 152 N. W. 257. In a purchase and sale of a series of notes, a representation that a former note in the series, which had fallen due before the transaction in question, had been paid, when as a matter of fact it had not, was held to be fraudulent where it was known by the vendor to be untrue, in *MacLaren v. Cochran* (1890) 44 Minn. 255, 46 N. W. 408. The representations of an attorney employed to defend an ejectment suit, for which his fee was fixed at a certain sum and a certain larger sum if he succeeded in getting his client a clear title, that he had obtained for him a clear title, on which representation the client executed to him a note for the larger amount, is such fraud as casts upon a subsequent holder the burden of showing his bona fides. *Knowlton v. Schultz* (1897) 6 N. D. 417, 71 N. W. 550. An affidavit of defense by the maker of a note given for the purchase price of pepper that, before the note became due, the payee was employed by the maker to make sale of the pepper upon such terms that the proceeds of the pepper would meet the note at maturity, and that afterwards the payee represented that he had sold the pepper on the maker's account, but on such terms that the note must be renewed in order that

the time of the maturity of the note might agree with the time the proceeds of the pepper would be received, and upon these representations the note was renewed, when in fact the payee, instead of having sold the pepper on account of the maker, had converted it to his own use, was held to be such fraud in the inception as to cast upon the holder the burden of showing his bona fides, in *Hutchinson v. Boggs & Kirk* (1857) 28 Pa. 294. Where a party executed an accommodation note for another, sending it to him in a letter through the mail, and was advised by the accommodated party that the letter had been received, but had been opened by some person and the note taken out, and requesting the maker to inclose another note, stating that if he got the first note in his possession he would return it, whereupon the maker inclosed another note for the same amount, payable in the same length of time, the second note having been negotiated by the payee, protested, suit brought, and judgment obtained thereon against the defendant, it was held to be clear that the first note had thrown around it a cloud of suspicion and fraud which called upon a holder thereof to show that he obtained it upon a valuable consideration, in the usual course of business, before maturity. *Hoffman v. Foster* (1862) 43 Pa. 137. The representation by a book agent that the books for which note was given were a special, limited, extra-illustrated edition, in reliance upon which the defendant executed the note, and which representation was entirely false and untrue, was held to constitute such fraud in the obtaining of the note as to cast upon the plaintiff the burden of showing his bona fides. *Schultheis v. Sellers* (1909) 223 Pa. 513, 22 L.R.A. (N.S.) 1210, 72 Atl. 887 (a case decided under the Negotiable Instruments Law). The representation by the payee of a note to the maker, who was illiterate, that it was a note for not over \$300, when in fact it had been left blank in part, and was subsequently filled up for a note of \$4,200, is such fraud as casts upon the plaintiff the burden of showing his bona

fides. *Howie v. Lewis* (1900) 14 Pa. Super. Ct. 232. An affidavit of defense saying that the payee of the note came to the maker and told him that he had purchased some merchandise, and that he was without sufficient funds with which to pay for the same, and requested the maker to purchase the merchandise, and offered to accept the note in question in payment therefor, saying that he would use the note for the payment to his vendor for the merchandise, and deliver it at once to the maker of the note,—representations which were false, and upon which the maker relied in giving the note,—were held to constitute fraud in the inception, in *Eliel v. Chamberlain* (1912) 48 Pa. Super. Ct. 610. In *City Deposit Bank v. Green* (1908) 138 Iowa, 156, 115 N. W. 893, the fraud consisted in the representation by the payee of a joint and several note that all the subscribers thereto would be responsible, and the failure of the payee to obtain all responsible subscribers, but the acceptance of one who was insolvent.

See *supra*, as to representations as to title.

b. Fraud in the execution of partnership and corporate notes.

The execution by one partner of a note in the partnership name for the accommodation of a third person, the partnership receiving no benefit therefrom, is held to throw the burden of proving his bona fides upon a subsequent holder. *First Nat. Bank v. Weston* (1897) 24 App. Div. 230, 48 N. Y. Supp. 403; *Porter v. Gunnison* (1854) 2 Grant. Cas. (Pa.) 297. Such a note is fraudulent. *Porter v. Gunnison* (Pa.) *supra*. That such a note, executed after the dissolution of the firm, is fraudulent, is held in *Albietz v. Mellon* (1860) 37 Pa. 367. That such a note is fraudulent is held in *Second Nat. Bank v. Weston* (1898) 31 App. Div. 403, 52 N. Y. Supp. 315, reversed on other grounds in (1900) 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080, *s. c.* on subsequent appeal in (1901) 62 App. Div. 621, 70 N. Y. Supp. 995, where it was executed after the dissolution of the firm, and antedated.

A partnership bill or note executed by a partner for his own private debt is a fraud upon the other partner which casts the burden of proving his bona fides upon the holder. *Porter v. Gunnison* (1854) 2 Grant, Cas. (Pa.) 297; *Stevens v. McLachlan* (1899) 120 Mich. 285, 79 N. W. 627; *Real Estate Invest. Co. v. Russel* (1892) 148 Pa. 496, 24 Atl. 59; *Loeb v. Mellinger* (1900) 12 Pa. Super. Ct. 592, 17 Lanc. L. Rev. 129; *Bank v. Cunningham* (1877) 4 W. N. C. (Pa.) 414; *Heath v. Sansom* (1831) 2 Barn. & Ad. 291, 109 Eng. Reprint, 1151, 9 L. J. K. B. 246; *Hogg v. Skeen* (1865) 18 C. B. N. S. 426, 144 Eng. Reprint, 510, 34 L. J. C. P. N. S. 153, 11 Jur. N. S. 244, 11 L. T. N. S. 709, 13 Week. Rep. 383; *Oakley v. Boulton* (1888) 5 Times L. R. 60; *Fuller v. Alexander* (1882) 47 L. T. N. S. (Eng.) 443, 52 L. J. Q. B. N. S. 103.

Musgrave v. Drake (1843) 5 Q. B. 185, 114 Eng. Reprint, 1218, Dar. & M. 347, 13 L. J. Q. B. N. S. 16, 7 Jur. 1015, in which it is held, apparently, that though the partners show that the signature was a fraudulent act on the part of the partner in signing the partnership name, yet, if the proof does not affect the plaintiff with knowledge of the fraud, the plaintiff is not put to give any explanation on account of the transaction, is distinguished in *Hogg v. Skeen* (Eng.) supra, and the decision in the *Musgrave Case* attributed, in part, at least, to the pleading.

It was held in *Wright v. Brosseau* (1874) 73 Ill. 381, that the jury were warranted in finding it to have been a fraudulent transaction for the members of a partnership to have executed the partnership note for a debt of the predecessor of the partnership in which a third member was not a partner, the note being executed without his knowledge or consent.

The execution of a partnership note by one who had formerly been a partner, but who at the time of the execution had retired from the firm, was held to be such fraud as to cast upon the holder the duty of showing his bona fides, in *Charles v. Remick* (1895) 156 Ill. 327, 40 N. E. 970.

In *Citizens' Nat. Bank v. Weston* (1900) 162 N. Y. 113, 56 N. E. 494, where the evidence showed that a note purporting to be executed by a partnership was in fact executed by one of the partners after the dissolution of the firm, and antedated so as to appear to have been executed before the dissolution, the payee having knowledge of the facts, it was held that the jury, which found in favor of one of the members of the partnership who had no knowledge of the note, and did not consent to its execution, will be presumed to have found, among other things, that the note was fraudulent as between the payee and the partnership. A similar decision appears in *Second Nat. Bank v. Weston* (1902) 172 N. Y. 250, 64 N. E. 949, and *Second Nat. Bank v. Weston* (1900) 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080.

Proof in an action against a corporation on a corporate note that the note was given by an officer of the corporation in payment of his personal debt is held to render title of the payee defective, so as to cast upon a subsequent holder the burden of showing that he is the holder in due course. *De Jonge & Co. v. Woodport Hotel & Land Co.* (1909) 77 N. J. L. 233, 72 Atl. 439.

See *Hodson v. Eugene Glass Co.* (1895) 156 Ill. 397, 40 N. E. 971.

c. Illustrative cases of fraud.

Fraudulent representations in the sale of horses—ordinarily stallions to companies organized for breeding purposes—have been a common source of fraud casting upon the subsequent holder the burden of showing his bona fides.

Idaho. — *Winter v. Nobs* (1910) 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302; *Park v. Johnson* (1911) 20 Idaho, 548, 119 Pac. 52; *Vaughn v. Johnson* (1911) 20 Idaho, 669, 37 L.R.A.(N.S.) 816, 119 Pac. 879; *South-west Nat. Bank v. Lindsley* (1916) 29 Idaho, 343, 158 Pac. 1082.

Kentucky. — *Barnard v. Napier* (1916) 167 Ky. 824, 181 S. W. 624.

Minnesota. — *Cochran v. Stein*

(1912) 118 Minn. 323, 41 L.R.A.(N.S.) 391, 136 N. W. 1037.

Missouri. — Adams County Bank v. Hainline (1896) 67 Mo. App. 483.

New York.—Wright v. Bartholomew (1901) 66 App. Div. 357, 72 N. Y. Supp. 706.

North Carolina. — Fidelity Trust Co. v. Ellen (1913) 163 N. C. 45, 79 S. E. 263; Third Nat. Bank v. Exum (1913) 163 N. C. 199, 79 S. E. 498; Fidelity Trust Co. v. Whitehead (1914) 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200; Merchants Nat. Bank v. Branson (1914) 165 N. C. 344, 81 S. E. 410; Wilson v. Lewis (1915) 170 N. C. 47, 86 S. E. 804; Dennison v. Spivey (1920) 180 N. C. 220, 104 S. E. 370; Hickman v. Sawyer (1914) 132 C. C. A. 425, 216 Fed. 281 (applying North Carolina rule).

South Dakota. — Union Nat. Bank v. Mailloux (1911) 27 S. D. 543, 132 N. W. 168.

Tennessee. — Elgin City Bkg. Co. v. Hall (1907) 119 Tenn. 548, 108 S. W. 1068.

Texas. — Mulberger v. Morgan (1896) — Tex. Civ. App. —, 34 S. W. 148, s. c. on second appeal in (1898) — Tex. Civ. App. —, 47 S. W. 379, 738.

Washington. — City Nat. Bank v. Mason (1910) 58 Wash. 492, 108 Pac. 1071.

The fraudulent representations involved are illustrated by the following cases: A defense by the maker of a note, given upon the purchase of a stallion, that the horse was purchased for breeding purposes, and was represented by the vendors as being sound, good, and suitable therefor, and that defendant relied upon such representations, which were in fact untrue and known to be so by the vendors when made, and that he, upon discovering the defects, rescinded the contract and returned the horse to the vendors, who accepted him and verbally promised to surrender to the defendant his notes given for the purchase price, was held to cast the burden of showing his bona fides upon a subsequent holder in *Bennett State Bank v. Schloesser* (1897) 101 Iowa, 571, 70 N. W. 705. The jury found specially that the notes were

obtained by false representations and the defense seems to be treated as one of fraud in the inception. The breach of a warranty, made upon the sale of a stallion, that the stallion with reasonable care would get with foal 60 per cent of the mares mated with him for a period of two years, and that, if he did not do so, he would be replaced with another of the same breed and price, and that the vendor would keep him insured for a period of two years, and that, in the event the stallion should die within the two years, the vendor would replace him with another, and that the makers need not pay notes given for the purchase price, last maturing, until they were satisfied that the stallion was as guaranteed, seems to have been treated as making the payee's title defective within the meaning of the Negotiable Instruments Law, in *Peterson v. Nichols* (1913) 71 Wash. 656, 129 Pac. 373. An allegation by the defendant in an action upon notes given for the purchase price of a stallion that the vendors warranted the horse to be sound in every particular, and a sure foal getter, when they well knew that the horse was not sound, and was not a reasonably sure foal getter, was held to be fraud casting the burden upon the subsequent holder to show that he was a holder in due course under the Negotiable Instruments Law, where the defendant further alleged that the notes were given upon the faith and credit of the warranty, and that without it, they would not have signed them, in *Citizens' Nat. Bank v. Stein* (1912) 21 Pa. Dist. R. 1070. False representations by the vendor of a horse to a number of persons that a certain person who joined in making the note had agreed to become a party to the purchase of the horse, and pay his equal share with the other purchasers, when, as it afterwards transpired, this person was in fact acting as a stool pigeon in the interest of the payee, and when the defendants' signatures were secured to the note was released from all liability thereon, without any consideration except his assistance in perpetrating the fraud, was held to be

such fraud as cast upon a subsequent holder the burden of showing his bona fides in *Cox v. Cline* (1908) 139 Iowa, 128, 117 N. W. 48, a case decided under the Negotiable Instruments Law. Such fraud as casts upon the holder the burden of proving that he was a holder in due course was held to exist in *Jobes v. Wilson* (1910) 140 Mo. App. 281, 124 S. W. 548, in the fact that, after an agent for the sale of a horse had received a large proportion of the purchase price in cash, he fraudulently represented to the purchasers of the horse that it was necessary for them to sign notes for the full amount of the purchase price, that the note sued on would be canceled and returned, and the second note for a like amount would also be canceled and returned, and that a credit of a certain amount would be placed upon a third note, where the makers, relying upon the false and fraudulent representations, were induced to sign the notes.

Fraudulent representations in the sale of corporate stock have also been common sources of fraud.

California.—*Burns v. Bauer* (1918) 37 Cal. App. 251, 174 Pac. 346.

Iowa.—*Stotts v. Fairfield* (1914) 163 Iowa, 726, 145 N. W. 61; *First Nat. Bank v. Wise* (1915) 172 Iowa, 24, 151 N. W. 495; *Farmers & M. State Bank v. Shaffer* (1915) 172 Iowa, 173, 154 N. W. 485; *City Nat. Bank v. Mason* (1917) 181 Iowa, 824, 165 N. W. 103; *German American Nat. Bank v. Kelley* (1918) 183 Iowa, 269, 166 N. W. 1053.

Kansas.—*Beachy v. Jones* (1921) 108 Kan. 236, 195 Pac. 184.

Louisiana.—*Appalachian Corp. v. Ayo* (1919) 145 La. 201, 82 So. 89.

Maine.—*Roberts v. Lane* (1874) 64 Me. 108, 18 Am. Rep. 242.

Massachusetts.—*Berenson v. Conant* (1913) 214 Mass. 127, 101 N. E. 60.

Nebraska.—*Fawcett v. Powell* (1895) 43 Neb. 437, 61 N. W. 586.

The agent making the sale in *First Nat. Bank v. Wise* (1915) 172 Iowa, 24, 151 N. W. 495, where there was held to be fraud in the inception of the note, among other things, represented that the company owned a valuable

patent for which it had refused an offer of \$125,000, and had purchased ground for a factory site to which it was about to remove its plant. He also exhibited alleged pictures of the plant of the company at another place, where he stated it had property to the value of the issue of stock. On these representations the maker of the note swore that he relied in purchasing the stock, and further testified that upon subsequent investigation he found that the company had no property at the former place, and that the representations made to him concerning the property at the latter place were grossly exaggerated.

Evidence of a representation by one in charge of mines that ore which was scattered over a part of the mines represented their general condition, and would run 4 per cent mineral, which was false and known by the representative to be false, and which induced the purchase of stock in the mining company, was held to be sufficient to entitle the maker of a note given in payment thereof to go to the jury on the question of fraud, in *Hill v. Dillon* (1910) 151 Mo. App. 86, 131 S. W. 728, s. c. on second appeal in (1913) 176 Mo. App. 192, 161 S. W. 881. But see later appeal in (1916) — Mo. App. —, 183 S. W. 1088.

Fraud in obtaining the original note in a stock transaction seems to have been held to cast the burden upon the subsequent holder of a renewal note which was given, and which was the one in suit, in *Barnard v. Tidrick* (1915) 35 S. D. 403, 152 N. W. 690.

It is stated in *State Bank v. Gates* (1901) 114 Iowa, 323, 86 N. W. 311, that misrepresentations by a corporation in the sale of its stock, as to what it would do in the future, do not establish fraud which will vitiate notes given for the stock. It is held in *State Bank v. Cook* (1904) 125 Iowa, 111, 100 N. W. 72, that the act of the promoters of a corporation in securing a prominent man of influence and reputation to subscribe, upon an inducement of stock at a much lower rate than that at which it was sold to others, concealing the fact from the other subscribers, and leading them to

believe that the person thus elected to head the subscription list was a bona fide investor of the amount set opposite his name, may constitute fraud justifying the rescission of the contract on the part of other subscribers. It had previously been held, in *State Bank v. Gates (Iowa)* supra, a case growing out of the same transaction, that the mere allegation that, by a secret agreement with the other stockholders, stock was transferred to him at a lower rate than that at which defendant's stock was sold to him, did not charge such fraud as would relieve defendant from liability on his note given for such stock, but it is added that such fact might, with others, tend to establish a fraudulent scheme.

The "Bohemian oats" and similar schemes have also furnished their quota of cases involving the question under annotation. *Bowser v. Spiesshofer (1891)* 4 Ind. App. 349, 30 N. E. 942; *Kain v. Bare (1891)* 4 Ind. App. 440, 31 N. E. 205; *Cover v. Myers (1892)* 75 Md. 406, 32 Am. St. Rep. 394, 23 Atl. 850; *Mace v. Kennedy (1888)* 68 Mich. 389, 36 N. W. 187; *Ward v. Doane (1889)* 77 Mich. 328, 43 N. W. 980; *Gere v. Unger (1889)* 125 Pa. 644, 17 Atl. 511. In *Sanford v. Moss (1892)* 63 Hun, 635, 45 N. Y. S. R. 710, 18 N. Y. Supp. 673, where rye was sold at a high price on the agreement that the vendor was to sell for the purchaser, from the crop raised, double the amount of the original sale at the same price per bushel, in pursuance of which a note was given for the purchase price, the court, in holding that a subsequent holder of the note had the burden of showing his bona fides, seems to rely upon false representations as to the responsibility and standing of the vendor company, although the court adds that it is quite doubtful if the false representation had any influence in inducing the defendant to enter into the contract and give the note. The agreement of the company to sell the rye the following year was not kept.

Other cases involving fraudulent representations disclose the variety of situations in which fraud may exist. *Johnson County Sav. Bank v. Mendell*

(1911) 36 App. D. C. 413 (sale of jewelry); *State Nat. Bank v. Bennett (1893)* 8 Ind. App. 679, 36 N. E. 551 (sale of patents); *Kirby v. Berguin (1902)* 15 S. D. 444, 90 N. W. 856 (sale of lightning rods); *Underwood v. Leichtman (1920)* 188 Iowa, 794, 176 N. W. 683 (sale of lands). False statements and representations as to the number of acres of land, exclusive of a lake which is situated on the premises, was held to constitute such fraud as to cast upon the holder of a note the burden of showing his bona fides, in *Rinella v. Faylor (1921)* — Iowa, —, 180 N. W. 983. Notes given upon the sale of plans for a popularity contest, which contained many elements of fraud, were held to be given under such circumstances as to cast upon a subsequent holder the burden of showing his bona fides, in *Commercial Secur. Co. v. Archer (1918)* 179 Ky. 842, 201 S. W. 479, and *Harrison v. Perry (1919)* 184 Ky. 722, 212 S. W. 911.

d. Illustrative cases showing no fraud.

In many cases in which the payee of the note failed to keep a promise made at the time of securing the note, there has been held to be no fraud. The fact that the drawer of a bill, which had been accepted for his accommodation, failed to keep his promise to place in the acceptor's hands funds or goods to meet the bill upon its maturity, seems to have been regarded in *Ellcott v. Martin (1854)* 6 Md. 509, 61 Am. Dec. 327, as not to be such fraud as to cast upon a subsequent holder the burden of showing his bona fides. The only defense attempted in *First Nat. Bank v. McNairy (1913)* 122 Minn. 215, 142 N. W. 139, Ann. Cas. 1914D, 977, in an action by the holder of a note against the maker, was an offset to the note arising from the breach of an alleged warranty in the sale of an automobile, and the court holds that the evidence fails to show such fraud in the transaction leading to the execution of the note as to cast the burden upon the plaintiff to show his bona fides. In *Kelman v. Calhoun (1895)* 43 Neb. 157, 61 N. W. 615, an action by a subsequent holder of a

cussion. It cannot be said that the cases adhering to this view are convincing of its correctness. It does not appear that the question was given much consideration. Moreover, the great number of cases adhering to the opposite theory, together with the wording of the Negotiable Instruments Act, makes the opposite conclusion seem the correct one.

V. What constitutes fraud within the rule.

a. In general.

Fraud, as it is known in the law, is well summed up by the supreme court of Washington as follows: "The essential elements of representations to constitute fraud, whether as a defense or as a cause of action, are undoubtedly the same. They are these: The representations must have been made as to a material matter; they must be false; it must appear that the maker knew them to be false, or made them recklessly as facts, without knowledge of their truth; they must have been made with the intention that they should be acted upon by the other party; the other party must have acted in reliance upon them, and he must have thereby suffered injury." *Hamilton v. Milhills* (1916) 92 Wash. 675, 159 Pac. 887.

When the foregoing elements are present in a transaction, fraud exists, and if the action taken by the defrauded party is the execution and delivery of a negotiable instrument, there is such fraud in the inception of the instrument as casts upon a subsequent holder thereof the burden of showing that he is a holder in due course, if he relies upon his character as such to cut off defenses. The following pages show that fraud has arisen in a great variety of transactions. While for convenience the cases have been grouped according to the transaction in which the fraudulent representations were made, it must be understood that it is the fraudulent representations that constitute the fraud, and not the character of the transaction, that is, whether a sale of land, or a sale of horses, etc. In many of the cases in

which fraud was held to exist, the facts constituting the fraud have been so involved that setting them out would serve no useful purpose. In other cases the courts have not clearly stated the representations constituting the fraud, and no exhaustive discussion of these cases has been attempted. However, for the purpose of furnishing representative cases dealing with various states of facts, a number of cases have been listed under a brief statement of the facts out of which the fraud arose. See V. c, *infra*.

There are, of course, certain questions of law as to whether certain representations or the creation of certain appearances constitute fraud, and these questions will be noticed. It must be remembered, however, in this connection, that this note deals primarily with an evidentiary question, and the evidentiary question is confined to bills and notes, so that no exhaustive presentation of any representations or states of facts will appear. Obtaining a check in payment of a bet on a fake horse race has been held such fraud as casts upon a subsequent holder the burden of proving his bona fides. *Arkansas Nat. Bank v. Martin* (1914) 110 Ark. 578, 163 S. W. 795. The execution of a note by a client to his attorney within the time of the employment and the existence of the confidential relation, for a fee which was agreed upon at the time, was presumed to have been fraudulent in *Shirk v. Neible* (1901) 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281. In *Asbury v. Taube* (1912) 151 Ky. 142, 151 S. W. 372, the failure of a vendor of horses to whom the purchaser had given a check for the amount of the purchase price, to deliver the horses as agreed, the explanation being offered that one of the horses had become sick and could not be delivered, whereupon the purchaser demanded a return of the check, which was refused, was treated as fraud casting upon one to whom the check had been transferred the burden of proving his bona fides. Nothing is said as to an intention on the part of the vendor at the time of ob-

taining the check, of failing to deliver the horses, and there is little discussion of the question. In *Ganz v. Weisenberger* (1896) 66 Mo. App. 110, the holder of a note was held to have the burden of proof where it appeared that the maker signed a contract with an agent to put up lightning rods which he supposed called for the payment of \$5; but where in a few days another person drove to his home and told him that the contract called for \$150 for his house alone, and that, unless he would sign a note for this amount, the person would obtain a United States marshal and turn him out of house and home, whereupon he, being frightened, signed the note; the court says that this was evidence showing that the note originated in fraud. The receipt by an insolvent bank for deposit, of a check drawn by the depositor on another bank in his own favor without knowledge of the insolvent condition of the bank of deposit, seems to be treated as a fraud which will cast upon a subsequent holder of the check the burden of showing his bona fides, in *Grant v. Walsh* (1895) 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209. The obtaining of a check surreptitiously and without authority from the drawer, and filling in the name of the person thus obtaining the check as payee, was treated as such fraud as cast the burden upon the subsequent holder, in *Ern v. Rubinstein* (1897) 72 Mo. App. 337.

It has been argued that the fraud which casts upon a subsequent holder the burden of proving that he is a holder in due course under the Negotiable Instruments Law consists of some trick or device that induces the giving of the negotiable instrument under the belief that some instrument of a different kind is being given. There is some indication in *Kellogg v. Hale* (1914) 190 Ill. App. 15, that this is the view of the court in that case, but it seems that the attention of the court was directed more to the substantive question as to what fraud would defeat recovery by a bona fide holder, than to the evidential question as to the burden of proof. It seems

clear that such fraud does cast upon the subsequent holder the burden of providing his bona fides. And so it has been held such fraud as casts upon the holder the burden of proving his bona fide character that the person who took a bill of exchange, knowing it to be such, procured it by the false statement that it was an ordinary note, and the parties who gave the bill did it in ignorance of its true character and in reliance upon the false statement made to them. *Ross v. Drunkard* (1860) 35 Ala. 434. In *Baldwin v. Fagan* (1882) 83 Ind. 447, the fraud consisted in falsely reading to the payee of a note, who was illiterate and almost blind, and misrepresentation of its contents. A note procured by the representation of the payee that it was merely a recommendation required by an insurance company to enable the payee to become their agent, on which the maker relies in signing the note, is tainted with fraud in its inception, so as to throw upon a subsequent holder the burden of showing his bona fides. *Cahen v. Everitt* (1901) 67 App. Div. 86, 73 N. Y. Supp. 549.

But generally the view that the fraud which casts upon the holder the burden of proving that he is a holder in due course is confined to fraud as to the character of the instrument has not been followed. Fraud relating to the consideration of a note is held to cast the burden upon the holder. *First Nat. Bank v. Denfeld* (1919) 143 Minn. 281, 173 N. W. 661. It has been held that the burden of showing his bona fides rests upon the holder of a note when there is fraud in the inception, even though the fraud affected the consideration. *City Deposit Bank v. Green* (1908) 138 Iowa, 156, 115 N. W. 893. This rule that fraud relating to the consideration casts the burden of proving his bona fides upon the holder is supported by the great majority of the cases, although not directly discussing it, for in most cases the fraud consisted in misrepresentations concerning the goods or articles for which the note was given. It must be remembered in this connection that,

while fraud may arise from misrepresentations as to the consideration for the instrument, not every failure of consideration amounts to fraud. It is perhaps true that no consistent rule of distinction can be formulated. Facts which are regarded by one court as showing a failure of consideration are regarded by another as showing fraud.

The broader distinction between the two things is illustrated by the decision in *Violet v. Rose* (1894) 39 Neb. 660, 58 N. W. 216, that the representation by the payee of a note to the maker concerning a deed of assignment given to secure the maker for executing the note, that the name of the payee's wife appearing on the assignment was her genuine signature, when in fact it was not, is fraud, casting the burden of proof upon a subsequent holder, if the maker relied upon such representation in executing the note. If, on the contrary, the deed of assignment failed merely because the wife refused or failed thereafter to acknowledge the instrument, as the payee of the note agreed she would do, there would be merely a failure of consideration, and not fraud which would cast upon a subsequent holder the burden of showing his bona fides. Another illustration is furnished by the decision in *McKinley v. Beggs* (1902) 17 Colo. App. 23, 67 Pac. 1019, an action by a subsequent holder upon a note given for services rendered or supposed to have been rendered, by the payee, a subsequent holder, the mere fact that the services were not rendered was held not to show that the note was secured by fraud, where there was no offer to show that the payee had falsely stated any facts to the maker for the purpose of inducing the execution of the note.

A failure of title to the object which constituted the consideration has been held to cast the burden on the holder. For instance, the sale of mules which had been stolen by the vendor was, in *Famous Shoe & Clothing Co. v. Crosswhite* (1894) 124 Mo. 34, 26 L.R.A. 568, 46 Am. St. Rep. 424, 27 S. W. 397, treated as such fraud

as to cast upon the subsequent holder of a check given for the purchase price the burden of proving his bona fides. Evidence supporting a charge that the payee of the note assumed to be the owner of a right to sell a certain wire-fence machine, and agreed in writing with the maker of the note to appoint him general agent, which agreement, together with the sale of certain machines, furnished the sole consideration for the execution of the note, when in fact the payee did not own the right, but had sold it previously to another person, was held to raise the issue of fraud which cast the burden upon the purchaser to show his good faith, in *Stewart v. Andes* (1905) 110 Mo. App. 243, 84 S. W. 1134. Notes given in payment for certain shares of stock which the person to whom the notes were given represented belonged to him, when in fact they did not and he knew they did not, were held to have been obtained by fraud, so as to cast the burden upon a subsequent holder of showing his bona fides, in *Hale v. Shannon* (1890) 57 Hun, 466, 32 N. Y. S. R. 1079, 11 N. Y. Supp. 129. It further appeared in this case that the person obtaining the notes agreed to hold them and to part with them only to the maker, and on their gradual payment by the profits to be derived from the stock. In *Pelly v. Onderdonk* (1891) 61 Hun, 314, 15 N. Y. Supp. 915, the maker of a note pleaded that the person to whom the note was given claimed to be the owner and inventor of processes for the manufacture of different articles of paint, and also for the manufacture of a liquid called pyrodene. These articles of paint and this liquid were alleged to have been falsely represented to the defendants as to their quality and utility, and the profits that could be derived from their manufacture and sale, and it was further alleged that the representations were fraudulently made for the purpose of inducing the defendants and others to associate together and form a corporation, in the organization of which the note in question was given. It was urged that the mere failure of

consideration did not cast upon a subsequent holder the burden of showing his bona fides. In answer to this contention the court says that the defense in this case did not depend upon a failure of consideration, but was placed upon the ground that the note had been fraudulently obtained.

Fraudulent representations as to value have also been held to cast the burden on the subsequent holder. Thus, notes induced by false representations as to the value and character of lands have been held to be fraudulent in inception, so as to cast the burden of showing bona fides on a subsequent holder. *Eames v. Crozier* (1894) 101 Cal. 260, 35 Pac. 873. Representations by the vendor of a secondhand X-ray machine who knew its value, as to the value thereof, in negotiations leading up to a sale to one who had no such knowledge, were held to amount to fraud in *Scheidel Western X-Ray Co. v. Bacon* (1918) — Mo. App. —, 201 S. W. 917. The court here recognizes the difficulty of determining when a representation as to value is a mere expression of opinion, or is one of fact, but concludes in this case that the representation was not a mere opinion. In *Vickery v. Burton* (1896) 6 N. D. 245, 69 N. W. 193, where, in an action by a subsequent holder of a note given for certain machinery, the maker pleaded certain false and fraudulent representations concerning the quality of the machinery, and alleged that it was not worth a greater sum than was paid down in cash, and that the notes were wholly without consideration, the court says: "There is much conflict of judicial opinion as to whether, where fraud in a sale of property as between the vendor and vendee is shown, such showing operates to shift the burden of proof to the plaintiff in a case where negotiable paper given for the property by the purchaser is sued on by an indorsee of the paper. We think the better reason and the weight of authority support the view that proof of such fraud does shift the burden of proof, and that in such cases, after proof of fraud, the plain-

tiff has the burden of showing a good-faith purchase of such paper in due course and without notice." An affidavit of defense that the note was procured by false and fraudulent representations, in the first instance, in reference to the value of the property in part payment of which the note was given, and that the defendants had a full, just, and legal defense to the payment of the note, in this, that the consideration therefor had failed, coupled with the denial of the plaintiff's title, was held sufficient to put the latter upon proof that he was a bona fide holder, in *Reamer v. Bell* (1875) 79 Pa. 292. The fraudulent representations which were held to cast the burden upon the holder of the note of showing his bona fides, in *Zook v. Simonson* (1880) 72 Ind. 83, were fraudulent representations as to the skill and ability of the payee in grafting fruit trees, in consideration of certain work of which kind the note was given. Fraudulent representations by the payee of a note given for the purchase price of a buggy that the buggy was new and of the value named in the note, when in truth the property was old and secondhand, but had been newly painted and varnished so that its real condition could not be observed, were held to be fraud casting the burden upon a subsequent holder, where the maker of the note relied upon the false and fraudulent representations so made, and believed them to be true. *Bradley, H. & Co. v. Whicker* (1899) 23 Ind. App. 380, 55 N. E. 490. Representations by a vendor of cigars as to the number and quality of the cigars, which were false, and upon which the purchaser relied in executing a note, were held to cast upon the holder of the note the burden of showing his bona fides, in *Owens v. Snell* (1896) 29 Or. 483, 44 Pac. 827.

Fraudulent representations as to quantity have also been held to cast the burden on the subsequent holder. The representation of a vendor of corn to the purchaser as to the quantity was held to be fraudulent, casting upon the subsequent holder of a note given for the purchase price of the

corn the burden of showing his bona fides, where the vendor was a farmer accustomed to growing and measuring corn, and assumed to know and stated the quantity, and the purchaser, on the other hand, was a merchant tailor wholly without knowledge or experience in measuring corn in the field, whose ignorance and inexperience in the matter were well known to the vendor, if the misrepresentations were made with intent to deceive, and the purchaser relied thereon to his injury. *Abmeyer v. First Nat. Bank* (1907) 76 Kan. 877, 92 Pac. 1109.

See *Owens v. Snell* (1896) 29 Or. 483, 44 Pac. 827, *supra*.

Even failure to keep an agreement has been held to be evidence of a fraudulent intent. Where the agent for a fence machine procured the note in question upon his agreement that it should not be used by his principal, but deposited in a bank selected by the defendant, who thereafter assisted him in securing a subagent, who in turn gave a note for \$100, a part of which was to be paid to the defendant for his commission, and subsequently the agent sold both notes and appropriated the entire proceeds, such evidence tends to prove a fraudulent intent on the part of the agent in obtaining the note. *Rochford v. Barrett* (1908) 22 S. D. 83, 115 N. W. 522.

See, in this connection, *supra*, II. and also *infra*, V. d.

Fraudulent representations as to a material fact have been frequently held the source of fraud. Evidence that the payee of a note given for corporate stock represented that the corporation held certain patents, and that the shares of stock were worth what the purchaser paid therefor and would rapidly increase in value,—representations that were untrue, the company having no patent and the stock being of no substantial value,—was held sufficient to authorize a submission of the case to the jury upon the question of fraud in procuring the notes, in *Lentz v. Landers* (1919) 21 Ariz. 117, 185 Pac. 821. A further promise was made by the seller of the stock that, if the purchaser at the end of a year so desired, he would repur-

chase the stock at a considerable advance over the purchase price, a promise which he did not intend to keep. The holder of a check given to a stockbroker upon a purchase of stock which the broker represented had been ordered transferred to the purchaser's name on the books of the corporation, whereas in fact it was not so transferred,—the broker at the time the check was delivered to the subsequent holder being insolvent, and having taken proceedings looking to the appointment of a receiver,—was held to have the burden of showing his bona fides on the theory that the transaction between the broker and the drawer of the check was a fraudulent one, and that the title to the check by reason thereof was defective within the meaning of the Negotiable Instruments Law. *People's State Bank v. Miller* (1915) 185 Mich. 565, 152 N. W. 257. In a purchase and sale of a series of notes, a representation that a former note in the series, which had fallen due before the transaction in question, had been paid, when as a matter of fact it had not, was held to be fraudulent where it was known by the vendor to be untrue, in *MacLaren v. Cochran* (1890) 44 Minn. 255, 46 N. W. 408. The representations of an attorney employed to defend an ejectment suit, for which his fee was fixed at a certain sum and a certain larger sum if he succeeded in getting his client a clear title, that he had obtained for him a clear title, on which representation the client executed to him a note for the larger amount, is such fraud as casts upon a subsequent holder the burden of showing his bona fides. *Knowlton v. Schultz* (1897) 6 N. D. 417, 71 N. W. 550. An affidavit of defense by the maker of a note given for the purchase price of pepper that, before the note became due, the payee was employed by the maker to make sale of the pepper upon such terms that the proceeds of the pepper would meet the note at maturity, and that afterwards the payee represented that he had sold the pepper on the maker's account, but on such terms that the note must be renewed in order that

the time of the maturity of the note might agree with the time the proceeds of the pepper would be received, and upon these representations the note was renewed, when in fact the payee, instead of having sold the pepper on account of the maker, had converted it to his own use, was held to be such fraud in the inception as to cast upon the holder the burden of showing his bona fides, in *Hutchinson v. Boggs & Kirk* (1857) 28 Pa. 294. Where a party executed an accommodation note for another, sending it to him in a letter through the mail, and was advised by the accommodated party that the letter had been received, but had been opened by some person and the note taken out, and requesting the maker to inclose another note, stating that if he got the first note in his possession he would return it, whereupon the maker inclosed another note for the same amount, payable in the same length of time, the second note having been negotiated by the payee, protested, suit brought, and judgment obtained thereon against the defendant, it was held to be clear that the first note had thrown around it a cloud of suspicion and fraud which called upon a holder thereof to show that he obtained it upon a valuable consideration, in the usual course of business, before maturity. *Hoffman v. Foster* (1862) 43 Pa. 137. The representation by a book agent that the books for which note was given were a special, limited, extra-illustrated edition, in reliance upon which the defendant executed the note, and which representation was entirely false and untrue, was held to constitute such fraud in the obtaining of the note as to cast upon the plaintiff the burden of showing his bona fides. *Schultheis v. Sellers* (1909) 223 Pa. 513, 22 L.R.A. (N.S.) 1210, 72 Atl. 887 (a case decided under the Negotiable Instruments Law). The representation by the payee of a note to the maker, who was illiterate, that it was a note for not over \$300, when in fact it had been left blank in part, and was subsequently filled up for a note of \$4,200, is such fraud as casts upon the plaintiff the burden of showing his bona

fides. *Howie v. Lewis* (1900) 14 Pa. Super. Ct. 232. An affidavit of defense saying that the payee of the note came to the maker and told him that he had purchased some merchandise, and that he was without sufficient funds with which to pay for the same, and requested the maker to purchase the merchandise, and offered to accept the note in question in payment therefor, saying that he would use the note for the payment to his vendor for the merchandise, and deliver it at once to the maker of the note,—representations which were false, and upon which the maker relied in giving the note,—were held to constitute fraud in the inception, in *Eliel v. Chamberlain* (1912) 48 Pa. Super. Ct. 610. In *City Deposit Bank v. Green* (1908) 138 Iowa, 156, 115 N. W. 893, the fraud consisted in the representation by the payee of a joint and several note that all the subscribers thereto would be responsible, and the failure of the payee to obtain all responsible subscribers, but the acceptance of one who was insolvent.

See *supra*, as to representations as to title.

b. Fraud in the execution of partnership and corporate notes.

The execution by one partner of a note in the partnership name for the accommodation of a third person, the partnership receiving no benefit therefrom, is held to throw the burden of proving his bona fides upon a subsequent holder. *First Nat. Bank v. Weston* (1897) 24 App. Div. 230, 48 N. Y. Supp. 403; *Porter v. Gunnison* (1854) 2 Grant. Cas. (Pa.) 297. Such a note is fraudulent. *Porter v. Gunnison* (Pa.) *supra*. That such a note, executed after the dissolution of the firm, is fraudulent, is held in *Albietz v. Mellon* (1860) 37 Pa. 367. That such a note is fraudulent is held in *Second Nat. Bank v. Weston* (1898) 31 App. Div. 403, 52 N. Y. Supp. 315, reversed on other grounds in (1900) 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080, s. c. on subsequent appeal in (1901) 62 App. Div. 621, 70 N. Y. Supp. 995, where it was executed after the dissolution of the firm, and antedated.

A partnership bill or note executed by a partner for his own private debt is a fraud upon the other partner which casts the burden of proving his bona fides upon the holder. *Porter v. Gunnison* (1854) 2 Grant, Cas. (Pa.) 297; *Stevens v. McLachlan* (1899) 120 Mich. 285, 79 N. W. 627; *Real Estate Invest. Co. v. Russel* (1892) 148 Pa. 496, 24 Atl. 59; *Loeb v. Mellinger* (1900) 12 Pa. Super. Ct. 592, 17 Lanc. L. Rev. 129; *Bank v. Cunningham* (1877) 4 W. N. C. (Pa.) 414; *Heath v. Sansom* (1831) 2 Barn. & Ad. 291, 109 Eng. Reprint, 1151, 9 L. J. K. B. 246; *Hogg v. Skeen* (1865) 18 C. B. N. S. 426, 144 Eng. Reprint, 510, 34 L. J. C. P. N. S. 153, 11 Jur. N. S. 244, 11 L. T. N. S. 709, 13 Week. Rep. 383; *Oakley v. Boulton* (1888) 5 Times L. R. 60; *Fuller v. Alexander* (1882) 47 L. T. N. S. (Eng.) 443, 52 L. J. Q. B. N. S. 103.

Musgrave v. Drake (1843) 5 Q. B. 185, 114 Eng. Reprint, 1218, Dar. & M. 347, 13 L. J. Q. B. N. S. 16, 7 Jur. 1015, in which it is held, apparently, that though the partners show that the signature was a fraudulent act on the part of the partner in signing the partnership name, yet, if the proof does not affect the plaintiff with knowledge of the fraud, the plaintiff is not put to give any explanation on account of the transaction, is distinguished in *Hogg v. Skeen* (Eng.) supra, and the decision in the *Musgrave Case* attributed, in part, at least, to the pleading.

It was held in *Wright v. Brosseau* (1874) 73 Ill. 381, that the jury were warranted in finding it to have been a fraudulent transaction for the members of a partnership to have executed the partnership note for a debt of the predecessor of the partnership in which a third member was not a partner, the note being executed without his knowledge or consent.

The execution of a partnership note by one who had formerly been a partner, but who at the time of the execution had retired from the firm, was held to be such fraud as to cast upon the holder the duty of showing his bona fides, in *Charles v. Remick* (1895) 156 Ill. 327, 40 N. E. 970.

In *Citizens' Nat. Bank v. Weston* (1900) 162 N. Y. 113, 56 N. E. 494, where the evidence showed that a note purporting to be executed by a partnership was in fact executed by one of the partners after the dissolution of the firm, and antedated so as to appear to have been executed before the dissolution, the payee having knowledge of the facts, it was held that the jury, which found in favor of one of the members of the partnership who had no knowledge of the note, and did not consent to its execution, will be presumed to have found, among other things, that the note was fraudulent as between the payee and the partnership. A similar decision appears in *Second Nat. Bank v. Weston* (1902) 172 N. Y. 250, 64 N. E. 949, and *Second Nat. Bank v. Weston* (1900) 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080.

Proof in an action against a corporation on a corporate note that the note was given by an officer of the corporation in payment of his personal debt is held to render title of the payee defective, so as to cast upon a subsequent holder the burden of showing that he is the holder in due course. *De Jonge & Co. v. Woodport Hotel & Land Co.* (1909) 77 N. J. L. 233, 72 Atl. 439.

See *Hodson v. Eugene Glass Co.* (1895) 156 Ill. 397, 40 N. E. 971.

c. Illustrative cases of fraud.

Fraudulent representations in the sale of horses—ordinarily stallions to companies organized for breeding purposes—have been a common source of fraud casting upon the subsequent holder the burden of showing his bona fides.

Idaho. — *Winter v. Nobs* (1910) 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302; *Park v. Johnson* (1911) 20 Idaho, 548, 119 Pac. 52; *Vaughn v. Johnson* (1911) 20 Idaho, 669, 37 L.R.A.(N.S.) 816, 119 Pac. 879; *South-west Nat. Bank v. Lindsley* (1916) 29 Idaho, 343, 158 Pac. 1082.

Kentucky. — *Barnard v. Napier* (1916) 167 Ky. 824, 181 S. W. 624.

Minnesota. — *Cochran v. Stein*

(1912) 118 Minn. 323, 41 L.R.A.(N.S.) 391, 136 N. W. 1087.

Missouri. — Adams County Bank v. Hainline (1896) 67 Mo. App. 483.

New York.—Wright v. Bartholomew (1901) 66 App. Div. 357, 72 N. Y. Supp. 706.

North Carolina. — Fidelity Trust Co. v. Ellen (1913) 163 N. C. 45, 79 S. E. 263; Third Nat. Bank v. Exum (1913) 163 N. C. 199, 79 S. E. 498; Fidelity Trust Co. v. Whitehead (1914) 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200; Merchants Nat. Bank v. Branson (1914) 165 N. C. 344, 81 S. E. 410; Wilson v. Lewis (1915) 170 N. C. 47, 86 S. E. 804; Dennison v. Spivey (1920) 180 N. C. 220, 104 S. E. 370; Hickman v. Sawyer (1914) 132 C. C. A. 425, 216 Fed. 281 (applying North Carolina rule).

South Dakota. — Union Nat. Bank v. Mailloux (1911) 27 S. D. 543, 132 N. W. 168.

Tennessee. — Elgin City Bkg. Co. v. Hall (1907) 119 Tenn. 548, 108 S. W. 1068.

Texas. — Mulberger v. Morgan (1896) — Tex. Civ. App. —, 34 S. W. 148, s. c. on second appeal in (1898) — Tex. Civ. App. —, 47 S. W. 379, 738.

Washington. — City Nat. Bank v. Mason (1910) 58 Wash. 492, 108 Pac. 1071.

The fraudulent representations involved are illustrated by the following cases: A defense by the maker of a note, given upon the purchase of a stallion, that the horse was purchased for breeding purposes, and was represented by the vendors as being sound, good, and suitable therefor, and that defendant relied upon such representations, which were in fact untrue and known to be so by the vendors when made, and that he, upon discovering the defects, rescinded the contract and returned the horse to the vendors, who accepted him and verbally promised to surrender to the defendant his notes given for the purchase price, was held to cast the burden of showing his bona fides upon a subsequent holder in Bennett State Bank v. Schloesser (1897) 101 Iowa, 571, 70 N. W. 705. The jury found specially that the notes were

obtained by false representations and the defense seems to be treated as one of fraud in the inception. The breach of a warranty, made upon the sale of a stallion, that the stallion with reasonable care would get with foal 60 per cent of the mares mated with him for a period of two years, and that, if he did not do so, he would be replaced with another of the same breed and price, and that the vendor would keep him insured for a period of two years, and that, in the event the stallion should die within the two years, the vendor would replace him with another, and that the makers need not pay notes given for the purchase price, last maturing, until they were satisfied that the stallion was as guaranteed, seems to have been treated as making the payee's title defective within the meaning of the Negotiable Instruments Law, in Peterson v. Nichols (1913) 71 Wash. 656, 129 Pac. 373. An allegation by the defendant in an action upon notes given for the purchase price of a stallion that the vendors warranted the horse to be sound in every particular, and a sure foal getter, when they well knew that the horse was not sound, and was not a reasonably sure foal getter, was held to be fraud casting the burden upon the subsequent holder to show that he was a holder in due course under the Negotiable Instruments Law, where the defendant further alleged that the notes were given upon the faith and credit of the warranty, and that without it, they would not have signed them, in Citizens' Nat. Bank v. Stein (1912) 21 Pa. Dist. R. 1070. False representations by the vendor of a horse to a number of persons that a certain person who joined in making the note had agreed to become a party to the purchase of the horse, and pay his equal share with the other purchasers, when, as it afterwards transpired, this person was in fact acting as a stool pigeon in the interest of the payee, and when the defendants' signatures were secured to the note was released from all liability thereon, without any consideration except his assistance in perpetrating the fraud, was held to be

ERROR to the District Court of the United States for the Southern District of Mississippi (Holmes, Dist. J.) to review a judgment in favor of plaintiff in an action brought to recover damages for alleged rude and insulting conduct of the porter on a sleeping car operated by defendant. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Walker, Bryan, and King, Circuit Judges.

Messrs. **Albert S. Bozeman, J. Harvey Thompson, and Robert H. Thompson**, for plaintiff in error:

Plaintiff never became a sleeping car passenger; no contractual relation existed between her and the Director General as operator of the sleeping cars constituting a part of the train upon which she was a day-coach passenger.

Williams v. Pullman Palace Car Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; *Cassedy v. Pullman Palace-Car Co.* — Miss. —, 17 So. 373; *Cincinnati, N. O. & T. P. R. Co. v. Raine*, 130 Ky. 454, 19 L.R.A.(N.S.) 753, 132 Am. St. Rep. 400, 113 S. W. 495.

Messrs. **William B. Lucas, Gabe Jacobson, and Harden H. Brooks**, for defendant in error:

To all intents and purposes, plaintiff was a bona fide passenger of the Pullman car at the time the insults were heaped upon her by the porter in the dressing room of the car.

3 *Thomp. Neg.* § 3321, p. 738; 10 *C. J.* § 1055, p. 635; 2 *Hutchinson, Carr.* § 1019; *Louisville & N. R. Co. v. Scott* (Louisville & N. R. Co. v. Weaver) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674; *Southern R. Co. v. Lee*, 30 Ky. L. Rep. 1360, 10 L.R.A.(N.S.) 837, 101 S. W. 307; *Alabama G. S. R. Co. v. Yarbrough*, 83 Ala. 238, 3 Am. St. Rep. 715, 3 So. 447; *St. Louis & S. F. R. Co. v. Sanderson*, 99 Miss. 148, 46 L.R.A.(N.S.) 352, 54 So. 885.

Bryan, Circuit Judge, delivered the opinion of the court:

Defendant in error (herein called plaintiff) recovered judgment against plaintiff in error as Director General of Railroads (herein called defendant), operating the Pullman Company, for \$5,000, in an action for damages arising out of the alleged conduct of a porter of the Pullman Company.

Plaintiff, a lady passenger on a train of the Pennsylvania Railroad, was traveling in an ordinary passenger coach from St. Louis, Mis-

souri, to Columbus, Ohio. The train included a dining car and a sleeping car of the Pullman Company. Plaintiff and two lady companions applied to the sleeping car conductor, who was at the time in the dining car, for permission to enter the sleeping car and make use of the dressing room and lavatory facilities therein, and offered to pay for the privilege.

Testimony on behalf of the plaintiff was to the effect that the sleeping car conductor granted the permission desired, but declined to accept anything in payment for the use of the dressing room; that thereupon plaintiff and her companions proceeded into the said dressing room; that while there the sleeping car porter, in a rude and insulting manner, ordered them to leave; that a member of plaintiff's party told the porter to get out of the dressing room, and stated to him that they were there by permission of the conductor, and that, if he did not leave them alone, they would send for their husbands; and that the porter replied, in substance: "Send your damn husbands back. I would like to see them, and will settle with them." Plaintiff testified that her health was greatly impaired as a result of the porter's conduct. The testimony for defendant was in direct contradiction of that for plaintiff.

At the close of all the evidence the defendant moved for a directed verdict in his favor, on the ground that it affirmatively appeared that plaintiff was not a passenger of the Pullman Company. The trial court denied this motion, and instructed the jury that, if they believed plaintiff's evidence, that would constitute her a passenger, and entitle her to the care due to a passenger. Defendant assigns error upon the denial of

his motion for a directed verdict, and also upon the overruling of his exception to the court's charge, submitting to the jury the question of whether plaintiff became a passenger.

The duty which the defendant owed to a licensee or a trespasser was not, and is neither alleged nor claimed to have been, violated. Unless plaintiff was a passenger, she has no case.

While the question whether, as a matter of law, the relation of carrier and passenger exists, is often a difficult one, and in many cases is one of mixed law and fact, nevertheless such relation does not exist, if neither party intended to create it. Sleeping car companies are engaged in the business of transportation of passengers. The dressing rooms, lavatories, and other conveniences and facilities contained in the cars which they furnish are incidental to their business of transportation, and are provided exclusively for the use of those who become their passengers. One who

Carrier—sleeping car company—person entering car to use lavatory as passenger.

enters a sleeping car for the sole purpose of making use of these conveniences and facilities does not thereby

become a passenger. Plaintiff and her companions were not seeking

passage or transportation; they did not enter the sleeping car with the intention of riding from one station to another, or for any particular length of time, or for the purpose of riding at all. The use of the dressing room was the principal thing with them, and riding in the sleeping car was a mere incident. It would have suited their purpose just as well if the train had been standing still at a station.

The plaintiff was not in a situation similar to one who, without a ticket, enters a sleeping car, intending to pay if required to do so. She had obtained the consent of the conductor before she entered the car, and, according to her own testimony, she did not enter with the intention of paying for the privilege of riding in the sleeping car, or for that purpose. We are of opinion, therefore, that the trial court erred in refusing to direct a verdict in favor of defendant. The cases of *Williams v. Pullman Palace Car Co.* 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, and *Cassedy v. Pullman Palace Car Co.* — Miss. —, 17 So. 373, cited by counsel for defendant, sustain this view.

The other assignments of error need not be considered.

The judgment is reversed, and the cause remanded for a new trial.

ANNOTATION.

Status of passenger in ordinary coach who enters Pullman coach for temporary purpose.

It will be seen that in the reported case (*PAYNE v. SHEARER*, ante, 69) the plaintiff, a female passenger in an ordinary coach, applied to the Pullman sleeping car conductor for leave to use the dressing room in the sleeping car, offering to pay for the privilege, and he granted the leave asked for and declined to receive pay therefor; and that, while she was using the dressing room accordingly, she was insulted by the sleeping car porter; and that it was held that she could not recover of the Director Gen-

eral of Railroads operating the Pullman Company, as she was not a passenger of the Pullman Company.

That a Pullman Company is not liable for an assault committed by its porter on a passenger in a day coach, who had gone into the sleeping car for the purpose of requesting permission to wash, was held in *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631. The court based its decision on the absence of any contractual relations between such passenger and the sleep-

ing car company, and also on the fact that the general principles of the law of master and servant were inapplicable to the case. As to the latter point the court said: "The great difficulty in applying these principles lies in defining what acts properly fall within the scope of the servant's employment. The evidence in this case establishes that the porters employed in defendant's service are mere menials, employed to clean up the car and keep it in order, and to wait upon the passengers, having no police authority whatever, and no connection with the enforcement of the rules of the service except to report violations of them to the conductor. Anything more completely outside of 'the functions in which he was employed' than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and, in performing this duty, he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privilege, and that, in addressing the porter, he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible."

In *Cassedy v. Pullman Palace-Car Co.* (1895) — Miss. —, 17 So. 373, it was held that a passenger in a day coach, who goes into a sleeping car for the sole purpose of inducing the steward to sell him liquor, in violation of law, and also in violation of the company's instructions to the steward, being technically a trespasser, cannot hold the sleeping car company liable for an assault committed upon him by the steward.

In *Cincinnati, N. O. & T. P. R. Co. v. Raine* (1908) 130 Ky. 454, 19 L.R.A. (N.S.) 753, 132 Am. St. Rep. 400, 113

S. W. 495, it is held that a passenger who boards a train after telegraphing for a reservation on a certain Pullman car which is not attached to that train, but will be picked up a few miles down the road, and is allowed to remain in a Pullman car, pending the arrival of the one on which she has a reservation, is not a passenger of the Pullman Company, and it is not liable for negligence of its conductor which results in her missing her car.

Liability of the railroad company.

Upon the facts in the above case of *Williams v. Pullman Palace Car Co.* it was held in a further opinion, 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, 8 Am. Neg. Cas. 302, that the railroad company was liable to the passenger for the assault of the Pullman Company's porter, on the ground that the porter must be considered an employee of the railroad company, "and, as such, intrusted with the duty of contributing, in the performance of his legitimate duties, to the safety and security of the passenger whom the railway company had undertaken to carry safely over its line."

In *Louisville & N. R. Co. v. Ashley* (1916) 169 Ky. 330, L.R.A.1916E, 763, 183 S. W. 921, where a woman, somewhat infirm, entered a Pullman car by mistake, and was ordered out of it by the porter several times while the train was in motion, and, in attempting to leave it, was thrown down by a lurch of the car and injured, it seems to have been taken for granted that the railroad company was liable for the conduct of the porter. In that case the plaintiff was directed to go into the coach by a brakeman and by the porter. It was held that it was a question for the jury to determine whether the railroad company, by the exercise of ordinary care, could have known that, because of age, bodily infirmity, the speed and motion of the train, or other circumstances, the safety of the passenger would be endangered by the attempt.

In *Thorpe v. New York C. & H. R. R. Co.* (1879) 76 N. Y. 402, 32 Am. Rep. 325, a passenger on a train, finding no vacant seats in the ordinary

coaches, entered the drawing-room car, declined to pay the sum demanded for a seat there, expressing a willingness to leave the car whenever he could get a seat in an ordinary car, and the porter attempted to eject him. It was held that the railroad company was liable for the assault, notwithstanding that the car was owned by a third party, who employed the porter. It was also held that, although there were several seats filled with passengers' baggage, it was not the duty of the passenger to ask the conductor for a seat before going into the drawing-room car, where, if the baggage had been removed, there would not have been enough seats to supply all the passengers who were standing. The court said: "The persons in charge of the drawing-room car are to be regarded and treated, in respect of their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company. . . . The plaintiff cannot be deemed a wrongdoer, in passing into the drawing-room car and taking a seat, until seats in the other cars should be vacated. It was the duty of the defendant to furnish him a seat. His omission to speak to the conductor and for a seat, when he first met him, may reasonably be accounted for on the ground that he supposed that such a request, at that time, would be unavailing. So far as appears, there was no regulation—at least, none known to the plaintiff—prohibiting a passenger not intending to ride in a drawing-room car from entering it for a temporary purpose, under circumstances such as existed in this case."

In *Cincinnati, N. O. & T. P. R. Co. v. Raine* (Ky.) *supra*, it was also held that a railroad company (the connecting carrier) receiving a sleeping car from another company upon which is a passenger for a car on its train whom the conductor of the former car has undertaken to put on

the right car is not liable for sending the right car forward in the first section of the train, so that the passenger does not get it, where it had no notice of her desire until after the train had been separated, and its conductor did all he could to rectify the mistake after learning of it. But it was also held in the same case that where a sleeping car conductor undertakes, in the presence of the train conductor, to put a lady holding a railroad ticket on the right Pullman car, and tells her to remain in his car until the desired car arrives, the railroad company (the initial carrier) is liable for his neglect to do so, but that such railroad company, which negligently causes a passenger to miss a train on a connecting road, so that she is compelled to stop over at a way station and return home, is not liable for injury to her through going into a cold room of a hotel and sitting up all night, or for vexation or personal inconvenience because of the delay, but may be chargeable for hotel bills and lost time.

The reported case (*PAYNE v. SHEARER* ante, 69) does not appear to pass upon the liability of the railroad company for the insults of the sleeping car porter.

In *Cincinnati, N. O. & T. P. R. Co. v. Raine* (Ky.) *supra*, the initial carrier railroad company was held liable for damages to the passenger, due to missing her car at the junction, where she relied upon the assurance of a Pullman conductor of the car on which she was permitted to ride, assented to by the train conductor, that he would transfer her to the proper sleeper, and he made no effort to do so until the car on which she was riding had left the junction, when it was discovered that the car in which she had her reservation had been put in another section; but the connecting carrier (railroad company) was held not liable; it appears that its employees did all they could to rectify the error for which they were not responsible.

B. B. B.

JOHN E. COLLETTE

v.

EARL G. PAGE.

Rhode Island Supreme Court—July 1, 1921.

(— R. I. —, 114 Atl. 136.)

Automobile — duty of one letting for hire — defective condition.

1. One who, for hire, lets an automobile to be operated upon the public highway, is bound to use ordinary care to see that the steering gear is in reasonably safe condition to prevent injury to other persons lawfully using the highway.

[See note on this question beginning on page 76.]

— defective steering gear — liability for injury.

2. One letting an automobile for hire, to be used on a public highway, with the steering gear in defective condition, is liable for injury to a

traveler on the highway by the machine becoming ungovernable because of such defect.

[See 3 R. C. L. 138, 148; see also note in 12 A.L.R. 788.]

EXCEPTION by plaintiff to rulings of the Superior Court for Providence and Bristol Counties (Barrows, J.), made during the trial of an action brought to recover damages for injuries to plaintiff's automobile, alleged to have been caused by defendant's negligence, which resulted in the sustaining of a demurrer to the amended declaration. *Exception sustained.*

The facts are stated in the opinion of the court.

Mr. William A. Gunning for plaintiff.

Messrs. Cushing, Carroll, & McCartin for defendant.

Sweeney, J., delivered the opinion of the court:

This is an action of trespass on the case for negligence on account of a collision between the automobiles of the plaintiff and the defendant. Demurrer to the amended declaration was sustained by a justice of the superior court, and the plaintiff has brought the case to this court by his exception.

The declaration contains three counts, and the third one avers that the defendant was the keeper of a public garage, letting automobiles for public hire in said city; that he, or his servant, negligently rented or let an automobile to a person, full well knowing, or, by the exercise of reasonable care and diligence, should have well known, that the same was in a bad, unsafe, and dangerous state of repair on account of some bolts be-

ing loose, which ordinarily made the radius rod of said automobile secure, so that, while it was being driven by said person on a public highway in said city, it became ungovernable and a menace to the safety of the public, and ran into the automobile of the plaintiff, then being driven upon said highway, and damaged it.

The facts are not fully set forth in the first and second counts, because it does not appear in either of them whether the defendant, his agent or a bailee, was operating the automobile at said time.

The defendant filed three grounds of demurrer to the declaration, claiming: (1) That the facts stated gave rise to no duty from the defendant to the plaintiff; (2) that an automobile is not an imminently dangerous article, and no privity of contract existed between the defendant and the plaintiff; and (3) that it is not alleged that the defendant actually knew of the defective condition of the automobile.

The demurrer was sustained under authority of the case of *McCaffrey v. Mossberg Mfg. Co.* 23 R. I. 381, 55 L.R.A. 822, 91 Am. St. Rep. 637, 50 Atl. 651, in which this court held that the maker of a machine, which he sold to another, is not liable to a third person for injuries received by him, arising from negligence in the construction of the machine, because the machine was not imminently dangerous, nor was its maker guilty of deceit or fraud in selling it, having knowledge of its defect. In so holding, the court said, on page 386 of 23 R. I.: "The third class of cases relating to the sale of a thing not in its nature dangerous rests on the principle that, as to such things, there is no general or public duty, but only a duty which arises from contract, out of which no duty arises to strangers to the contract."

In the case at bar the function of the radius rod is not alleged in either of the counts, but it was stated in argument that it is an important part of the steering gear of the automobile. The case has been argued upon the assumption that the defendant's automobile was in charge of an independent bailee.

This court has held that an automobile is not an instrumentality dangerous per se, so as to make the owner liable for injuries resulting from the negligence of his servant while driving the automobile for his own pleasure, and not upon the owner's business (*Colwell v. Ætna Bottle & Stopper Co.* 33 R. I. 531, 82 Atl. 388, 2 N. C. C. A. 430); but it is obvious that it may become a dangerous instrumentality when driven upon a public highway in a reckless or negligent manner, or when it has inadequate brakes, or its direction cannot be controlled by the steering gear; and it has been held that an automobile may be so out of repair as to be a dangerous instrumentality (*Texas Co. v. Veloz*, — Tex. Civ. App. —, 162 S. W. 377).

Trouble with the steering gear is a difficulty feared by every motorist, as it leaves him helpless, and,

even though the automobile is traveling at a moderate speed, is likely to cause serious injury to the occupant of the automobile, to say nothing of those on the road. *Babbitt Motor Vehicles*, § 226.

In order to give some protection to persons using the public highways, safety appliances or motor vehicles are required by statute in nearly all of the states. Apart from any statute, the law requires care in all things pertaining to the efficiency of the engine and equipment and the means by which both may be controlled. *Babbitt*, supra, § 229.

The statute of this state (*Gen. Laws 1909*, chap. 86) requires, among other things, that every motor vehicle, while in use on the public highways, shall be provided with adequate brakes.

In the case of *MacPherson v. Buick Motor Co.* 217 N. Y. 382, L.R.A. 1916F, 696, 111 N. E. 1050, Ann. Cas. 1916C, 440, 13 N. C. C. A. 1029, in a carefully written opinion by Cardozo, J., the court held that "the manufacturer of an automobile is liable to a purchaser thereof from a dealer for injuries caused by a defective wheel, the defects in which could have been discovered by reasonable inspection, though the wheel was purchased by the automobile manufacturer from the maker thereof."

In discussing the rule relating to the liability of the manufacturer of an article which, by reason of a defect therein, discoverable by reasonable inspection, is a source of peril to the user thereof, and renders the manufacturer liable to the ultimate purchaser for an injury resulting from the defect, the court says:

"If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new

tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

"Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was almost certain.

"Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

The bailor, by the bailment, impliedly warrants that the thing hired is of the character and in a condition to be used as contemplated by the contract, and he is liable for damages occasioned by the faults or defects of the article hired. 7 Am. & Eng. Enc. Law, 2d ed. 306 bb.

Whenever a garage keeper lets a vehicle for hire to a customer, it becomes his duty to exercise that degree of care and skill in the selection of the vehicle he sends out which a prudent man, having regard to the circumstances or the occasion, would bestow upon such a matter. *Babbitt*, supra, § 522.

It has been held that he is liable to the hirer of an automobile for injuries which happen by reason of defects in the automobile which might have been discovered by a most careful and thorough examination. *Denver Omnibus & Cab Co. v. Madigan*, 21 Colo. App. 131, 120 Pac. 1044.

The right to use the highways must be exercised so as not to endanger the lives or property of others who have equal rights upon them. *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628.

Automobiles are in constant use upon the public highways, and a garage keeper who lets automobiles for hire owes a duty to the public

to the extent that he is bound to use ordinary care to see that the automobile he lets to be operated upon the public highways

has its steering gear in a reasonably safe condition, as injury to other persons lawfully using the highways is reasonably to be foreseen as the probable result of a defective steering gear.

Automobile—
duty of one
letting for hire
—defective
condition.

If the defendant operated his own automobile with a defective steering gear upon the public highway when he knew, or, in the exercise of reasonable care, should have known of such defect, and a third person was injured as the direct and proximate result of said defect, he would be liable to such third person; and it would be anomalous to hold that, because he let said defective automobile to a bailee for hire, for use upon the public highway, and, while it was being so used, such third person was injured as the direct and proximate result of said defect, he would not be liable.

The defect alleged in the declaration is not in the construction of the radius rod, but negligence in permitting some bolts to be loose which ordinarily made it secure, thereby rendering the automobile ungovernable while being driven upon the public highway.

On demurrer these allegations are taken to be true, and for damage resulting therefrom the bailor should be held responsible, subject to the rules relating to proximate cause and contributory negligence.

—defective
steering gear—
liability for
injury.

The plaintiff's exception is sustained, the demurrer is overruled, and the case is remitted to the Superior Court for further proceedings.

NOTE.

Although not a personal-injury case, the decision in the reported case (*COLLETTE v. PAGE*, ante, 74) comes

within the principles discussed in the cases cited in the annotation, appended to *Johnson v. H. M. Bullard* Co. in 12 A.L.R. 774, on the liability of bailor for personal injuries due to defects in the subject of the bailment.

RE WILL OF JOHN NEAL, Deceased.

CHARLES E. HAMILTON, Public Administrator, Appt.

North Carolina Supreme Court—November 9, 1921.

(— N. C. —, 109 S. E. 70.)

Will — right of public administrator to file caveat.

Under a statute designating those entitled to file a caveat to a will as those entitled under the will, or interested in the estate, a public administrator has not such interest as to be entitled to file such caveat until he has been appointed and is qualified to administer upon the particular estate in question.

[See note on this question beginning on page 79.]

APPEAL by the public administrator from a judgment of the Superior Court for Forsyth County (Long, J.) dismissing a caveat filed to contest the validity of the will of John Neal, deceased, and to contest the claims of relationship of the wife and mother of deceased. *Affirmed.*

Statement by Clark, Ch. J.:

John Neal, born in Winston, North Carolina, a nullius filius, died in Omaha, Nebraska, leaving an estate estimated to be of the value of \$800,000 or over. On October 19, 1920, what was claimed to be a copy of a lost or destroyed will, disposing of his property and appointing the Wachovia Bank & Trust Company executor and trustee, was admitted to probate in the superior court of Forsyth.

The caveat was duly filed to said will by Jenny Beckerdite, of Washington, District of Columbia, claiming to be the mother of said John Neal, and by one Mary Harbin McCoy and her son, Tharry McCoy, of Okmulgee, Oklahoma, claiming to be the wife and son of said John Neal, and in addition, on April 19, 1921, the appellant, Charles E. Hamilton, public administrator of Forsyth, filed his petition for caveat, upon the ground that he was entitled to qualify and that his interest in the commissions which would accrue was such "interest in the estate" as

would entitle him to maintain a caveat to contest the validity of the copy of the alleged will, and also to contest the claim of Jenny Beckerdite to be the mother of the deceased and of Mary Harbin McCoy and her son to be the wife and son of the deceased. The court dismissed the petition of said Charles E. Hamilton, public administrator, and he appealed.

Messrs. Lindsay Patterson and H. G. Hudson, for appellant:

The right to administer an estate is a sufficient interest to entitle the person in whom it is vested to contest the probate of a will.

Re Davis, 182 N. Y. 468, 75 N. E. 530; Gombault v. Public Administrator, 4 Bradf. 226; Re Thompson, 178 N. C. 542, 101 S. E. 107; Brooks v. Paine, 123 Ky. 271, 90 S. W. 600; Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604, 14 Ann. Cas. 332; Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 5 A.L.R. 284, 99 S. E. 240; Re Healy, 122 Cal. 162, 54 Pac. 736.

The public administrator also represents other interests, and as such representative he is entitled to a hear-

ing as to the validity of the alleged will of John Neal.

Re Davis, 182 N. Y. 468, 75 N. E. 530; Schouler, Exrs. & Admrs. 5th ed. § 1116.

Messrs. Manly, Hendren, & Womble, L. M. Swink, B. S. Royster, M. L. Learned, and Craig & Vogler, for appellees:

As a general rule, the public administrator, as such, has no right to file a caveat, as a caveat can only be filed by one "entitled under the will, or interested in the estate."

Randolph v. Hughes, 89 N. C. 431; Re Sanborn, 98 Cal. 103, 32 Pac. 865; Re Hickman, 101 Cal. 609, 36 Pac. 118; State ex rel. Eakins v. District Ct. 34 Mont. 226, 85 Pac. 1022; 28 R. C. L. p. 390; Braeuel v. Reuther, L.R.A.1918A, 469, note, Ann. Cas. 1918B, 538, note.

Neither has a public administrator such interest as will entitle him to maintain an action to contest.

Thomp. Wills, p. 454, § 518; 3 Alexander, Wills, p. 2038, § 1326; Re Davis, 45 Misc. 306, 92 N. Y. Supp. 392.

Clark, Ch. J., delivered the opinion of the court:

The petition was properly dismissed. A party entitled to file a caveat under Consol. Stat. § 4158, must be someone "entitled under such will, or interested in the estate." It being admitted that the deceased was nullius filius, there could be no one coming within that designation except (1) his mother, if living; (2) his wife and child, if proven to be such; and (3) the University of North Carolina, should it be found that the deceased left neither mother nor wife nor children.

A public administrator is a position created by chapter 113, Laws 1868-69, now Consol. Stat. § 17. He has no interest in or control over any estate until appointed thereto by the clerk and qualified. Consol. Stat. § 20. It is not necessary to discuss whether his prospective commissions are such an interest as would entitle him to caveat the will, for he has not been appointed administrator of this estate, and has no interest whatever therein.

Under Consol. Stat. § 20, the pub-

lic administrator can apply for letters of administration "when the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for and issued to any person," and even then such public administrator is not entitled in all cases to be appointed. See citations under that section.

In this case the Wachovia Bank & Trust Company has already been appointed, and there is no ground upon which the public administrator can be entitled to qualify unless such administration is set aside upon a caveat of the will or by order of the clerk for other sufficient cause.

In the trial of the caveat now pending, it must be determined whether the mother is living, or whether the deceased left a wife and child, as alleged, and in the trial of such caveat the University of North Carolina is a proper party, as, in view of the claims of the first two parties being negatived, the University would be entitled to the property, if the will is set aside, by the terms of the charter of that institution in 1789 (chapter 305), which conferred upon it all property escheating for lack of heirs and distributees, or otherwise. If the contest should be decided in favor of either of these three parties and the alleged will should be set aside, the administration would be conferred upon the successful contestant, or someone selected at the request of such party. In no event has the public administrator any right to be appointed to administer until the successful party has waived its right to do so, Consol. Stat. §§ 29 and 30. The position of public administrator confers no right to administration until the parties having the prior right to qualify have waived their right or been adjudged unfit by the clerk. He has no interest in the estate and no right to qualify unless and until appointed to the particular estate by the clerk. Until so appointed he is simply an "eligible" for

Will—right of
public adminis-
trator to file
caveat.

appointment upon the default of the parties who have a prior right to appointment. 24 C. J. p. 1201, § 2873, note (a).

The right of succeeding by escheat to all property, when there are no wife or parties entitled under the Statutes of Descent and Distribution, was conferred upon the University by its charter in 1789 (chap. 306, § 2), and has been confirmed since by the state Constitution (art. 9, § 7), and has been extended by several statutes, which are now Consol. Stat. §§ 5784–5786. This is a most valuable right, which will become more and more a source of revenue to the University as the state grows in wealth and population. One of the first cases in which the matter was presented is *University of North Carolina v. Johnston*, 2 N. C. 373, and among those since have been two recent cases, one from *Wilmington* and the other from *Goldsboro* (*Grantham v. Jinnette*, 177 N. C. 229, 98 S. E. 724),

out of which the University became entitled, under decisions of this court, to receive very considerable sums.

The University, therefore, is the proper, if not necessary, party to represent the public interest, if there is a default of heirs and distributees; but the public administrator is not when he has not been appointed and qualified upon the estate in question. Consol. Stat. § 6.

This contest turns upon the validity of the alleged will, a copy of which has been probated in common form in lieu of the alleged original will. The parties who are entitled to urge the caveat to set aside this probate are, as already stated, the alleged mother, the alleged wife and son, and the University of North Carolina.

The judgment dismissing the petition of the public administrator is affirmed.

Stacy, J., concurs in result.

ANNOTATION.

Right of public administrator or state to file caveat to or contest will.

- I. General statement, 79.
- II. Public administrator, 79.
- III. State, 81.

I. General statement.

Since proceedings to contest a will are statutory, and the statutes of most of the states authorize contests by "persons interested," or use similar terms, the question whether the state or a public administrator may contest or oppose the probate of a will is one of statutory construction, and depends largely upon the inquiry as to who may be regarded as an interested person. The authorities are not agreed either as to the right of the state or a public administrator to contest a will.

II. Public administrator.

There are several decisions to the effect that a public administrator is not a "person interested," entitled to contest a will. *Re Sanborn* (1893) 98

Cal. 103, 32 Pac. 865; *Re Hickman* (1894) 101 Cal. 609, 36 Pac. 118; *Re Healy* (1898) 122 Cal. 162, 54 Pac. 736 (obiter); *State ex rel. Eakins v. District Ct.* (1906) 34 Mont. 226, 85 Pac. 1022; *RE NEAL* (reported herewith) ante, 77.

In *Re Sanborn* (Cal.) supra, it was held that a public administrator cannot contest the probate of a will under a statute permitting contests by "persons interested." The court said: "The probate of a will can be contested only upon 'written grounds of opposition' filed by a 'person interested,'—that is, interested in the estate, and not in the mere fees of an administration thereof. . . . A public administrator has no interest in an estate, or in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go. . . . If a public administrator could legally as-

sume the character of a standing contestant of wills, notwithstanding the wishes of heirs and devisees, he would certainly enlarge the sphere of his activities; but the limitations of the statute do not allow such inflation."

And, citing the Sanborn Case, the court in *State ex rel. Eakins v. District Ct.* (1906) 34 Mont. 226, 85 Pac. 1022, held that the public administrator was not an interested person, entitled to object to the probate of a will.

It was held in the reported case (*RE NEAL*, ante, 77) that under a statute by which a party entitled to file a caveat must be someone "entitled under such will, or interested in the estate," a public administrator was not entitled to maintain a caveat to contest the validity of a will unless and until appointed administrator of the particular estate.

But in several New York cases the holding, or assumption at least, is to the effect that a public administrator may appear in opposition to the will.

Thus, under the New York statute authorizing any person interested in sustaining or defeating a will to appear, and at his election support or oppose the application for probate, it was held in *Re Davis* (1905) 182 N. Y. 468, 75 N. E. 530, affirming (1905) 105 App. Div. 221, 93 N. Y. Supp. 1004, that a public administrator appointed in another state as administrator of the property of the decedent in that state, under a claim that the decedent died intestate, should be allowed to intervene in a proceeding for the probate of an alleged will of the decedent, pending in New York, the domicile of the decedent, and to oppose such probate. The court said: "As was said by the learned surrogate in his opinion, 'the right to administer the estate is a sufficient interest, in this state, to entitle the person in whom it is vested to contest the probate of the will.' The administrator in California was authorized by a decree of the proper court in that state to take possession of the assets of the deceased in his county, to convert them into money, and to distribute

the proceeds according to law. That decree was granted before any application had been made to prove the will. The assets were of great value, and the administrator had a personal interest to the extent of his fees for services already rendered, and a much more important interest as the representative of others; for, if there was no will, he had exclusive jurisdiction and control of all the personal property of the decedent in the county of Fresno, California, for the purpose of administration. He represented the beneficiaries, who were the substantial owners of the property. Probate of a will, however, would deprive him of power to administer, and leave the validity of all his acts before he heard that there was a will open to question. He had an interest to protect and the right to become a party to the proceeding, so as to see that no paper purporting to be a will of the decedent was admitted to probate unless it was genuine and executed by a competent person according to law." See also opinion of the surrogate court, on objections to the application of the administrator for leave to appear and oppose the probate, reported in (1904) 45 Misc. 306, 92 N. Y. Supp. 392, in which the same conclusion was reached and in which the court distinguished the case from *Re Hickman* (1894) 101 Cal. 609, 36 Pac. 118, supra, on the ground that in the latter case the interest of the public administrator was simply his right to letters of administration, whereas in the case before it letters of administration had been issued to the public administrator, and he appeared not as one seeking to enforce his right to administer, but as one to whom letters of administration had in fact been issued, and for the purpose of vindicating his rights and authority over the estate.

It was apparently assumed in *Gombault v. Public Administrator* (1857) 4 Bradf. (N. Y.) 226, that a public administrator representing the city of New York was entitled to oppose, on the ground of testamentary incapacity and undue influence, the probate of a will of one who died in that city,

where it did not appear that the decedent left any known heirs or next of kin.

And it appears to be assumed in *Public Administrator v. Watts* (1829) 1 Paige (N. Y.) 347, reversed on other grounds in (1829) 4 Wend. 168, that a public administrator may appeal from a decree allowing probate of a will.

III. State.

A question related to that already considered, is whether or not the state has a right to contest or oppose the probate of a will. This question is interesting from a practical point of view, because the question may arise as to who may represent the public in preventing a probate, or in setting aside the probate, of a forged or fraudulent or improperly executed will, in case the property, in the absence of a will, would escheat to the state. If the public administrator cannot oppose the will, may the state do so on the ground that it is an interested party? Or may both the public administrator and the state oppose the will? The authorities are not in harmony on the question of the right of the state to oppose or to set aside probate.

In several cases it has been held that the state has a right to contest the validity of a will. *State ex rel. Donovan v. Second Judicial Dist. Ct.* (1901) 25 Mont. 355, 65 Pac. 120; *State v. Nieuwenhuis* (1920) 43 S. D. 198, 178 N. W. 976; *State v. Lancaster* (1907) 119 Tenn. 638, 14 L.R.A. (N.S.) 991, 105 S. W. 858, 14 Ann. Cas. 953; *Davis v. Davis* (1824) 2 Addams, Eccl. Rep. 223, 162 Eng. Reprint, 275. See also *Gombault v. Public Administrator* (1857) 4 Bradf. (N. Y.) 226.

In *State v. Nieuwenhuis* (1920) 43 S. D. 198, 178 N. W. 976, supra, it was held that the state is a party in interest within the meaning of a statute providing that, where a will has been admitted to probate, any person interested therein may, at any time within a year, after such probate, contest the same or the validity of the will. It was contended in this case that the remedy of the state was not in the

county court, which had exclusive jurisdiction of probate proceedings, but in the circuit court in an action to declare an escheat, and that the admission of a will to probate in no way affected the rights of the state. But the court took the view that in any action instituted by the state in the circuit court to declare an escheat of the property, the devisees under the will might offer in evidence the decree of the county court admitting the will to probate, which decree would be conclusive on the state; and that the state, therefore, was an interested party, entitled to contest the will in the county court.

So, under a statute providing that any person interested may appear and contest a will, it was held in *State ex rel. Donovan v. Second Judicial Dist. Ct. (Mont.) supra*, that the state had such interest, under the statutory right to the estate by escheat in case there were no heirs, as would entitle it to contest the probate of a will, on allegations that the will was a forgery and that the testator had no heirs in the state or elsewhere, to the knowledge of the contestant, even though the statutory time for an escheat proceeding had not arrived and the state's interest might subsequently cease on the appearance of heirs. The court regarded the interest of the state, contingent on the non-appearance of heirs, as sufficient to entitle it to contest the will. Another statute provided that if no person, within a year after probate, instituted a contest, the probate was conclusive; while an escheat proceeding could not be begun within five years after the death of the decedent. And the court said it was apparent, therefore, that if the state could not contest the will before its probate or within a year thereafter, its rights were lost.

And it was held in *State v. Lancaster* (1907) 119 Tenn. 638, 14 L.R.A. (N.S.) 991, 105 S. W. 858, 14 Ann. Cas. 953, supra, that statutory authority is not necessary to enable the state to contest a will, in the absence of which the testator's property would escheat; and it may therefore institute such contest in the probate court,

after instituting the proceedings to declare the escheat in the court designated by the statute for that purpose.

In *Davis v. Davis* (1824) 2 Addams, Eccl. Rep. 223, 162 Eng. Reprint, 275, supra, his Majesty's proctor intervened in proceedings instituted for the purpose of proving in solemn form a codicil, since, in the event the codicil should not be sustained, the testator would have died intestate as to the residue of his property. It was apparently assumed that he had the right to intervene, it being held that the costs of his appearance should be taken out of the estate, although the codicil was held valid.

And it is said in the syllabus in *Gombault v. Public Administrator* (1857) 4 Bradf. (N. Y.) 226, supra: "On the probate of a will, where the deceased leaves no known heirs or next of kin, the public administrator of the city of New York may intervene to contest the will in relation to the personal estate and the attorney general in relation to the real estate." In this case objections were made to the probate of the will by the attorney general on behalf of the estate, and by the public administrator representing the city of New York, but the court decreed in favor of probate, on the merits, without discussing the question of the right of the public administrator or the state to oppose the will.

Without referring to the right of the state to contest the will, the court in *Cardwell's Estate* (1891) 28 W. N. C. (Pa.) 291, dismissed an appeal by the commonwealth of Pennsylvania from the decision of the register of wills admitting a will to probate, brought on the ground that the testatrix was incapacitated to make a will, and that as the will was, for that reason, void, the estate escheated to the commonwealth in default of heirs or next of kin. It was held that the facts did not show that the testatrix was incompetent to make a will.

There are decisions, however, out of harmony with the above.

Thus, in *Re Leslie* (1915) 92 Misc. 663, 156 N. Y. Supp. 346, affirmed on

different grounds in (1916) 175 App. Div. 108, 161 N. Y. Supp. 790, it was held that, as the state could not contest the validity of a will, parties who stood in the position of donees of the state had no right to contest the will. The court said: "It has never been understood that the ultimate right of the state in what are known as caducary successions, including escheats, entitles it to contest the probate of a will of an heirless person in order to promote its right to escheats. The will of an heirless testator stands free from attack in that quarter. It would be contrary to public policy and to all principles of the common law, nay, contrary to all rights secured to our citizens by our constitutions of government, if the state could promote its caducary succession by a resort of that kind to its own courts of justice. The only remedy of the state for escheats is by way of office found, or its substitute. If the state had itself no right, power, or authority to contest the probate of a will of an alleged heirless man or woman, then, under the great maxim already quoted [*non debeo melioris conditionis esse, quam auctor meus a quo jus in me transit*'], those succeeding to its rights stand in no better position."

And where an application for probate of an alleged will was resisted on behalf of the state on the grounds of the testator's incapacity and improper execution, the court in *Hopf v. State* (1888) 72 Tex. 281, 10 S. W. 589, in holding that, on the evidence, the court had erroneously refused to admit the will to probate, said that no reason was shown which entitled the state to contest the probate, and that an escheat could not be declared in a proceeding to probate a will; but that it did not appear that any objection was made to the contest, and as it would have been the duty of the court to bring out all the facts, if it thought necessary, bearing upon the execution of the alleged will, it was unimportant that this was done by a person not entitled to make the contest.

And it is held in *State ex rel. Atty.*

Gen. v. Superior Ct. (1895) 148 Cal. 55, 2 L.R.A.(N.S.) 643, 82 Pac. 672, that the state has no interest which will entitle it to contest a will, where it merely shows that there is a probability that some heir may fail to appear and claim the property, so as to permit proceedings to declare an escheat, and that the heir may fail to appear within the statutory period thereafter to claim the property, so that the state's title may become absolute. It was said: "The only ground upon which the state can claim that it has an interest sufficient to authorize it to maintain the contest is that, although the deceased did leave surviving heirs in whom, if the will is invalid, the title to his property has vested, and who are not aliens whose titles will be forfeited by escheat if they do not claim the property within five years, yet, that there is a possibility that all the heirs, or someone of them, may fail to appear and claim the property, that thereupon proceedings may be instituted, under § 1269, Code Civ. Proc., to declare an escheat, and that no heir entitled may then, or within twenty years after judgment therein, appear to claim the property or its proceeds; and thereupon the state may take as absolute owner. . . . We do not think this remote and contingent possibility, or series of successive possibilities, constitutes an interest which will authorize the party, having noth-

ing more substantial, to maintain a contest of a will."

In *State v. Ames* (1871) 23 La. Ann. 69, where, in an action in the name of the state to annul the probate of a will on the ground that it was a forgery, and that there was no one entitled to succeed to the property except the state, the court held that the state was not entitled to notice of probate, and was not recognized as an heir entitled to inherit in the absence of all other heirs, under a statute providing that "the party praying for the opening and proof of the will shall cause to be summoned the number of witnesses possessing the qualities required for such proof; and, if the presumptive heir of the deceased, or any of them, reside in the place, he shall give them notice in writing that they may attend . . . at the opening and proof of the will."

An application by the state for a writ of mandamus to compel the superior court to hear a motion for an order to set aside the probate of a will on the ground that no citation was issued, and that no attempt was made to find anyone interested in the estate, and, claiming that, under the Washington statute, the state was interested in testing the validity of the will, was refused, in *State ex rel. Stratton v. Tallman* (1901) 25 Wash. 295, 65 Pac. 545, on the ground that there was an adequate remedy at law.

R. E. H.

H. V. RIGGS, Respt.,

v.

BANK OF CAMAS PRAIRIE, Appt.

Idaho Supreme Court — July 22, 1921.

(— Idaho, —, 200 Pac. 118.)

Bailment — box — loss of contents — liability.

One who receives, as a gratuitous bailment, a locked box represented by bailor to contain "papers and other valuables," is not liable for the loss of money contained in such box, of the presence of which money bailee had no notice.

[See note on this question beginning on page 87.]

Headnote by Dunn, J.

APPEAL by defendant from a judgment of the District Court for Nez Perce County (Steele, J.) in favor of plaintiff in an action brought to recover the value of certain personal property alleged to have been left by him in the custody of defendant bank. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Messrs. S. O. Tannahill and James E. Babb, for appellant:

The evidence is not sufficient to support the finding of gross negligence, or any negligence.

First Nat. Bank v. Rex, 89 Pa. 308, 33 Am. Rep. 767; Trexler v. Baltimore & O. R. Co. 23 Pa. Super. Ct. 208; Whitney v. First Nat. Bank, 55 Vt. 155, 45 Am. Rep. 598, 1 Am. Neg. Cas. 582; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Scott v. National Bank, 72 Pa. 471, 13 Am. Rep. 711; Gerrish v. Muskegon Sav. Bank, 138 Mich. 46, 100 N. W. 1000, 4 Ann. Cas. 1083, 17 Am. Neg. Rep. 81; Caldwell v. Hall, 60 Miss. 330, 45 Am. Rep. 410, 1 Am. Neg. Cas. 803; DeHaven v. Kensington Nat. Bank, 81 Pa. 95; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Carlyon v. Fitzhenry, 2 Ariz. 266, 15 Pac. 273, 1 Am. Neg. Cas. 748; Giblin v. McMullen, L. R. 2 P. C. 327, 5 Moore, P. C. C. N. S. 434, 16 Eng. Reprint, 578, 38 L. J. P. C. N. S. 25, 21 L. T. N. S. 214, 17 Week. Rep. 445, 3 Eng. Rul. Cas. 613; First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49; Comp v. Carlisle Deposit Bank, 94 Pa. 409, 1 Am. Neg. Cas. 562; Johnson v. Reynolds, 3 Kan. 257; Pitlock v. Wells, F. & Co. 109 Mass. 452; Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; Pullman Palace Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578; 6 C. J. 1160, note 96, subd. a, notes 37, 49.

Defendant is not liable, because not informed that the box contained money, and plaintiff's loss was not caused by any neglect of defendant.

Humphreys v. Perry, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 718; Michigan C. R. Co. v. Garrow, 73 Ill. 348, 24 Am. Rep. 248; Haines v. Chicago, St. P. M. & O. R. Co. 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; Toledo & O. C. R. Co. v. Bowler & B. Co. 63 Ohio St. 274, 58 N. E. 813, 19 Am. Neg. Rep. 156; Illinois C. R. Co. v. Matthews, 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302; 10 C. J. 1190, § 1561, note 5; Hillis v. Chicago, R. I. & P. R. Co. 72 Iowa, 228, 33 N. W. 643; Patten v. Warner, 11 App. D. C. 149; State ex rel. Townshend v.

Meagher, 44 Mo. 356, 100 Am. Dec. 298; Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133; 1 Michie, Carr. § 1002; Cavendish v. Cavendish, 1 Cox. Ch. Cas. 77, 29 Eng. Reprint, 1070, 1 Bro. Ch. 467; Sawyer v. Old Lowell Nat. Bank, 230 Mass. 342, 1 A.L.R. 269, 119 N. E. 825; Wunsch v. Northern P. R. Co. 62 Fed. 871; Southern Kansas R. Co. v. Clark, 52 Kan. 398, 34 Pac. 1055; Shackett v. Illinois C. R. Co. 94 Tenn. 658, 23 L.R.A. 176, 30 S. W. 742.

Idaho banks are not authorized to receive deposits save as a credit on their books, payable on check or order.

Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122; Whitney v. First Nat. Bank, 50 Vt. 389, 23 Am. Rep. 503; Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; Lloyd v. West Branch Bank, 15 Pa. 172, 53 Am. Dec. 583, 1 Am. Neg. Cas. 574.

Mr. Eugene A. Cox, for respondent:

It has generally been considered that taking a special deposit falls within the general scope of the banking business, although no express power is conferred by the bank's charter, or by the organic law, so to do. It has been regarded as an incident to the general function of the institution.

Morse, Banks & Bkg. 5th ed. p. 423, § 191; Bates v. Capital State Bank, 18 Idaho, 429, 110 Pac. 277; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588.

Banks, being places for the deposit and safe-keeping of valuables, are bound to exercise such degree of care as is consistent with the character of their business.

Morse, Banks & Bkg. 5th ed. 426, p. 431.

Where a bailment is proven, the bailee must deliver the property in accordance with the contract, or account for the loss of the property. The failure either to deliver the property or account for it is sufficient evidence of

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such a degree of negligence as will bind the bailee.

Bates v. Capital State Bank, 18 Idaho, 429, 110 Pac. 277; *Strong v. Morgan*, 8 Idaho, 269, 67 Pac. 1123; *First Nat. Bank v. Zent*, 39 Ohio St. 105; *Bean v. Ford*, 65 Misc. 481, 119 N. Y. Supp. 1074; *Yazoo & M. Valley R. Co. v. Hughes*, 94 Miss. 242, 22 L.R.A.(N.S.) 975, 47 So. 662; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263, 23 N. E. 875; *Hackney v. Perry*, 152 Ala. 626, 44 So. 1029; *Central of Georgia R. Co. v. Jones*, 150 Ala. 379, 9 L.R.A.(N.S.) 1240, 124 Am. St. Rep. 71, 43 So. 575; *Fairfax v. New York C. & H. R. R. Co.* 67 N. Y. 11; *Steers v. Liverpool, N. Y. & P. S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 453; *Burnell v. New York C. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61; *Baehr v. Downey*, 133 Mich. 163, 103 Am. St. Rep. 444, 94 N. W. 750, 14 Am. Neg. Rep. 84; *Travelers Indemnity Co. v. Fawkes*, 120 Minn. 353, 45 L.R.A.(N.S.) 331, 139 N. W. 703; *Union Stone Co. v. Wilmington Transfer Co.* 5 Boyce, 59, 90 Atl. 407; *H. J. Keith Co. v. Booth Fisheries Co.* 4 Boyce, 218, 87 Atl. 715; *Donlan v. Clark*, 23 Nev. 203, 45 Pac. 1; *Pregent v. Mills*, 51 Wash. 187, 98 Pac. 328; *Corbin v. Gentry & F. Cleaning & Dyeing Co.* 181 Mo. App. 151, 167 S. W. 1144; *Hackney v. Perry*, 152 Ala. 626, 44 So. 1029; *Patriska v. Kronk*, 57 Misc. 552, 109 N. Y. Supp. 1092; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582; *Guaranty Trust Co. v. Diltz*, 42 Tex. Civ. App. 26, 91 S. W. 596; *Chicopee Bank v. Seventh Nat. Bank*, 8 Wall. 641, 19 L. ed. 422; *Lloyd v. McWilliams*, 137 U. S. 577, 34 L. ed. 788, 11 Sup. Ct. Rep. 173.

The bank had notice that the box contained valuables, and, from the proven course of dealing of the plaintiff, had sufficient reason to infer that the box contained some money. Such notice is sufficient to render it liable where the bailment consists of money, and that fact is not specifically disclosed.

Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133; *Central of Georgia R. Co. v. Jones*, 150 Ala. 379, 9 L.R.A.(N.S.) 1240, 124 Am. St. Rep. 71, 43 So. 575; *Allen v. Sewall*, 2 Wend. 327; *Farnsworth v. National Exp. Co.* 166 Mich. 676, 132 N. W. 441; *Galveston, H. & S. A. R. Co. v. Quilhot*, — Tex. Civ. App. —, 123 S. W. 200; *Southern P. R. Co. v. D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813; *Galt v. Adams Exp. Co. Mac-*

Arth. & M. 124, 48 Am. Rep. 742; *Head v. Pacific Exp. Co.* 60 Tex. Civ. App. 169, 126 S. W. 682; *William Fine & Bro. v. Southern Exp. Co.* 10 Ga. App. 161, 73 S. E. 35; *Hastings v. Pepper*, 11 Pick. 40; *Goldberg v. New York C. & H. R. R. Co.* 164 App. Div. 389, 149 N. Y. Supp. 629; *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473.

Dunn, J., delivered the opinion of the court:

This is an action to recover the value of certain personal property alleged to have been left by the plaintiff in the custody of the defendant about the 12th of August, 1916, said property being of the alleged value of \$6,895.50, including \$702 in money. The answer denies the receipt by the defendant of any of the property set out in the complaint.

A jury having been waived, the case was tried before the court, who found that the property described in the complaint was delivered to the defendant, and that its value was as follows: Lawful money of the United States, \$702; one gold ring, \$10; one strong box, \$1.50; and documents described in the complaint, the stipulated cost of the replacement of which is \$50—making a total of \$763.50, for which, with \$42.50 as costs, judgment was entered against the defendant. The appeal is from the judgment.

The second assignment of error is that "the court erred on the evidence in the case in awarding plaintiff judgment for \$702, claimed to have been in the box delivered to the defendant."

Our conclusion as to this assignment will dispose of the case.

The evidence offered on behalf of respondent, so far as it attempts to show a delivery to appellant, consists wholly of the testimony of Mrs. Mary E. Riggs, wife of respondent. She testified that she was in the bank of appellant about the time she and her husband were preparing to leave Grangeville, and, relating a conversation with Mr. Otto Nail, who was bookkeeper, and sometimes acted as teller of the

bank, she says: "I asked Mr. Nail if we might leave a box of papers and other valuables in the bank until such time as we could send for them, as we were leaving town, . . . and I asked Mr. Nail if it would be all right, and he said: 'Certainly; you can leave the box here, and we will send it to you whenever and wherever you want it. We will send it by express.' And when I asked him about leaving some papers, he said: 'We have cloth envelops which you might use;' and I said: 'No; there are too many papers and other things which couldn't be put up in cloth envelops.' And that is about all."

The witness testifies further that she and her husband bought a tin box with a lock on it, and placed therein the personal property that they desired to leave with the bank, and that she took this box to the bank and delivered it to Mr. Otto Nail.

On or about the 9th of April, 1917, the wife of respondent returned to Grangeville, and requested the return of the tin box with its contents, but a diligent search by the officers and employees of the bank failed to discover it, and this action followed.

At the time of the deposit of the box with the bank, nothing was said as to its contents except what has been quoted above. Not until demand for the return of the box was anything said indicating that it contained a large sum of money, or any money. Under the testimony given on behalf of respondent, we do not think the bank became a bailee of the money. Among the requirements necessary to constitute a party a bailee of property of another are delivery and acceptance of the property.

"The very essence of the relation is possession, and so it may be said, as a general rule, that there must be an acceptance of the property on the part of the bailee; for one cannot be made a bailee against his will, and must have knowledge of the fact that he is in possession of

the property." Van Zile, Bailm. & Carr. § 18.

"Since the duties and responsibilities of a bailee cannot be thrust upon a person without his knowledge or against his consent, it is essential to a bailment that there be an acceptance of the subject-matter." 6 C. J. 1104, § 24.

"It is necessary, however, that the person sought to be charged as a bailee shall have notice of his possession of the goods." 6 C. J. 1104, § 25. Story, Bailm. § 60.

To the same effect is the case of *Bertig v. Norman*, 101 Ark. 75, 81, 141 S. W. 201, Ann. Cas. 1913D, 943.

The appellant was entitled to know at the time of receiving the box in question that it contained the money that respondent claims to have been contained therein, or to know that its contents were of such value as to require the great care that is ordinarily bestowed on large sums of money. When his wife, who delivered the box to the bank, undertook to state its contents, it certainly was incumbent upon her to advise the bank, not only that the box contained "papers and other valuables," which expression contains no intimation of money, but, if it did in fact contain this large sum of money, to so advise the bank in order that it might give the box the care that should be given a thing of such value, or in order that it might decline, if it saw fit, to take the care of so large an amount of money delivered to it in this manner. The effect upon the bank was the same whether this information was withheld by her intentionally or unintentionally. Failing thus to advise the bank of the presence of the money in the box, we think the respondent cannot now successfully contend that the bank accepted the custody of this money, which acceptance was necessary in order to make it a bailee of this fund. The loss of the money, therefore, cannot be charged to the negligence of the bank, since it did

Bailment—box
—loss of contents—liability.

not know of its presence in the box. *Sawyer v. Old Lowell Nat. Bank*, 230 Mass. 342, 346, 1 A.L.R. 269, 119 N. E. 825; *Copelin v. Berlin Dye Works & Laundry Co.* 168 Cal. 715, L.R.A.1915C, 712, 12 N. C. C. A. 362, 144 Pac. 961; *Scollans v. E. H. Rollins & Sons*, 179 Mass. 346, 354, 88 Am. St. Rep. 386, 60 N. E. 983; *Belknap v. National Bank*, 100 Mass. 376, 381, 97 Am. Dec. 105.

If the expression "papers and other valuables" be held to include the gold ring in this case, as we think it may, it could certainly not so be held if, instead of a single ring of small value, there had been a

large amount of very valuable jewelry, and no intimation of that fact had been given to the bank.

We think the findings and judgment are supported by sufficient evidence as to the remainder of the property, the value of which the court found to be \$61.50. The judgment is accordingly modified by deducting therefrom the sum of \$702 and the costs allowed by the trial court, and as modified is affirmed for \$61.50. No costs to either party on this appeal.

Rice, Ch. J., and Budge, McCarthy, and Lee, JJ., concur.

ANNOTATION.

Acceptance of receptacle as charging one as bailee of contents.

Generally, as to what amounts to delivery of or assumption of control over property essential to a bailment, see the annotation following *Zetserstrom v. Thomas*, 1 A.L.R. 392.

The earlier cases upon the question under consideration in the present annotation are treated in the annotation following *Sawyer v. Lowell Nat. Bank*, 1 A.L.R. 269. As shown in that treatment of the subject there is a difference of judicial opinion as to whether or not the acceptance of a receptacle charges the depositary as a bailee of the contents, which conflict seems to extend through the more recent cases.

On the one hand, the reported case (*RIGGS v. BANK OF CAMAS PRAIRIE*, ante, 83), in holding that the gratuitous bailee of a locked box represented as containing "papers and other valuables" is not liable for the loss of a large sum of money contained in the box,—at least, in the absence of notice of such contents,—supports the rule that a depositary of a receptacle is not a bailee of the contents thereof. And further support for this rule is found in *Waters v. Beau Site Co.* (1920) 114 Misc. 65, 186 N. Y. Supp. 731. In this case the relation of bailor and bailee was created by the leaving of a trunk in defendant's hotel for

safe-keeping, and the question was as to the liability of the defendant for the loss of a diamond pendant worth over \$1,000, which had been left in the trunk, but which was missing when the bailment was ended. In holding that there was no liability, because of the fact that the defendant had no notice that the pendant was in the trunk, the court, among other things, said: "The relation between the parties as to the stored property was that of bailor and bailee, and not that of innkeeper and guest. Upon the foregoing facts the court dismissed the complaint, upon the ground that the defendant, by becoming a bailee of plaintiff's trunks and their contents, was not required to and did not assume that the same contained articles other than those ordinarily contained in trunks, and that, consequently, there was no bailment as to the pendant. There was no testimony in the case to show that defendant had actual notice of the fact that this valuable piece of jewelry was in plaintiff's trunk. Nor is it so usual or customary to place articles of this character in trunks as to warrant or require any assumption on defendant's part that the trunk contained the jewel in question. In such case there is no contract of bailment, for the bailee cannot by artifice be compelled to

assume a liability greater than he intended. *Edwards*, Bailm. 3d ed. § 49. It does not follow that there must be an intention to impose upon the bailee. It is sufficient if such is the practical effect of the bailor's conduct. By the use of the word 'artifice' it is not intended to convey that plaintiff had any motive or design inconsistent with absolute honor and fair dealing. A better characterization would probably be a concealment without design. It is true that plaintiff testified that in her conversation with defendant's manager she referred to her trunks as baggage or luggage; but the mere use of this expression is insufficient to give notice to the defendant that the trunks contained articles of a character different from those ordinarily placed in trunks left for storage. Luggage and baggage are essentially the bags, trunks, etc., that a passenger takes with him for his personal use or convenience with reference to his necessities or to the ultimate purpose of his journey, and in this connection it has been held that, within limits, the same include such jewelry as may be adapted to the tastes, habits, and social standing, and be necessary for the convenience, use, and enjoyment, of the traveler, either while in transit or temporarily staying at a particular place. The trunks here were to be stored, and not to be used as luggage or baggage, and for this reason it is apparent that the above rule respecting jewelry is not applicable. Plaintiff insists that jewelry of the kind ordinarily worn upon the person is

part of a woman's baggage, and that defendant, by undertaking to care for plaintiff's baggage, became a bailee of the diamond pendant contained in one of the trunks. . . . Plaintiff also claims that, even though defendant may not have been informed of the presence of the pendant in the trunk, it would nevertheless be liable in an action for breach of the contract of bailment if the pendant were stolen by one of the employees of defendant, and that testimony in the case made it reasonably plain, or at least permitted the inference, that the pendant was stolen by one of the defendant's employees. For this reason it is asserted the case should have been submitted to the jury. . . . In the instant case, as above stated, there was absolutely nothing to indicate to defendant the presence of valuable jewelry in the trunks of plaintiff."

On the other hand, however, in *Miles v. International Hotel Co.* (1919) 289 Ill. 320, 124 N. E. 599, reversing (1918) 211 Ill. App. 323, where a guest, upon leaving a hotel, left an old, small trunk for storage, and which later could not be found, the court, in holding that the hotel company as gratuitous bailee, upon proof of failure upon its part to exercise such care and diligence in the preservation of the trunk as a prudent man would take of his own goods of like character, would be liable for the loss, seems to have assumed that the bailee would be liable for the contents of the trunk, even though they exceeded \$1,000 in value.

G. J. C.

WILLIE BELL IRVING et al., Plffs. in Err.,
v.
LENA IRVING.

Georgia Supreme Court — October 1, 1921.

(— Ga. —, 108 S. E. 540.)

Will — birth of child of bigamous marriage — effect.

1. Where one died leaving a last will and testament containing various bequests, and subsequently to the execution of the will a posthumous

Headnotes 1 and 2 by BECK, P. J.

child was born to the testator, the child being the issue of a bigamous marriage, the testator having a living wife at the time of entering into the bigamous marriage, the birth of the child did not revoke the will.

[See note on this question beginning on page 91.]

Bastard — bigamous marriage of parents — effect.

2. Such child was not made legitimate under the provisions of Civ. Code 1910, § 2935, relating to void marriages and legitimacy of offspring prior to the annulment of the marriage.

Marriage — validity of bigamous marriage.

3. A bigamous marriage is an absolute nullity, and may be treated so by the parties to it and by all the world.

[See 18 R. C. L. 445.]

ERROR to the Superior Court for Fulton County (Bell, J.) to review a judgment sustaining a caveat filed in a proceeding for the probate of the will of Lacy Irving, deceased. *Reversed.*

Statement by Beck, P. J.:

Lacy Irving died on December 6, 1919, leaving a last will and testament which contains various bequests to Willie Bell Irving, referred to in the will as his wife, and to certain named children of his. This will was offered for probate by Willie Bell Irving and J. W. E. Lindner; and to the application for probate a caveat was filed by Lena Irving. One of the grounds of caveat—the one out of which springs the question to be determined here—is that subsequently to the death of Lacy Irving there was born to Willie Bell Irving a posthumous child of the said Lacy Irving, this child being known as Lacy Irving, Jr.; and it is contended that the birth of the child subsequently to the execution of the will, in which no provision is made in contemplation of such an event, revoked the will. The case was appealed to the superior court, and was submitted to the judge without the intervention of a jury, on the following agreed statement of facts: "It is agreed that Lena Irving is the lawful widow of Lacy Irving, deceased, she and the said Lacy Irving having married in Key West, Florida, on October 26, 1898; that as the issue of this marriage between Lena Irving and Lacy Irving there are three surviving children, Lewis Irving, age twenty, Leroy Irving, age nineteen, and Lillian Irving, age seventeen; that about two years before his death the said Lacy Irving, while still lawfully

married to Lena Irving, contracted in Fulton county, Georgia, a second marriage with Willie Bell Irving; that on December 6, 1919, Lacy Irving died; that a few weeks after his death there was born to the said Willie Bell Irving a posthumous child of the said Lacy Irving, said posthumous child now being known as Lacy Irving, Jr.; that on August 7, 1919, Lacy Irving executed the instrument referred to in the petition and purporting to be a last will and testament. It is further agreed that the marriage between Lacy Irving and Willie Bell Irving was never annulled and declared void by a court of competent jurisdiction. It is agreed that said will is regularly and properly executed, and is entitled to probate unless same is revoked by the subsequent birth of the child referred to in paragraph 1 hereof."

After evidence submitted and argument of counsel, the court rendered the judgment sustaining the caveat on the ground that the will had been revoked by the subsequent birth of a child to the testator. The propounders excepted.

Messrs. Anderson, Rountree, & Crenshaw, for plaintiffs in error:

Under the common law, marriage alone, or the birth of a child alone, was insufficient to revoke a man's will. It took the conjunction of marriage and birth of issue to effect a revocation.

Sutton v. Hancock, 115 Ga. 857, 42 S. E. 214; 1 Jarman, Wills, 5th ed. p.

286; 40 Cyc. p. 1199, note 99; Robinson v. Georgia R. & Bkg. Co. 117 Ga. 168, 60 L.R.A. 555, 97 Am. St. Rep. 156, 43 S. E. 452.

A bigamous marriage is void ab initio, and no decree is necessary to declare it void.

Murchison v. Green, 128 Ga. 342, 11 L.R.A. (N.S.) 702, 57 S. E. 709; Wilson v. Allen, 108 Ga. 280, 33 S. E. 975; Clark v. Cassidy, 62 Ga. 403; Goset v. Goset, L.R.A.1916C, 711, note; 3 R. C. L. 723.

Mr. William A. Fuller for defendant in error.

Beck, P. J., delivered the opinion of the court:

The ground of the caveat out of which springs the issue which this court has to determine does not show good ground for the refusal to admit the will to probate. Section 3923 of the Civil Code declares that "in all cases the marriage of the testator, or the birth of a child to him, subsequently to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will."

The word "child," as here used in this section, where it is declared that the birth of a child subsequently to the making of a will in which no provision is made in contemplation of such an event revokes the will, means a legitimate child. Such is its ordinary meaning in laws and statutes prescribing the rules of inheritance and property rights; and usually where the term "child"

is allowed to include illegitimate children it is done under the provisions of statutes recognizing the

rule just stated, and which make an exception to that rule. No doubt the court below recognized this doctrine, but the court evidently was of the opinion that § 2935 of the Civil Code, relating to void marriages, and legitimacy of children, made the posthumous child, Lacy Irving, Jr., a legitimate child. This section reads as follows: "Marriages of persons unable to contract, or unwilling to contract, or fraudulently induced to contract, are void. The

issue of such marriages, before they are annulled and declared void by a competent court, are legitimate. In the latter two cases, however, a subsequent consent and ratification of the marriage, freely and voluntarily made, accompanied by cohabitation as husband and wife, shall render valid the marriage."

This section does not have reference to bigamous marriages, but includes three classes of marriages: (1) Marriages between parties unable to contract; (2) marriages between parties unwilling to contract, that is, marriages procured by force or duress; (3) marriages where one of the parties is fraudulently induced to contract. Clearly the bigamous marriage does not fall within the last two classes; nor do we think it falls within the first class, that is, marriages between persons unable to contract. While the expression "marriages of persons unable to contract" might be sufficiently broad if we consider only the expression "unable to contract" to include marriages of persons one of whom had a living spouse, when we take the entire expression "marriages of persons unable to contract," we do not think that bigamous marriages were included, for the reason that a mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all; it is a mere empty ceremony, and effects nothing and creates no status between the parties.

Such a marriage is an absolute nullity, and may be treated so by the parties to such a ceremony and by all the world.

"The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void, and not merely voidable. Being a nullity, no decree is necessary to avoid the same. Reeves v. Reeves, 54 Ill. 332; Drummond v.

Bastard—
bigamous
marriage of
parents—effect.

Marriage—
validity of
bigamous
marriage.

Will—birth of
child of
bigamous
marriage—
effect.

Irish, 52 Iowa, 41, 2 N. W. 622; Blossom v. Barrett, 37 N. Y. 434, 97 Am. Dec. 747; Janes v. Janes, 5 Blackf. 141; Tefft v. Tefft, 35 Ind. 44; Glass v. Glass, 114 Mass. 563; Martin v. Martin, 22 Ala. 86. A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto, or after their death." Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 107, 12 N. E. 737.

An almost unbroken line of precedents for this ruling, taken from the decisions of other states of this country, might be cited to support the proposition here stated. See annotations on the subject of bigamous marriages, whether void or voidable, in L.R.A.1916C, 711. But this court has more than once held that bigamous marriages are absolutely void. In the case of Murchison v. Green, 128 Ga. 339, 11 L.R.A. (N.S.) 702, 57 S. E. 709, where the presumption of the validity of the marriage arising from the performance of the ceremony came in conflict with the presumption of the continued life of a former spouse of one of the parties, neither presumption being aided by proof of extraneous facts, the presumption of the validity of the second marriage, it was ruled, will prevail over the presumption of the continuance of the life of the former spouse; and Pre-

siding Justice Cobb, delivering the opinion of the court, gave as one of the reasons for holding that the presumption of the validity of the marriage should prevail that "the status of the woman is involved, as well as the legitimacy of children, and every reasonable presumption must be indulged which will relieve the woman of the charge of being a concubine and her children being declared bastards."

The converse of the proposition stated by the learned justice is that, if the first presumption had prevailed—that is, the continuation of the life of the former spouse—then the wife who became such by a bigamous marriage was a mere concubine, and her children who resulted from such bigamous marriage were illegitimate. And such we have concluded to be the law, and consequently that the birth of a child to a testator as the issue of a bigamous marriage, subsequently to the making of a will, does not work the revocation of the will, although no provision was made in the will in contemplation of the birth of such child. And it follows that the court below erred in sustaining the caveat on the ground that the birth of the posthumous child worked a revocation of the will of Lacy Irving.

Judgment reversed.

All the Justices concur, except Hill, J., absent.

ANNOTATION.

Illegitimacy of child as affecting revocation of will by subsequent birth of child.

Under the general common-law rule the marriage of a man and the birth of a child, both occurring subsequent to the making of a will by him, revoked the will. And under the statutes of some states the birth of a child will of itself operate to revoke a prior will. The present annotation purports to deal only with the question of the effect of the illegitimacy of the child on the rule under statute or common law with respect to the revocation of

a will by the birth of children to the testator subsequent to the making of the will.

There is little authority on the question under annotation, and, because of differences in the inheritance laws affecting illegitimate children, the courts have reached different conclusions. It seems that, unless special statutory provisions control, the question whether a will is revoked by the subsequent birth of an illegitimate

child, assuming that had the child been legitimate the will would be revoked,—in other words, the question whether the circumstances of illegitimacy affects the matter,—may depend on the question whether, in the absence of a will, the illegitimate child would inherit under statute. As has been brought out in one case, if under the laws of the state the illegitimate child would not inherit in case the will were revoked, there would seem to be no good reason for revoking the will on this ground.

The word "child," in a statute providing that in all cases the marriage of the testator, or the birth of a child to him, subsequently to the making of a will in which no provision was made in contemplation of such an event, should be a revocation of the will, was held in the reported case (*IRVING v. IRVING*, ante, 88) to mean a legitimate child; so that it was held that a will was not revoked by the birth of a posthumous child which was the issue of a bigamous marriage of the testator. The court held, also, that bigamous marriages were not within a statute providing that marriages of persons "unable to contract, or unwilling to contract, or fraudulently induced to contract," were void, but that the issue of such marriages, before they were annulled or declared void by a competent court, were legitimate.

And that a will is not revoked by the subsequent birth of an illegitimate child to the testator, not mentioned in the will, is held in *Sneed v. Ewing* (1831) 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41. This case involved the right to real estate in Kentucky, and a slave in that state, both of which belonged to the testator, who was a resident of Indiana. It was contended that at the time of the testator's marriage the wife had a husband who was living, but who had abandoned her several years previous, and that the marriage was therefore illegal; that the child was illegitimate and therefore the will not revoked. A statute, however, in Kentucky, provided that "issue in marriage deemed null in law shall nevertheless be legiti-

mate." The court held accordingly that the child was legitimized in Kentucky, and, so far as the real estate was concerned, there was an implied revocation of the will. But it was held that, as regards the slave, the law of Indiana controlled, and, unless by that law the marriage was valid and the child legitimate, there was no implied revocation. In regard to the point under consideration, the court said: "According to the common law, a child born out of 'lawful wedlock' is 'filius nullius,' and cannot inherit the father's estate. The rule as to implied revocations is, as we have stated, fixed and inflexible. It does not allow courts to speculate *ad libitum* on the moral duties, the affections, or actual intentions of testators, but restricts them to an isolated fact, and the countervailing or corroborating circumstances. Were it otherwise, the statute of wills would be virtually abolished. In this case, the essential fact is the birth of the child; and the law requires the birth of a legitimate child. '*Ita lex scripta est.*' The reason is obvious. It would be inconsistent with the object of implied revocation to permit a will to be revoked by the birth of a child who, after the sentence of nullification, would not be entitled to one particle of the estate of the testator. Hence, a revocation will be implied by the birth only of a child who, by operation of law, would have been entitled to the estate, or a portion of it, if there had been no will, and who would take it, or some of it if the will be set aside."

It was held in *Re Bunce* (1887) 6 Dem. (N. Y.) 278, that the subsequent birth of an illegitimate child to a testatrix did not effect a complete revocation of the will so as to prevent its admission to probate. In this case, where probate of a will was opposed by an illegitimate daughter of the testatrix, born after the execution of the will and not provided for or mentioned therein, the court said that the daughter would be entitled under the statutes of the state, in the event of the decedent's intestacy, to succeed to her entire estate, and had, therefore, a right to appear in opposition to the

probate of the will; but that if the will were duly executed, the circumstances set up were not sufficient to work its complete revocation; that the instrument, in the absence of other objections, must go to probate, even though none of its provisions except its appointment of an executor might be practically effective. And decision regarding the claims of the illegitimate child was deferred until after submission of proofs as to the execution of the will.

The will involved in the preceding case came before the supreme court in *Bunce v. Bunce* (1891) 27 Abb. N. C. 61, 20 N. Y. Civ. Proc. Rep. 332, 14 N. Y. Supp. 659. And it was held that the illegitimate daughter, who was the only child and was born after the execution of the will, had a right to her share, which in this case would amount to the whole property, of the mother's independent estate, under statutes providing that illegitimate children, in default of lawful issue, might inherit property from their mother as if legitimate, and that whenever a testator had a child born after the making of a will, and should die leaving such child unprovided for by any settlement and not mentioned in the will, such child should succeed to the portion of the parent's estate as would have descended or been distributed to it had the parent died intestate.

The statutes of some states provide expressly for revocation of the will by the subsequent birth of "legitimate" children of the testator. See, for example, *Lewis v. Hare* (1853) 8 La. Ann. 378. This would seem to negative any implied revocation by the birth of an illegitimate child.

But the birth of an illegitimate child to the testator after the making of the will was held in *Milburn v. Milburn* (1882) 60 Iowa, 411, 14 N. W. 204, to revoke the will, where there was general and notorious recognition by the testator of the child as his, and a statute provided that under such circumstances illegitimate children should inherit from their father. The court said: "It must be regarded as the settled rule in this state that the

birth of a legitimate child to the testator, subsequent to the making of a will and before the testator's death, will alone operate as an implied revocation of the will. . . . It is provided by statute: 'Illegitimate children inherit from their mother, and the mother from the children. They shall inherit from their father, whenever the paternity is proved during the life of the father, or they have been recognized by him as his children, but such recognition must have been general and notorious, or else in writing.' . . . For the purpose of inheritance, an illegitimate child, when recognized by its father, stands on precisely the same footing as if it were legitimate. If the father dies intestate, both inherit, and such right can only be cut off by a will of the father, which is equally effectual as to both classes of children. The birth of a legitimate child entitles it to inherit, but this is not so as to an illegitimate child. For mere birth does not entitle the latter to inherit, but the notorious recognition does. Such recognition legitimizes the child. In the case at bar the testator, after making the will, recognized the plaintiff as his child. This being so, the statute provides that the right to inherit shall, from that time, exist. It follows that the plaintiff could only be deprived of such right in the same manner as a legitimate child, and that is by a will executed subsequently to the birth of the child. The statute does not provide that the birth of a child subsequently to the execution of a will has the effect to revoke it. In this respect the statute makes no difference between different classes of children. . . . It seems to us the statute under consideration leaves no room for construction, and as the rule is that the birth of a legitimate child, after the execution of a will by its father, has the effect to revoke a will, that, under the statute, the same results must follow the birth and recognition of an illegitimate child."

The question under consideration does not strictly arise in such cases as *Re Del Genovese* (1907) 56 Misc. 418, 107 N. Y. Supp. 1033, affirmed without

opinion in (1909) 136 App. Div. 894, 120 N. Y. Supp. 1121, where the illegitimate child was legitimized by the marriage of the parents, and it was held that a will made before such marriage was revoked. It does not appear whether the will was executed prior to the birth of the child, but the court said that the will was completely revoked by the marriage of the deceased and the birth of lawful issue.

See, however, in this connection, *McCulloch's Appeal* (1886) 113 Pa. 247, 6 Atl. 253, among possibly other cases of the kind, where the illegitimate child was legitimized by the subsequent marriage of the parents, but it was held that a will made after the birth of the child, but before the marriage, was not revoked, since the child was not an "after-born" child, within the meaning of a statute providing that when any person made a will and afterwards married or had a child not provided for in the will, such child should be entitled to such share of the estate as if there had been no will; since the statute, in providing for after-born children, meant a physical birth, and not a mere legislative legitimation, after the making of the will.

Other cases, such as *Caballero v. Executor* (1872) 24 La. Ann. 573, and *Davis v. Davis* (1899) 27 Misc. 455, 59 N. Y. Supp. 223, involve the rights of a child legitimized by the marriage of its parents, where the parent died leaving a will, but in these cases the will was executed subsequently to the birth of the child.

Although not within the annotation, and valuable only by way of analogy, attention is called to several cases construing statutes relative to the rights of children unintentionally omitted from wills, because of their bearing on the construction of the term "children," where the party claiming that the will was revoked, at least partially, was an illegitimate child.

Where the statute made an illegitimate child an heir of its mother, it was held in *Re Wardell* (1881) 57 Cal. 484, that such a child, who was

omitted from her mother's will with nothing to show that the omission was intentional, was within a statute providing that when any testator omitted to provide in his will for any of his children, or for the issue of any deceased child, unless it appeared that such omission was intentional, such child, or the issue of such child, should have the same share in the estate of testator as if he had died intestate.

But it was held in *Kent v. Barker* (1854) 2 Gray (Mass.) 535, involving the mother's will, that an illegitimate child, although by a later statute given the right of inheritance from the mother in case of intestacy, was not within a statute providing in effect that when any testator unintentionally omitted to provide in his will for any of his children, they should take the same share in his estate as they would have been entitled to if he had died intestate.

To a similar effect is *King v. Thisell* (1915) 222 Mass. 140, 109 N. E. 880, where, relying on the case last above cited, the court held that the words "issue of any deceased child," in the statute providing that if a testator omitted to provide in his will for any of his children or for the issue of a deceased child, they should take the same share of his estate which they would have taken if he had died intestate, unless they were provided for by the testator in his lifetime, or unless it appeared that the omission was intentional, meant the legitimate issue of a deceased child, and that the illegitimate child of a child of the testator had no right under the statute.

And to the same effect is *Mansfield v. Neff* (1913) 43 Utah, 258, 134 Pac. 1160, the court referring to *Kent v. Barker* (Mass.) *supra*, and stating that the statute in that state was copied from the Massachusetts law.

Illegitimate children born after the execution of a will were held not entitled to share in the property in *Mortimer v. West* (1827) 3 Russ. Ch. 370, 38 Eng. Reprint, 615, 5 L. J. Ch. 181, 27 Revised Rep. 98, and *Metham v. Devon* (1718) 1 P. Wms. 529, 24 Eng.

Reprint, 502; but the decisions turn on the construction of the particular provision in the wills and the right of after-born children to take under a

will, rather than on the question whether a will is revoked by the subsequent birth of an illegitimate child.
R. E. H.

STANDARD OIL COMPANY, Appt.,

v.

CITY OF KEARNEY et al.

Nebraska Supreme Court—July 15, 1921.

(— Neb. —, 184 N. W. 109.)

Municipal corporations — power to prohibit gasoline filling station.

1. A municipal corporation cannot, under the general welfare provision of its charter, forbid the operation between designated points on its principal streets of a filling station for automobiles, to reach which cars must cross the sidewalk.

[See note on this question beginning on page 101.]

—health rules — review.

2. In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations, and ordinances are required for the health, comfort, and safety of the people, but their action is not final and is subject to the scrutiny of the courts.

[See 6 R. C. L. 244; 19 R. C. L. 805.]

—ordinance — overturning for unreasonableness.

3. To overturn a city ordinance as being arbitrary, unreasonable, or discriminatory, the evidence of such

facts should be clear and satisfactory.

[See 6 R. C. L. 245; 19 R. C. L. 809.]

—not within police power.

4. In the light of the evidence, the ordinance set out in the opinion is held void as being an arbitrary, unreasonable, and discriminatory exercise of the police power.

Evidence — judicial notice — population of city.

5. The court takes judicial notice of the population of a city in the state by which it is created.

[See 15 R. C. L. 1091, 1092, 1129.]

Headnotes 2-4 by DAY, J.

(Dean, J., dissents.)

APPEAL by plaintiff from a judgment of the District Court for Buffalo County (Hostetler, J.) dismissing an action brought to enjoin defendant from interfering with plaintiff in the construction of a filling station on certain premises owned by it in the defendant city. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. H. Herdman and Pratt & Hamer, for appellant:

Plaintiff is entitled to protection at the hands of the chancellor to prevent irreparable injury and a multiplicity of suits, or prosecution for violating a city ordinance, if said ordinance is invalid.

Dill. Mun. Corp. 5th ed. § 650; Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 673; Newport v. Newport & C. Bridge Co. 90 Ky. 193,

8 L.R.A. 484, 13 S. W. 720; South Covington & C. Street R. Co. v. Berry, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

The ordinance in question is void and without force and effect.

Dill. Mun. Corp. 5th ed. § 695, pp. 1057, 1058; Passaic v. Paterson Bill Posting, Adv. & Sign Painting Co. 72 N. J. L. 285, 111 Am. St. Rep. 678, 62 Atl. 267, 5 Ann. Cas. 995; Crawford

v. Topeka, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 477; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Com. v. Boston Adv. Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 602; State v. Whitlock, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765; McQuillin, Mun. Corp. § 929, pp. 2020-2022; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 20; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Tolliver v. Blizard, 143 Ky. 773, 34 L.R.A.(N.S.) 893, 137 S. W. 509; Lawton v. Steele, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; People v. Ringe, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; Thompson, Business Trusts, § 11, pp. 18, 19.

Mr. E. P. McDermott for appellees.

Day, J., delivered the opinion of the court:

The only question involved in this case is the validity of a certain ordinance of the city of Kearney, Nebraska.

Plaintiff, who was the owner of certain lots abutting upon Central avenue at Twenty-fourth street in the city of Kearney, had commenced to erect thereon a filling station for the purpose of selling on the premises gasoline and lubricating oil to the users of motor vehicles. When the city council of defendant city learned of the character of the improvement the plaintiff intended to make and the nature of the business it proposed to conduct on the premises, the council very promptly passed the ordinance in question. Section 1 provides: "That it shall be unlawful for any person or persons, firm, or corporation to erect or construct upon any lot, piece of lot, or parcel of land, a filling station wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oils, between Eighteenth and Thirty-first streets on Central avenue, in the city of Kearney, Nebraska."

Section 2 provides a penalty for a violation of the ordinance.

Acting under authority of this ordinance, the municipal authorities were proceeding to stop the further progress of the work on the filling station when this action was commenced. By this action the plaintiff sought an injunction restraining the municipal authorities from interfering with it in the construction of the improvement, upon the ground that the ordinance is unreasonable, discriminatory, and an illegal invasion of its property rights. The trial court found the issues in favor of the defendants, and dismissed the plaintiff's cause of action. From this judgment plaintiff appeals.

It is conceded that the legislature has, by § 4862, Rev. Stat. 1913, delegated to the municipal authorities of cities of the class of defendant city the power to enact all needful ordinances, rules, and regulations for maintaining the peace, good government, and general welfare of such cities. It is manifest that the council, in passing the ordinance in question, was acting under the "general welfare" clause of the power delegated to it by the legislature. Generally speaking, it is within the right of municipal legislative authority, acting under the "general welfare" clause, to determine what ordinances are required to protect and secure the public health, comfort, and safety, but it may not, under the guise of such power, enact ordinances which are unreasonable, or discriminatory, or an invasion of constitutional rights.

In Peterson v. State, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306, it was held: "The determination of the question whether an ordinance is reasonably necessary for the protection of life and property within the city is committed, in the first instance, to the municipal authorities, and, when they have acted and passed an ordinance, it is presumptively valid, and the courts will not interfere

Municipal corporations—health rules—review.

—ordinance—overturning for unreasonableness.

with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence."

The same principle is announced in *State ex rel. Krittenbrink v. Withnell*, 91 Neb. 101, 40 L.R.A. (N.S.) 898, 135 N. W. 376. Whether an ordinance of this character is a proper exercise of power becomes, therefore, in its last analysis, a question for the courts to decide, and when it appears from all of the facts and circumstances, to the satisfaction of the court, that an ordinance is unreasonable or discriminatory, or an invasion of constitutional rights, it is the duty of the courts to declare such ordinance void.

With this general principle in mind, we proceed to examine the facts and circumstances existing at the time the ordinance was passed, and the mischief proposed to be remedied thereby. The record shows that the plaintiff was proceeding to erect upon its lots abutting on Central avenue and Twenty-fourth street a filling station for the purpose of vending oils and gasoline to the users of motor vehicles, when stopped by the defendants. The general plan of the improvement contemplated the construction of a small one-story cement and concrete office building, standing well back from the two streets, and having a wide semi-circular driveway extending from Central avenue to Twenty-fourth street across the plaintiff's premises. The plan was that a customer by driving across the sidewalk could enter upon the premises from either of the two streets, it being the intention that a customer who entered the premises from Central avenue, after having his wants supplied, could make his exit on Twenty-fourth street, and vice versa. Pumps were to be stationed along the driveway in the open air, well back from the streets, by means of which customers were to be supplied with gasoline. It was the plan to store the gasoline upon the premises in large steel tanks specially

designed for the purpose, and buried in the ground, while the oil was to be stored in metal cans such as are generally used for that purpose. The building itself fully complied with the fire-protection and building ordinances of the city, and the proposed manner of storing the gasoline and oils on the premises was not in violation of any ordinance of the city, or any law of the state.

It further appears that Central avenue is the principal business street in the city, and that the plaintiff's property is one of the important corners along that street. For about four blocks south of the proposed improvement, the business consists mostly of retail stores in buildings of one and two stories. Along the street are a few very valuable improvements, such as the Federal postoffice building, a church, a hotel, and residences.

It will be noted that the ordinance forbids the construction of a "filling station" wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oil. Just what the council may have intended by the term "filling station" is not entirely free from doubt. It would seem, however, that there could be an equipment which would come within the general meaning of that term, where no building was employed, and that therefore, the building which the plaintiff proposed to construct was not the objectionable feature of the improvement. The ordinance, as we view it, does not prevent the storing of oils and gasoline on the premises within the restricted district, and selling them to users of motor vehicles at the curb of the street. In fact, it is shown that within a few doors from the plaintiff's premises, and within the district, gasoline is being sold to users from a pump at the curb; the gasoline being stored in a large tank beneath the sidewalk. If the ordinance was really intended as a good-faith fire protection measure, it would seem that it would have been more general in its application, both as respects the territory in

which it operated and the persons to whom it applied. It is difficult to see how there would be more danger to the public from selling gasoline and oil from a pump on the premises, than from selling the same commodities from a pump at the curb of the street; both being in the open air. Besides this, the ordinance by its terms operates on Central avenue only, and from the conditions as shown by the photographs in evidence there would be as much danger from such a business conducted just off Central avenue as along that street.

In further support of the ordinance, it is argued that the crossing of the sidewalk by motor vehicles would unwarrantably interfere with the use thereof by pedestrians. The record does not show the approximate number of pedestrians using the sidewalk, nor the extent of the interference which the motor vehicles would entail. The court will, however, take judicial notice of the

**Evidence—
judicial notice—
population of
city.**

fact that the population of defendant city is less than 8,000, and from the circumstances in evidence, as shown by the photographs, we are convinced that the slight inconvenience to pedestrians by motor vehicles crossing the sidewalk is not of sufficient magnitude to justify the ordinance on that ground. The automobile as a business and pleasure vehicle has come to stay, and the rights of users, who constitute a considerable part of the public, must also be considered in determining the validity of ordinances of this nature. Besides this, within one block from the plaintiff's premises, and within the district, is a public garage, access to which is had across the sidewalk. It is conceded that the ordinance does not prohibit crossing the sidewalk to enter the garage. It is also claimed that the noise of the honking of horns and the running of the engines would be a nuisance to the other users of the street. The noise, however, is only incidental to, and not a necessary

part of, the proposed business. If the protection of the public from noise was the purpose sought to be attained, it would seem that it could be easily controlled by proper ordinances going directly to that subject.

Without extending the argument further, we are satisfied from a consideration of the entire record that the ordinance cannot be sustained.

While there are some phases of it which, upon first impression, appear to be within the domain of the proper exercise of the police power of the municipality, yet, when considered in connection with the facts and circumstances as shown by the record, it becomes apparent that it is an unreasonable, arbitrary, and discriminatory exercise of power. We think the real reason for the ordinance is set forth in the defendant's answer, wherein it is charged that the construction of an oil filling station on the principal street of the city would be an "everlasting eyesore and disgrace." While great latitude must be given to municipalities in the matter of the exercise of police power, it must not be carried to the extent that it is unreasonable, arbitrary, or discriminatory.

**Municipal corporations—
power to prohibit gasoline
filling station.**

**—not within
police power.**

From what has been said, it follows that the trial court should have granted the relief prayed. The judgment of the District Court is reversed and the cause remanded, with directions to enter a decree granting the injunction prayed.

Dean, J., dissenting:

Under the facts and the law it seems that the judgment should be affirmed. The ordinance prohibits the erection, on a certain designated part of a certain street, of all oil filling stations of a certain class, namely, those "wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oils."

There is a stipulation in the record wherein, among other things, sub-

(— Neb. —, 184 N. W. 109.)

stantially these material facts appear: Immediately east, and across Central avenue, from the proposed site of the oil filling station, is located the United States postoffice, a two-story marble building erected at a cost of about \$150,000, and also an apartment house. One block away from plaintiff's lots is located the three-story 100-room Midway hotel, and just across the street therefrom, and one block from plaintiff's lots, is the Christian Church, and east and north of that church is a residence district. About a half block west of plaintiff's lots is a Catholic Church, and connected therewith is a parochial school, which is open and in continuous session nine months in the year. A block south of the Catholic Church and school is the Presbyterian Church, and across the street east from the Presbyterian Church is the Christian Science Church. Both sides of the four blocks that are directly south of plaintiff's lots are practically all built up with business houses. Central avenue, whereon the proposed oil filling station is to be permanently located, is one of Kearney's principal business streets, and is one of the main traveled routes from the business center, on a paved street that leads to the State Teachers' College. On the east and south sides of the block in which are situated plaintiff's lots the sidewalks are about 20 feet wide.

It is in the midst of such an environment that there has been permanently located, almost under the eaves of a \$150,000 Federal building, by a judgment of this court, a noise-producing oil filling station that is to be used, as we are informed by plaintiff's brief, "in said business of vending oils, grease, and gasoline." The environment of the new structure will, as the stipulation shows, consist of a group of four leading churches, a church school, an apartment house, a large hotel, and the Federal building; a residence section of the city being on one side and the business center on the other. The oil station is per-

manently established over the protest of the city council, and in violation of an ordinance, adopted under the police power, and contrary to a judgment of the district court pronounced by a judge who has resided in Kearney more than thirty years, and who has been a district judge for almost twenty years.

One of Kearney's leading citizens, who lives directly across the street from a "two-pump" oil filling station, testified, in substance, that on Saturday evenings, from 5 o'clock until midnight, and on Sunday afternoons and evenings and on holidays, the station does a very large business, and at such times from four to six cars stand and honk and wait, all clamoring to be served at one time, and that to add to the confusion about half of the cars, while waiting, permit their engines to run, so that the noise interferes with ordinary conversation on his porch and injuriously affects the health of his family. He further testified that the traffic on the street was congested by large motor trucks and mule trucks backing up to the curb to fill the tank of the station with gasoline almost every evening; and that it was further obstructed by from three to six cars standing at the curb in the evenings waiting to have air pumped into the tires. He said his knowledge was confined to the hours named, as he was not at home very much during the day throughout the week. No evidence was offered by plaintiff on the question of noise, other than that of an employee of plaintiff, who testified that their men were instructed to ask car drivers to stop their engines while the tank was being filled. It is, however, suggested in plaintiff's brief that it was the customers, and not the plaintiff, that created the noise and the confusion of which complaint is made. But that suggestion does not meet the objection. In view of the evidence it is perhaps well that the Federal court has not yet begun to hold its sessions on the second floor of the Federal building.

In its argument plaintiff contends

that the ordinance is discriminatory because two "gasolene curb pumps" have been installed on the street in question. The contention is not sound. There is a vast difference between a "gasolene curb pump," a temporary and transitory contrivance, installed before the passage of the ordinance in question, and a permanent "oil filling station," to be used for selling "oils, grease, and gasolene." They are not in the same class, nor can a comparison properly be drawn between a "gasolene curb pump" that was first brought into use by the pioneer oil sellers, and now almost obsolete, and a pretentious, modern, and permanent "gas filling station," the last word in architectural expression and design of the modern oil vender.

The majority opinion points out that the automobile, that indispensable adjunct of modern and social life, has come to stay. Likewise the pedestrian. And some inalienable rights remain to him. Among these is the right freely to walk in peace and in safety on either side of a public street that he may choose. It is obvious that an oil filling station, located on a street corner in the business center, no matter how attractive, when newly built, in architectural design and appearance, with cars darting in and darting out, across a greasy sidewalk, adds to the perils of the passing pedestrian, of whatever age or sex. But in its brief plaintiff makes this argument in extenuation of its persistent and unwelcome intrusion. It says: "The slight inconvenience to pedestrians using the sidewalks on the same side of the street, although they could use the ones on the opposite side, must, as a public necessity, be submitted to."

Doubtless the same argument, upon which comment may well be spared, was advanced in the district court and was noted by the trial judge.

It has often been said that the police power is to the state what

self-protection is to the citizen. It is for the city council, then, under that beneficent power, reasonably to determine in the first instance in what district certain occupations, and the erection of certain structures, shall be prohibited. Under the police power the city council may determine, too, whether the perils of automobile traffic to pedestrians upon the main street intersections shall be diminished, and the safety of the citizens enhanced, by preventing the establishment on its prominent street corners of such oil filling stations and at such locations as the present case contemplates. And if complaint is made, as here made, and notwithstanding we must try the case here *de novo*, we have held, in the past, that the judgment of the district court, in an equity case, should be given great weight by this court when sitting as a court of review. And this case is not an exception. The question is: Has the council been unreasonable in its exercise of the police power? I submit that it does not clearly so appear. I fear that the fact has been overlooked that a reasonable exercise of the police power inheres in the city council.

A citizen should not be permitted so to use his property as to thereby create a nuisance, nor so to use it that it will become a menace to the personal and physical safety of others. Plainly speaking, plaintiff has been given permission to do both. In support of the views expressed herein these authorities are cited: *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Peterson v. State*, 79 Neb. 132, 14 L.R.A. (N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306; *Re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *State ex rel. Krittenbrink v. Withnell*, 91 Neb. 101, 40 L.R.A. (N.S.) 898, 135 N. W. 376; 2 *McQuillin*, Mun. Corp. § 732, and vol. 3, §§ 890-924.

For the reasons herein stated, I respectfully dissent from the opinion of the majority of the court.

ANNOTATION.

Public regulation of gasoline filling stations.

There is very little authority upon this subject, due probably to the recent origin of gasoline filling stations.

The public regulation of such stations is ordinarily in the hands of municipal corporations, which receive their authority from the legislature.

It will be observed that the ordinance on the subject was held invalid in the reported case (*STANDARD OIL Co. v. KEARNEY*, ante, 95) as being an arbitrary, unreasonable, and discriminatory exercise of the police power.

In the similar case of *Invader Oil & Ref. Co. v. Ft. Worth* (1921) — *Tex. Civ. App.* —, 229 S. W. 616, where, as in the reported case (*STANDARD OIL Co. v. KEARNEY*), the erection of a gasoline filling station upon private premises had been commenced and the ordinance was immediately passed to prevent it, the court, although calling attention to the elaborate briefs of counsel and the authorities cited therein upon the point, refused to decide the question of the validity of an ordinance prohibiting the erection of gasoline stations within the corporate limits of the city without first obtaining a permit from the board of commissioners of the city, in so far as such ordinance might affect the issuance of future permits, because it had reached the conclusion that the ordinance should not be held to operate against and affect one who had obtained all the permits necessary for a filling station prior to the passage of the ordinance. It was held that this ordinance, which made its violation a misdemeanor, was penal in effect, and should be construed strictly against the accused and favorably and equitably for him; and that as the intention that it operate retroactively did not clearly and strongly appear, and was not manifested in appropriate words, it was not to be given such operation, where to do so would materially change existing rights. The court said that

there was a further consideration that might be noted, that while a statute, although subordinate to the Constitution, is not dependent for its validity upon its reasonableness, yet an ordinance, unless expressly authorized by the legislature, must be reasonable. Under a section of the ordinance where it enumerated the things to be considered by the commissioners in granting or refusing a permit, it provided that said commissioners may consider "how long existing filling stations have been in operation, and the consent or acquiescence in their location by the occupants or owners of the adjacent buildings or residences;" and the court was of the opinion, in view of the strict rule of construction to be invoked, that this reference should be held to refer to filling stations already in operation, but which had not secured a permit under any ordinance. The court, however, intimated that the city could revoke its permit for the construction of the gasoline station in question, under the principle that a municipality is not estopped to withdraw its privilege or permit theretofore granted to conduct a business within its confines.

And a city was held, in *Des Moines v. Manhattan Oil Co.* (1921) — *Iowa*, —, — *A.L.R.* —, 184 N. W. 823, to have power to rescind a permit for the construction of a gasoline and oil filling station upon private property, in what was to be a restricted residence district, upon the ground that the adoption of the resolution of the city council granting such permit did not have the effect of conferring upon the owner of the property, or the one to whom it was leased for the site of such a station, a vested right which could not be canceled or recalled, under the circumstances shown, which were stated in the opinion as follows: "The lessor had not yet acquired title to the property, and did not acquire it until after the permit had been re-

scinded. The proposed filling station had not been constructed, though it is claimed certain material intended for that use had been deposited there. When the application for permit was made, there was then pending and undisposed of before the council, as the applicant well knew, the petition of the property owners within this area to make it a restricted residence district, and if the council, having adopted the resolution to grant the permit under such circumstances, concluded it had acted inadvertently, or improvidently, or without regard for the rights of the petitioners for a restricted district, rescinded the resolution with reasonable promptness, we are of the opinion it did not exceed its authority or abuse its discretion."

In construing a by-law of a city requiring a license for the privilege of carrying on the business of a public garage, passed in pursuance of the provision of a municipal act authorizing the passage, by the councils of cities, of by-laws for licensing and regulating public garages, and defining a public garage to be a "garage where motor cars are hired or kept or used for hire, or where such cars, or gasoline, oils, or other accessories, are stored or kept for sale," it was held in *Toronto v. Canadian Oil Cos.* (1919) 45 Ont. L. Rep. 225, that such by-law did not apply to a business which consisted in supplying, to persons using automobiles, gasoline and air, where the building on the premises where the business was conducted did not and could not afford storage for automobiles.

As to gasoline filling stations in the street, it was held in *Keyser v. Boise* (1917) 30 Idaho, 440, L.R.A. 1917F, 1004, 165 Pac. 1121, that a municipal corporation is without authority, in the absence of a legislative enactment expressly permitting it, to grant a private person or corporation a permit to erect or maintain a gasoline pump in a street, and therefore its purported license for that purpose may be revoked at pleasure, although expense has been incurred on the faith of it. The court said: "Anyone

obtaining a permit from the city for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and indeed, in this view, it matters not whether the use is made in accordance with a permit or without one; the use is merely permissive in either event, and revocable at any time without notice.

. . . The holder of a permit to install an obstruction in a public street or thoroughfare, for a private purpose, acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities, in their discretion, deem it necessary, as a proper police measure, to vacate and revoke such permit, the holder of the same has no alternative, but must comply with the order of revocation.

. . . It may be that a different rule would apply if the municipality had been given the right to grant such a permit by statute. Some cases have gone to the extent of announcing a rule contrary to the one herein expressed, apparently upon the theory that a municipality has a right, in the absence of a statute authorizing it, to grant an irrevocable license or permit of a private use of the streets, so long as such use does not materially interfere with the use thereof by the public. . . . While the latter view has some very plausible arguments in its favor, we are not in accord with it; for, as indicated above, the former view is supported by the weight of modern authority and by sound legal principle."

That the legislature has power to confer authority upon a municipality to grant a permit to install a gasoline station in a street was conceded in *New Orleans v. Shuler* (1916) 140 La. 657, 73 So. 715, the question being as to whether it had done so. It was there held that the authority of a city to adopt an ordinance forbidding, unless by permission of the council, the placing of a gasoline pump on the outer edge of a sidewalk, and requiring, as one condition of such permission, the payment of an annual fee

to the city, was delegated to the city by the following provisions of its charter: "The city shall also have all powers, privileges, and functions which, by or pursuant to the Constitution of this state, have been or could be granted to or exercised by any city. The legislative, executive, and judicial powers of the city shall

extend to all matters of local and municipal government, it being the intent thereof that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed."

G. V. I.

JAMES MCGHEE

v.

ROSA HENRY et al., Plffs. in Certiorari.

Tennessee Supreme Court—October 29, 1921.

(— Tenn. —, 234 S. W. 509.)

Descent and distribution — of estate held by entirety.

1. Upon simultaneous death of husband and wife holding an estate by entirety, the estate descends as if they had been tenants in common.

[See note on this question beginning on page 105.]

Entirety—duration of estate by.

2. An estate by entirety is one limited to the continuance of the relationship of husband and wife.

[See 13 R. C. L. 1096, 1122.]

—held as tenants in common.

3. With the exception of inability of either to alienate, and the right of survivorship, an estate by entireties is held by husband and wife as tenants in common.

Evidence—presumption as to survivorship in case several perish in same disaster.

4. If several persons perish in the same disaster and there is no fact or circumstance to show which survived, there is no presumption whatever on the subject.

[See 8 R. C. L. 716.]

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a decree of the Chancery Court for Knox County in favor of complainant in a suit to partition certain lands. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John A. Huff for plaintiffs in certiorari.

Mr. Charles M. Roberts for defendant in certiorari.

L. D. Smith, Special Justice, delivered the opinion of the court:

This is a partition proceeding. The complainant, James McGhee, claims that he owns a one-half undivided interest in the two certain tracts of land described in the original bill, and concedes that the defendants own the other one half. The defendants claim that the com-

plainant owns only a one-sixth undivided interest, while they themselves own a five-sixths undivided interest.

James McGhee is the child and only heir at law of Emma L. McGhee Henry, deceased, and the defendants are the only children and heirs at law of Robert H. Henry, deceased. Emma L. McGhee Henry and Robert H. Henry were married sometime prior to the 8th of April, 1910. One of the tracts of land sought to be partitioned was conveyed to Robert

Henry and wife, Emma L. McGhee Henry, on April 8, 1910; the other was conveyed to them on the 7th of December, 1910. They owned these tracts or lots of land by the entirety at the time of their deaths. They died simultaneously on the 13th day of January, 1919, by being burned up in a building which was burned down over them at Lonsdale, West Virginia.

The chancellor, upon a reference, decreed that the lands were not susceptible of partition in kind, and ordered a sale of the lands for division of the proceeds. He decreed that the complainant, as the only heir of Emma L. McGhee Henry, the wife, was entitled to one half of the proceeds, and that the defendants, the children and only heirs at law of Robert H. Henry, the husband, were entitled to the other one half. From this decree of the chancellor the defendants appealed to the court of civil appeals. The latter court affirmed the action of the chancellor. The case is now before this court upon a petition for certiorari by the defendants, who claim that each of them is entitled to a one sixth of the entire proceeds and that the complainant is entitled to only a one sixth instead of a one half as decreed by the chancellor.

There is no question in this record but that Robert H. Henry and his wife, by virtue of deeds executed to them, owned the property in question as tenants by the entirety. Neither is there any question as to whether the husband or the wife survived the other; it being stipulated that they died simultaneously in a disaster.

An estate by the entirety is one limited to the lifetime of the husband and wife; indeed, it is one limited to the continuance of the relationship of husband and wife. It is an estate which can be ended by the joint conveyance of husband and wife. It is like a joint estate, in that each is entitled to an equal interest and to take the whole

upon the death of the other. It is unlike a joint estate, in that neither can separate his interest from the other except by the joint action of both or by operation of law. This result is based upon the legal notion of the unity of two persons who are husband and wife. "In point of fact," as stated by Mr. Preston, "and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons."

It follows from what has been said that every other right than that which has been deduced from this legal notion of unity of husband and wife,—that is, on the death of one of them, the entire estate goes to the survivor without the power of alienation or forfeiture of either alone to prejudice the right of the other,—must be treated as applying to them without respect to their social unity; therefore as being held by them in moieties, as other distinct and individual persons would be. In other words, the only limitation of the full property right in the lands conveyed to them jointly is the right of survivorship in the other, and that neither had the power of alienation so as to prejudice the right of the other. —held as tenants in common.

In all other respects they must be treated as holding the property as if they were separate individuals, which under our statutes is as tenants in common, and at common law is equal. Washb. Real Prop. § 406.

While the exact question presented here has never arisen before in this court or before in any other court of which we are advised, the principles above stated were applied in *Hopson v. Fowlkes*, 92 Tenn. 697, 23 L.R.A. 805, 36 Am. St. Rep. 120, 23 S. W. 55. In that case there was a separation of husband and wife by divorce, and the question presented was the effect of the divorce on this estate by the entirety. It was reasoned therein that the relation of husband and wife was terminated by the divorce; that

Entirety—
duration of
estate by.

their interests and duties from thenceforth as related to each other were as though they never existed. The court said, among other things: "It was that circumstance [marriage], and that alone, which gave to them the joint life estate and the right to joint possession. When the very thing which, by operation of law, gave them a joint estate was destroyed, by operation of the same law the joint estate ceased, and they then became vested with an estate per my as tenants in common."

This doctrine was also applied in the case of Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269, wherein it was said: Since "they cannot longer hold by a joint seisin, they must hold by moieties. The law, in destroying the unity of persons between them, has, by necessary consequence, destroyed the unity of seisin in respect to their joint estate; for independent of the matrimonial union this tenancy cannot exist."

Likewise it must be held that the estate is limited by the period of the

matrimonial union, and, when death comes to both at the same instant, it must descend as if husband and wife had been tenants in common.

Descent and distribution—of estate held by entirety.

There is no room in this case for the presumption that one or the other survived. The weight of modern authority is, except where the question is governed by statute, if two or more persons perish in the same disaster and there is no fact or circumstance to prove which survived, there is no presumption whatever on the subject. 8 R. C. L. p. 716, and authorities there cited. As heretofore stated, it is stipulated in this case that the husband and wife died simultaneously.

Evidence—presumption as to survivorship in case several perish in same disaster.

It results, therefore, that there was no error in the decree of the Chancery Court, and the same is in all respects affirmed, and the case will be remanded to the Chancery Court for further proceedings not inconsistent with this opinion.

ANNOTATION.

Effect on joint estate, community estate, or estate by entireties, of death of both tenants in same disaster.

The earliest case in which arose the question of the devolution of a joint estate when both tenants meet their death in a common disaster was Broughton v. Randall (1596) Cro. Eliz. pt. 2, p. 502, 78 Eng. Reprint, 752, Noy, 64, 74 Eng. Reprint, 1032. In that case there was evidence by which the fact of survivorship could be and was determined. It appeared that a father and his son were both hanged from the same cart. They were joint tenants in certain real estate, and the widow of one of them claimed and established her dower right on the ground that her husband lived longer. The two reports differ as to whether it was the father or the son who lived longer, but both agree on the determining fact in the case; namely, that one victim was noticed to move his feet or shake his legs after the other's muscles were stilled in death.

The question was next presented in Bradshaw v. Toulmin (1784) 2 Dick. 633, 21 Eng. Reprint, 417. The report contains no statement of the facts, and merely states that "Lord Thurlow, C., said, if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy, in their respective heirs." It is apparent, however, that there was no evidence as to which of the tenants survived the other.

In the reported case (McGHEE v. HENRY, ante, 103), wherein it appeared that husband and wife, tenants by the entirety, died simultaneously in a fire, it is held that the property descended as if the husband and wife had been tenants in common. No question of survivorship was in issue, it being stipulated that their deaths were simultaneous. (The question as to the disposition of life

insurance which, by the terms of the policy, is dependent upon survivorship, where there is no presumption or proof of survivorship, is the subject of annotation in 5 A.L.R. 797).

It appeared in *Hollister v. Cordero* (1888) 76 Cal. 649, 18 Pac. 855, that husband and wife owned certain community property. Both were murdered at their home, and the house was set afire. On the issue of survivorship the evidence was without conflict. The witnesses testified that they arrived at the scene of the murder on the morning after the killing. The body of the woman lay near the door; the hoops of her crinoline lay over her head, showing that she had been dragged into the house by the feet; there were small foot tracks around a large rock a few yards from the house, and blood on the rock; there was a mark on the ground, indicating that the body of the woman had been dragged from the rock to the house, and there was the blood mark of a small hand on the stone doorstep, showing that she had clutched the doorstep as she was being dragged into the house. The body of the husband lay in the middle of the floor near the fireplace, with several large wounds on it. Both bodies were badly burned. The remains of the servant—a shepherd—were found several days later in the bottom of a stream several rods from the house. Affirming a finding by the trial judge that the husband survived the wife, and hence a judgment for his heirs, the court said: "We cannot agree with counsel for appellant in saying that the evidence 'points clearly and unmistakably to the conclusion that the husband was first

slain within their dwelling on the ranch, and that the wife was afterwards pursued, seized outside of their habitation, murdered, and dragged by the feet over the threshold of the door, and the building then set on fire.' It may be that such was the fact; but there is nothing to show which one expired first. The husband may have been wounded, and left on the floor of the house while they were pursuing the wife, and may have been alive when the latter was dragged into the house. No one can say from the evidence which one died first. Both may have been living while the house was burning. The court below, we think, properly indulged the presumption authorized by subdivision 40, § 1963, of the Code of Civil Procedure, which reads as follows: 'When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules: If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived; if the sexes be the same, then the older.' Both were between the ages of fifteen and sixty. Both perished in the same calamity. The murder, perpetrated as it was, was a calamity within the meaning of § 1693, *supra*,—as much so as would be a shipwreck or a battle; and the court found that there were no particular circumstances from which it could infer who died first. We think the decision of the court upon the issue was right." A. S. M.

THOMAS C. HORNBY, Admr., etc., of George H. Hornby, Deceased,
v.

STATE LIFE INSURANCE COMPANY, Appt.

Nebraska Supreme Court — July 15, 1921.

(— Neb. —, 184 N. W. 84.)

Insurance — blood poisoning — effect of wound.

1. Where the insured sustains an injury through violent, external, and

Headnotes by FLANSBURG, J.

(— *Neb.* —, 184 N. W. 84.)

accidental means, and blood poisoning sets in, finally resulting in death, it is immaterial whether the infection was introduced at the time of the accident, and through the instrument operating to cause the injury, if the infection enters before the wound has become so cured as to prevent exposure to infection, and if the infection comes about naturally, without any apparent human act to produce it.

[See note on this question beginning on page 113.]

Evidence — presumption against suicide.

2. In a suit on an insurance policy, covering death caused by violent, external, and accidental means, where the proof reasonably shows that an injury was produced by violent and external means, and where there is no ground for suspicion that the wound was intentionally inflicted, there is a presumption that the insured did not voluntarily inflict the injury upon himself, and it is presumed that the injury was the result of accident.

[See 14 R. C. L. 1236, 1239.]

Insurance — death result of accident.

3. The blood poisoning resulting in such a wound will be considered as the effect of the injury, and not as an additional or other cause aside from the accident, and the consequent death is held to be the result of the accident

exclusively and independently of other causes.

[See 14 R. C. L. 1245; see also notes in 7 A.L.R. 1133; 14 A.L.R. 788.]

Trial — instruction — consideration of circumstances.

4. An instruction that the jury, in determining the cause of the injury, might consider all the facts and circumstances in evidence, and were entitled to draw reasonable inferences and conclusions from such facts and circumstances, held not erroneous and not misleading so as to authorize the jury to draw illogical inferences.

Evidence — opinion — basis.

5. An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion.

[See 11 R. C. L. 577.]

(Letton, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Douglas County (Estelle, J.) in favor of plaintiff in an action brought to recover an amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. T. W. Blackburn for appellant.
Messrs. Merton L. Corey and Edward F. Dougherty, for appellee:

Where death results from disease which follows as a natural though not as a necessary consequence of an accidental wound, the death is caused by the wound within the requirements of an accident policy which insures against death resulting solely from external, violent, and accidental means.

Rathjen v. Woodmen Acci. Asso. 93 Neb. 629, 141 N. W. 815; Western Commercial Travelers' Asso. v. Smith, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; Caldwell v. Iowa State Traveling Men's Asso. 156 Iowa, 327, 136 N. W. 678; French v. Fidelity & C. Co. 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869; Delaney v. Modern Acci. Club, 121

Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; 1 C. J. 430; Gardner v. United Surety Co. 110 Minn. 291, 26 L.R.A.(N.S.) 1004, 125 N. W. 264.

Proof that an injury was external, violent, and accidental may be furnished by the nature of the injury itself and the surrounding circumstances.

1 C. J. 495; Omberg v. United States Mut. Acci. Asso. 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; Meadows v. Pacific Mut. L. Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; Caldwell v. Iowa State Traveling Men's Asso. 156 Iowa, 327, 136 N. W. 678; Western Travelers' Acci. Asso. v. Munson, 73 Neb. 858, 1 L.R.A.(N.S.) 1068, 103 N. W. 688; Preferred Acci. Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; Peck v. Equitable Acci. Asso. 52 Hun, 255, 5

N. Y. Supp. 215; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Western Travelers' Acci. Asso. v. Holbrook*, 65 Neb. 469, 91 N. W. 276, 94 N. W. 817.

There is a legal presumption that a wound was not intentionally inflicted either by the wounded person himself or by a third person, and this presumption is available as affirmative evidence from which a jury may draw the inference that the wound was caused by accidental means.

Caldwell v. Iowa State Traveling Men's Asso. 156 Iowa, 327, 136 N. W. 678; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 654, 61 N. W. 485; *Connell v. Iowa State Traveling Men's Asso.* 139 Iowa, 444, 116 N. W. 820; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372; *Ætna L. Ins. Co. v. Milward*, 118 Ky. 716, 68 L.R.A. 285, 82 S. W. 364, 4 Ann. Cas. 1092; *Preferred Acci. Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; *Western Travelers' Acci. Asso. v. Munson*, 73 Neb. 858, 1 L.R.A. (N.S.) 1068, 103 N. W. 688; 1 C. J. 495; *Western Travelers' Acci. Asso. v. Holbrook*, 65 Neb. 469, 91 N. W. 276, 94 N. W. 816.

In an action upon a policy of accident insurance, where the question of the cause of the death of the insured is submitted to the jury, a reviewing court will not set aside the verdict unless it is shown to be clearly wrong.

Rathjen v. Woodmen Acci. Asso. 93 Neb. 629, 141 N. W. 815; *Modern Woodman Acci. Asso. v. Shryock*, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; *Western Travelers' Acci. Asso. v. Holbrook*, 65 Neb. 469, 91 N. W. 276, 94 N. W. 816; *Moon v. Order of United Commercial Travelers*, 96 Neb. 65, 52 L.R.A.(N.S.) 1203, 146 N. W. 1037, Ann. Cas. 1916B, 222.

A medical expert who has examined a wounded person may give his opinion, not only as to the nature and effect of the wound, but also as to the manner in which, and the instrument with which, it might have been inflicted, and he may state his opinion as to the cause of his injury or the cause of his death.

Rathjen v. Woodmen Acci. Asso. 93 Neb. 629, 141 N. W. 815; *South Omaha v. Sutcliffe*, 72 Neb. 746, 101 N. W. 997;

State v. Brackey, 175 Iowa, 599, 157 N. W. 198; 5 Enc. Ev. p. 580.

Flansburg, J., delivered the opinion of the court:

This is an action to recover on an insurance policy under a provision allowing double indemnity in case of the death of the insured, resulting from bodily injury, sustained and effected directly through external, violent, and accidental means, exclusively and independently of all other causes. The company had paid the face of the policy, but denied liability for double indemnity, under the provision mentioned. Trial was had to a jury and judgment resulted in favor of the plaintiff. The defendant insurance company appeals.

The testimony upon which plaintiff's case is based stands practically without contradiction, and the defendant contends, under the facts so shown, that the plaintiff is not entitled to recover, and argues that there is no evidence that the insured sustained a bodily injury through external, violent, and accidental means, and that there is no evidence sufficient to show that death was the result of the accidental injury alleged, since death is shown to have been caused by blood poisoning, and since it does not appear that the poisonous infection was introduced into the wound at the time of the initial injury.

The testimony in behalf of the plaintiff shows that insured and his son, in the latter part of October, 1918, were engaged on the farm of the insured near Valentine, Nebraska, in harvesting a crop of beans and that the field was badly infested with sand burs. While the harvesting was going on, as insured's wife says, or shortly after it concluded as insured's son puts it, the insured was noticed by them to be pressing and picking at his thumb. The son testifies that he looked at insured's thumb and there appeared to be a small hole, a place like a thorn leaves after it has gone in, and that just about the little red spot in the cen-

ter the skin had turned red and that a sort of callous had formed about the place. The widow's testimony was that she noticed the insured pressing his thumb and picking at it, as if to remove a sliver.

Insured was engaged in the undertaking business, to which he devoted part of his time each week. Shortly after the time the above observations were made, the insured left for Valentine, and was gone a week, engaged in his undertaking business. The testimony shows that he did not directly-handle bodies, as he had a helper to do that, but that he did do embalming and inject embalming fluids. When he returned to the farm he was still pressing and working with his thumb. At that time it had become slightly swollen, and from then on the testimony fully shows the progress of an infection, resulting in the swelling of his entire arm, and finally in his death, which occurred on November 17 following. The testimony of physicians in behalf of the defendant was to the effect that any such infection, originating underneath the skin, is always due to entrance of germs by means of some injury which has resulted in an opening of the skin, although the opening may be ever so slight, and that in this particular instance the infection must have entered through the opening in the skin of insured's thumb. That death resulted from blood poisoning, so introduced into the physical system of the insured, would seem to be beyond reasonable question.

The testimony, however, in behalf of the defendant, which stands undisputed, is that whenever an infection enters a wound it will manifest itself in a few hours, almost always within twenty-four to thirty-six hours, and never more than three days afterwards. It would seem, then, from the testimony as it stands, that the infection of which the insured died, though perhaps not received at the time of the original injury to his thumb, was at

least received later through that injury and before it had become entirely cured.

It is one of defendant's contentions that the evidence is insufficient to show that the insured met with any injury through external, violent, and accidental means, and that, though there is evidence to show that there was a small abrasion or slight hole in the insured's thumb, there is nothing to show how it was produced, and that its cause must rest entirely in conjecture; and in argument defendant suggests that the insured may have had a pimple or a growth in his thumb resulting from some internal cause, and may have picked at it so as to, himself, have opened the skin and caused a wound through which the poisonous infection entered, and that, since one inference is as likely to be drawn as the other, the plaintiff has not carried the burden of proof, and that the plaintiff's action should, therefore, be dismissed.

The testimony of plaintiff's physicians shows that insured's thumb had been examined, in an endeavor to find some foreign substance that had pierced the skin, but that no thorn, or other foreign substance, was discovered, and that the place where any such foreign matter might have lodged was cut away. One of these physicians testifies that when the skin is pierced by a thorn, or other foreign substance, and the foreign matter, or a part thereof, is left in the skin, a callous will form immediately about it, thus walling off the foreign substance from the physical system; that nature thus provides a protective remedy.

The testimony of insured's son, describing the wound as a place like a thorn leaves after it has gone in, with a little red opening where the skin had been pierced, and with a callous about it, in connection with the circumstance of the insured's being employed at that time, or immediately before, in a field infested with sand burs, and in the light of the actions of the insured in pressing his thumb and picking at it, as

if to remove a sliver, would, to the ordinary mind, it seems to us, reasonably result in the conviction that a thorn, or some such foreign matter, had pierced insured's thumb.

This evidence, furthermore, is aided by the presumption that insured did not voluntarily inflict an injury upon himself. It is plain that the insured's thumb was pierced by some foreign substance. The wound and the nature of the wound are proved. Such an injury could only be the result of violent and external means, and, when the proof goes so far, the presumption is in favor of an accident. Under this condition

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presumption
against suicide.**

of the evidence, aided by such presumption, we are unable to agree with the defendant's argument that the cause of the injury must be left entirely to conjecture, or that the jury was called upon to guess, without evidence or reasonable inference to guide it, between the theory that the wound was caused through accidental means and the theory that the insured had, himself, with some instrument, voluntarily produced it. *Caldwell v. Iowa State Traveling Men's Asso.* 156 Iowa, 327, 136 N. W. 678; *Omberg v. United States Mut. Acci. Asso.* 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; *Peck v. Equitable Acci. Asso.* 52 Hun, 255, 5 N. Y. Supp. 215; 1 C. J. 495, § 278.

Though we do not deem it necessary to go into that question, some of the decisions are to the effect that even where the insured, through a voluntary act, pricks at a pimple and opens the skin, and in doing so unknowingly uses an instrument carrying infection, the resulting blood poisoning will be held to be the result of accident, rather than due to the voluntary act of the insured. *Nax v. Travelers' Ins. Co.* (C. C.) 130 Fed. 985; *Lewis v. Ocean Acci. & G. Corp.* 224 N. Y. 18, 7 A.L.R. 1129, 120 N. E. 56; *Interstate Business Men's Acci. Asso. v. Lewis*, 168 C. C. A. 325, 257 Fed. 241. And see *National Surety*

Co. v. Love, 102 Neb. 633, 168 N. W. 597.

Defendant makes the contention, since it is incumbent on the plaintiff to prove that death resulted from an accident exclusively and independently of all other causes than the accident that, before he can recover in this case, he must show that the poisonous infection was received as a part of the accident and at the time of the original injury.

It is argued that when there is an accidental injury, resulting in an abrasion of the skin, but no infectious matter is injected into the wound through the instrument operating to cause the injury, the injury resulting from the accident becomes complete, and, when an infection enters later through the wound produced, it becomes a new and intervening cause and one other than from the accident itself, and that, when death results in such case from blood poisoning, though, under the general rules of law on proximate cause, the death may be considered to have been caused by the accident, yet, under the specific provisions of the policy, before there can be a liability, the death must result from the accident exclusively and independently of all other causes, and it is argued that the accident is not the sole cause independent of all others, where blood poisoning later sets in and acts as a contributing cause, and that the company is not liable for the results of such several causes taken together.

The question then, as it now occurs, is whether the infection shown in this case, entering a wound which had been previously produced by accidental means, was an additional, contributing, or other cause than the injury produced by the accident itself, or whether it was merely incidental to the wound and a natural consequence therefrom.

The abrasion of the skin caused a necessary exposure to such an infection. It was an exposure that could not be entirely guarded against until the foreign substance

(— Neb. —, 184 N. W. 84.)

was removed, or the wound cured. It was a natural consequence that such an infection might set in, and that the wound, of slight and trivial nature in its beginning, should through the wound produced by the dire results. The infection was not of some specific disease to which there had been a careless or conscious exposure (see *Maryland Casualty Co. v. Spitz*, L.R.A.1918C, 1191, 159 C. C. A. 119, 246 Fed. 817), but of a kind that naturally develops from the wound itself, without any apparent human act to aid it. When the infection enters through the wound produced by the original accidental injury, naturally and before the wound has become so

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cured as to prevent exposure to infection, it seems to us immaterial when

the infection enters. *Rich v. Hartford Acci. & Indemnity Co.* 208 Ill. App. 506; *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; *Bell v. State L. Ins. Co.* 24 Ga. App. 497, 101 S. E. 541. When it appears that the original injury continues to develop in character and grow worse, it is impossible to determine just when an infection has entered it. In the eyes of the ordinary individual it is the original injury, through the process of development, which produces the final result, and the provision of the policy must be interpreted in that light. *Lewis v. Ocean Acci. & G. Corp.* 224 N. Y. 18, 7 A.L.R. 1129, 120 N. E. 56; *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91. There is no specific expression in the policy, as is found in some policies covering death by accident, that, whenever an accidental injury through the complication of infection shall produce death, there shall be no liability on the part of the company, unless the infection is shown to have been introduced at the time of the accident and by the instrument operating to cause the injury; and where the contract does not so provide we

can see no reason for making such an exception.

It is true, as defendant argues, that when insured's son first examined the wound he said that, though there was a small hole, it appeared to have healed over. Just what he meant is somewhat indefinite, but that testimony does not show that the wound had been cured, or that the danger of infection from the original injury had passed. The insured, it was shown, continued to work at his thumb, in an apparent endeavor to remove some object from the wound. It seems quite apparent that the injury had not been cured, but continued from the beginning to be a source of irritation, though it may be true that the surface of the skin over it may have appeared to heal.

We believe that the blood poisoning shown in this case was a natural incident of the wound, and should be considered as an effect of the original —death result of accident. injury, rather than as an independent or additional cause. *Ward v. Aetna L. Ins. Co.* 82 Neb. 499, 118 N. W. 70; *Maloney v. Maryland Casualty Co.* 113 Ark. 174, 167 S. W. 845; *Caldwell v. Iowa State Traveling Men's Asso.* supra; 1 C. J. 430, § 76.

Error is predicated upon the giving of an instruction telling the jury that, "in determining the question as to whether or not the death of said George H. Hornby would have resulted from external, violent, and accidental means exclusively and independently of all other causes, you are entitled to consider all the facts and circumstances which have been introduced in evidence before you, and you are entitled to draw reasonable inferences and conclusions from such facts and circumstances."

The case of *Grosvenor v. Fidelity & C. Co.* 102 Neb. 629, 168 N. W. 596, is relied upon. That was an action upon an insurance policy covering death by accidental means. Insured died from drinking carbolic acid. The lower court directed a verdict for the plaintiff, rely-

ing upon the presumption that death was by accidental means. This court, however, said, in reversing the case, that, since it appeared that insured drank carbolic acid, it was presumed that he did so voluntarily, and that the evidence of suicidal intent so introduced into the case destroyed the force of the presumption of death by accidental means, and held that it was incumbent upon the plaintiff to show that the death was accidental, "by evidence of the actual facts or a situation from which accident is the reasonable inference." In other words, the record must present to the jury such a state of facts that reasonable inferences, showing accident, can be drawn therefrom, and the case cannot be left to the jury for a guess or conjecture in arriving at a conclusion.

In a similar case, *Rawitzer v. Mutual Ben. Health. & Acci. Asso.* 101 Neb. 219, 162 N. W. 687, where death was also the result of carbolic acid poisoning, the court held that the surrounding circumstances were shown to be such as to allow of reasonable inferences as to the cause of death, and that the case was one which should have been submitted to the jury.

As before pointed out, we are of opinion that the condition of the evidence in this case presents a situation where a natural and reasonable inference could be drawn that the injury was accidental, and the matter of passing upon those inferences was for the jury. Since there

was sufficient to take the case to the jury, we believe there was no error in the instruction given. *North Chicago Street R. Co. v. Roderf*, 203 Ill. 413, 67 N. E. 812, 14 Am. Neg. Rep. 281; *Vandalia Coal Co. v. Moore*, 69 Ind. App. 311, 121 N. E. 685; *Wilcox v. Southern R. Co.* 91 S. C. 71, 74 S. E. 122; *Central of Georgia R. Co. v. Ellison*, 199 Ala. 571, 75 So. 159; 38 Cyc. 1673.

It is argued that there is prejudi-

cial error in the admission of testimony. Dr. Jonas, who examined the insured after the poisoning had progressed up the arm, was allowed to testify in behalf of the plaintiff that the poisoning was from external means. We see nothing improper in the admission of that testimony, since the doctor testified that poisoning of that kind in that locality always came from without, through an opening in the skin. On cross-examination he was asked, if septicemia had been in the body prior to the injury, whether or not it might not extend to the surface and manifest itself there, to which the doctor answered that he had only one opinion about this case,—that the poisoning came from without, from "an accident." No motion was made to strike out this answer, but it is now contended that the doctor was thus allowed to express his opinion that the injury was the result of accidental means, and therefore that the testimony was improperly received. Such an opinion as to a **Evidence—
opinion—basis.** conclusion of fact could, of course, not be received as evidence. *Dreher v. Order of United Commercial Travelers*, 173 Wis. 173, 180 N. W. 815. We take it that the doctor meant "injury" instead of "accident," and was not attempting to give evidence as to how the injury had been caused, and we cannot see that the answer would mislead the jury.

The further objection is made that the petition did not state a cause of action, since the name of the beneficiary under the policy was not disclosed. The action was brought by the administrator, and upon a policy, the provisions of which were fully known to the defendant. The trial court allowed an amendment of the pleadings during the trial, and the name of the beneficiary was inserted. We do not see that the defendant could have been taken by surprise by this amendment, or prejudiced in any way.

The case is therefore affirmed.

Letton, J., dissenting:

It seems to me the majority opinion rests upon an inference based upon an inference. First, the inference that a sand bur, or other substance, penetrated the thumb. Second, the inference that a malig-

nant germ entered the body through a perforation of the skin thus created. In my opinion the evidence does not justify the recovery.

Petition for rehearing denied October 11, 1921.

ANNOTATION.

Accident insurance: infection through a wound previously received.

As indicated by the title, cases where the wound and infection were practically simultaneous are not within the scope of this annotation.

Generally, as to provision in accident policy exempting from, or limiting liability, where death or injury results from poison, see annotation in 2 A.L.R. 61.

In actions on policies insuring against injury or death resulting solely, exclusively, or independently from accidental means, it is held that when infection enters through a wound, produced by an accidental injury, naturally and before the wound had become so healed or cured as to prevent exposure to infection, it is immaterial whether the infection enters at the exact time of the injury or subsequently, the wound under such circumstances being considered the proximate cause of the injury. *Rich v. Hartford Acci. & Indemnity Co.* (1917) 208 Ill. App. 506; *Delaney v. Modern Acci. Club* (1903) 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; *HORNBY v. STATE L. INS. CO.* (reported herewith) ante, 106; *Cary v. Preferred Acci. Ins. Co.* (1906) 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484.

In *Delaney v. Modern Acci. Club* (1903) 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91, it was held that death caused by blood poisoning received through a slight wound on the hand resulted solely from an accidental injury within the meaning of an accident policy, whether the poison was introduced into the wound by the instrument which inflicted it, or from some other source. The court said: "Their contention is that the bacilli causing the diseased condition of the

hand, and the subsequent death, may have been, and probably were, introduced into the blood of the hand through the cut, but after it was received; and they depend on evidence of the physicians to the effect that the bacilli causing the result known as 'blood poisoning' may easily be introduced and are often introduced into the blood through such a wound from a great variety of possible sources, such as washing the wound with contaminated water, or the bandaging of it with contaminated bandages, or in other like methods. It seems to us, however, that it is wholly immaterial when or how the specific bacilli which caused the disease known as 'blood poisoning,' which resulted in the death of Delaney, were introduced into the wound, whether at the time it was inflicted or subsequently. Blood poisoning is a disease, just as many other pathological conditions of the human system, resulting from the introduction therein of other specific bacilli, are diseases. It occurs to us that it is, indeed, wholly immaterial whether the pathological condition which results in death is due to bacilli or not. The simple question is whether the death of Delaney resulted, through natural causes, without the interposition of a new and independent cause, from the cut on his finger. Disease brought about as the result of a wound, even though not the necessary or probable result, yet if it is the natural result of the wound, and not of an independent cause, is properly attributed to the wound; and death resulting from the disease is a death resulting from the wound, even though the wound was not, in its nature, mortal or even dangerous.

Even though the wound results in disease and death, through the negligence of the injured person in failing to take ordinary and reasonable precautions to avoid the possible consequences, the death is the result of the wound."

And in *French v. Fidelity & C. Co.* (1908) 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869, where infection apparently entered subsequent to the time an accidental abrasion was sustained, it was held that the wound produced by the accident was the sole and proximate cause of death; that, had it not been for the accidental injury, there would have been no cause for infection; that, but for the abrasion, the disease germs could not have entered; and that the insured's death was the result of bodily injuries sustained through external, violent, and accidental means, independently of all other causes.

And in *Ballagh v. Interstate Business Men's Acci. Asso.* (1915) 176 Iowa, 110, L.R.A.1917A, 1050, 155 N. W. 241, where the insured accidentally sustained an abrasion of the skin of his leg and blood poisoning occurred shortly afterwards, it was held that the infection of the wound with streptococci, causing the blood poisoning, did not prevent the wound from being the direct cause of death without intervening cause within the meaning of an accident insurance policy, the court relying on *Delaney v. Modern Acci. Club* (Iowa) *supra*, and quoting from that part of the opinion wherein it was stated that it was wholly immaterial when or how the specific bacilli which caused the blood poisoning were introduced into the wound, whether at the time it was inflicted or subsequently; and it was also held that full liability on the accident policy in suit could not be avoided by the fact that the policy provided that there shall be no liability for death resulting from infection, except that whenever as a direct result of an injury the skin has been abraded, and there shall be introduced into the system through said abrasion, and by the very instrument causing the abrasion, any specific bacteria which shall produce blood poisoning,

the insurer's liability shall be only a small percentage of the face of the policy. The court said: "We have already expressed our agreement with the precedents which hold that in such cases the original injury is the sole proximate cause, and that the death in such case is not a 'death resulting from infection.'"

And in *Cary v. Preferred Acci. Ins. Co.* (1916) 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484, the jury were held warranted in finding that the insured's death resulted "proximately and solely from bodily injury caused solely by external, violent, and accidental means" within the meaning of an accident policy, where there was evidence, in effect, that the insured fell and sustained an abrasion of the skin on his leg, and that the wound appeared red and inflamed the second day after the injury, and that several days thereafter he was found to be suffering from blood poisoning. The court said: "This finding is assailed upon the ground that it is impeached by the undisputed facts established by the evidence and the findings in the special verdict. These findings are, in effect, that bacteria, causing septicemia, or blood poisoning, entered Mr. Cary's system through the abrasion of the skin caused by Mr. Cary's accidental fall, and that his death was immediately caused by the septicemia produced from the infection by such bacteria. This contention involves the inquiry as to what is meant, under the law of insurance, by 'the proximate cause' as applied and used by the parties to the contract. The term 'proximate cause' as here employed must be understood to have been used by the parties to the contract in its common and accepted meaning, as adopted and approved in the law under like conditions and circumstances. While attempts to define it are numerous, and the phraseology employed in these attempts differs in the use of terms, they all aim to express a certain and definite meaning, which has been observed and applied on many occasions in the decisions of this court. The proximate

relation of cause and effect, establishing legal responsibility, implies that the result produced had its inception in some responsible agency. The difficulty lies in ascertaining the agency to which the result is legally attributable. As stated by this court, the proximate cause 'is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury, or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result.' *Deisenrieter v. Kraus-Merkel Malting Co.* (1897) 97 Wis. 288, 72 N. W. 735. To determine it we must ascertain the cause which, from its inception, acts in a continuous sequence, and produces the injury as a natural and probable result. It cannot be ascertained by any specific and direct test, but must be determined as any ultimate fact is inferred from evidentiary facts. If different agencies share in producing a result, it then becomes necessary to determine which is the responsible and efficient cause from which the injury proceeds, by tracing it to the active agency from whose inception the injury naturally follows, either directly or through other causes set in action by it. . . . The facts upon which the jury based their finding of the special verdict that Mr. Cary's death resulted proximately and solely from bodily injury, caused solely by external, violent, and accidental means, are, in effect, that he accidentally fell and sustained an abrasion of the skin on his right leg, which wound appeared somewhat red and inflamed on the second day; that on the eighth day a physician first saw the wound and then found Mr. Cary to be suffering from blood poisoning; and that two days thereafter he died. The evidence also shows that the abrasion of the skin furnished the portal of entrance through which bacterial infection entered Mr. Cary's system

and caused the septicemia which was the immediate cause of his death. It is urged that, unless the evidence establishes the fact that the bacterial infection occurred at the time of the bodily injury by the fall, it cannot be found that his death was proximately and solely caused by the accident. As above stated, responsible causation, as applied in the law, is not dependent on time, distance, or a mere succession of events. If an injury is inflicted by an event, and it is found that it has set in motion all the succeeding agencies sharing in the result, then such event, as the efficient producing cause of the injury, is held to be the proximate cause of the injury. Under such circumstances, the causal connection in the chain of events is shown by the dependence of each event for its action on the one preceding it, which thus forms a continuous whole, with a proximate relationship established between the event which acted first through those naturally succeeding and the point of injury. Apply this test to the facts before us, and it is shown that no such bacterial infection would, in all probability, have occurred had there been no abrasion of the skin. This leads to the inevitable inference that the bacterial infection and the resultant septicemia were, in the natural course of events, dependent upon and set in motion by the abrasion of the skin caused by the fall. The entry of bacteria into the system cannot be considered as an independent cause and as having intervened between the accidental fall and the death, because of the fact that it was conditioned on the existence of the abrasion of the skin, and was wholly incidental to, and set in motion by, it, thus making it one of the events in the chain of causation. We are satisfied that the jury were well warranted in their conclusion that Mr. Cary's death resulted proximately and solely from his accidental falling on the floor."

And in the Cary Case it was held that a provision in the accident policy, exempting the insurer from liability for death resulting from poison or

infection, did not apply; since the infection, under the facts of that case, was not the proximate cause of the death, although it might not have entered the abrasion at the time the abrasion was sustained.

In *Rich v. Hartford Acci. & Indemnity Co.* (1917) 208 Ill. App. 506, where the court, at the instance of both parties, instructed the jury that the insurer was liable only if the insured inoculated himself with the noxious germs causing his death at the same time he sustained an accidental cut, and that if the germs entered through the cut at a later time there was no liability, it was held that there was evidence sufficient to support the jury's finding that the germs entered at the same time the wound was sustained, and that a directed verdict for the defendant was properly refused. The court in this case stated that, if the question was treated as a matter of law, it was immaterial when the germs entered the wound, if it actually entered and blood poisoning resulted.

In *National Life & Acci. Ins. Co. v. Singleton* (1915) 193 Ala. 84, 69 So. 80, where there was testimony that the insured cut his lip while shaving, and that it became infected, and that death resulted, the evidence was held sufficient to carry to the jury the question whether death resulted from or was caused by the cut, the court holding that, if death did result from the cutting of his lip while shaving, the loss was within the protection of the policy, which provided against bodily injuries effected through external, violent, and accidental means. It does not clearly appear in this case whether the infection entered at the time

of the cut or thereafter, and there is no intimation that this would vary the conclusion.

In *Bell v. State L. Ins. Co.* (1921) 151 Ga. 57, 105 S. E. 846, reversing (1919) 24 Ga. App. 497, 101 S. E. 541, where double indemnity was sought on a life policy, providing therefor in case it was shown that death resulted from bodily injury sustained and effected directly through external, violent, and accidental means, a petition alleging that the insured was a physician, and while attending a patient suffering from erysipelas, in adjusting his glasses, he accidentally caused a scratch or abrasion of the skin, which became infected with the germs of erysipelas, was held to justify the construction that the abrasion occurred at some time between the first and last visits to the patient, and not necessarily in his presence, and that so construed the allegation would be sustained by evidence showing that the abrasion occurred in the physician's office, which was located in a city adjoining the place where the patient lived.

And in the *Bell Case*, where there was evidence authorizing a finding that the infection from which the insured, a physician, died, originated in an abrasion on his ear, which was caused by a scratch in adjusting his glasses while attending a patient suffering from erysipelas, it was held a question for the jury whether the infection occurred as a consequence of the insured's voluntary act in subjecting the abrasion to such a serious and dangerous exposure as a visit to a patient suffering from erysipelas.

J. T. W.

JAY BRINK et al.

v.

BENJAMIN A. SHEPARD, Appt.

Michigan Supreme Court — October 3, 1921.

(— Mich. —, 184 N. W. 404.)

Injunction — against maintenance of tuberculosis hospital.

1. Injunction lies against the maintenance of a tuberculosis hospital

in a strictly residential district of a municipal corporation, where the disease is declared by statute to be communicable.

[See note on this question beginning on page 122.]

Estoppel — against enjoining hospital — permitting expenditures.

2 The owners of neighboring property are not estopped by permitting one to expend money in fitting up a tuber-

culosis hospital, to apply for an injunction against his conducting the institution as such, if they were assured by him that the institution was not intended for such use.

APPEAL by defendant from a decree of the Circuit Court for Kalamazoo County in Chancery (Barton, J.) in favor of plaintiffs in a suit brought to enjoin defendant from conducting a sanatorium for the treatment of tuberculosis in a residential district of a city. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Weston & Fox and Harry C. Howard for appellant.

Mr. Marvin J. Schaberg, for appellees:

Plaintiffs are entitled to the relief prayed for.

Barth v. Christian Psychopathic Hospital Asso. 196 Mich. 642, 163 N. W. 62; 29 Cyc. 1175; Joyce, Nuisances, 52; Saier v. Joy, 198 Mich. 295, L.R.A. 1918A, 825, 164 N. W. 507; Birchard v. Board of Health, 204 Mich. 284, 4 A.L.R. 990, 169 N. W. 901; Everett v. Paschall, 61 Wash. 47, 31 L.R.A. (N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128; Stotler v. Rochelle, 83 Kan. 86, 29 L.R.A. (N.S.) 49, 109 Pac. 788; Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 64 L.R.A. 215, 69 N. E. 748.

Fellows, J., delivered the opinion of the court:

Defendant, a physician, is conducting a tuberculosis sanatorium in what is called the "Inkster home-stand" in the city of Kalamazoo. The property is part of an addition known as "Inkster park addition." Plaintiffs, thirteen in number, are residents of the vicinity, and were such prior to the establishment of the sanatorium, the home of one being within 70 feet of the sanatorium, of two others less than 150 feet, and of the others being of varying distances. The oral testimony and the photographs introduced in evidence establish beyond doubt that the locality is a strictly residential district, although doubtless not as thickly settled as some of the other parts of Kalamazoo. The relief sought and granted by the trial

court was injunctive, restraining defendant from conducting a sanatorium for the treatment of tuberculosis in this residential district.

Unless these plaintiffs have lost their rights by laches, we are persuaded that they are entitled to the relief prayed under the former holdings of this court. Barth v. Christian Psychopathic Hospital Asso. 196 Mich. 642, 163 N. W. 62; Saier v. Joy, 198 Mich. 295, L.R.A. 1918A, 825, 164 N. W. 507; Birchard v. Board of Health, 204 Mich. 284, 4 A.L.R. 990, 169 N. W. 901. In the Barth Case an injunction was decreed restraining the erection and maintenance of a psychopathic hospital in a strictly residential district. In the Saier Case a like decree was entered against the maintenance of an undertaking establishment, and in the Birchard Case a similar decree was entered against the maintenance of a detention hospital for infectious diseases. In the first of these cases the trial judge dismissed the bill without taking the testimony; but in the others the testimony was quite persuasive, as it is in the instant case, that the institution, if properly conducted, would cause no actual danger to near-by residents, that there was little or no danger of communicating disease such a distance as intervened between the plaintiffs' residences and the defendant's institution, but, as in those cases, the fear of the disease being communicated is present. In each of these

cases we recognized the claim that the institutions were not nuisances per se, but in each of these cases we held that they might become nuisances as to private individuals by their location in strictly residential districts, and in the Birchard Case, referring to the earlier cases, we said: "We held in these cases that, while the institutions involved were not nuisances per se, they became such by reason of their location in a residential district. We recognized that there might be no actual danger if properly conducted, but that their maintenance in close proximity to the home would create such dread and fear in the mind of the normal person as would destroy the comfort, the well-being, and the property rights of the plaintiffs,—depressing the mind and lowering the vitality of the normal person, rendering one more susceptible to disease, and reducing the value of the property so situated; and in each of the cases this court decreed injunctive relief."

There is testimony in the record that property in this locality has increased in value, and one of defendant's witnesses, who is interested in the sale of lots in this addition, expresses the view that the establishment of the sanatorium has materially increased the value of surrounding property, but the undisputed testimony establishes that housing conditions in the city were abnormal at the time the case was heard, and that improved real estate commanded exceedingly high prices. The weight of the testimony clearly establishes that property values in this locality are at least 25 per cent lower with the sanatorium there than they would be without it. The maintenance of the sanatorium would cause the plaintiffs a distinct, definite financial loss.

The record discloses that in this state tuberculosis stands at the head of diseases in the toll it annually collects. The record likewise discloses the herculean efforts of the medical profession and the anti-tu-

berculosis societies to alleviate this condition. Circulars have been sent out, advice has been given, preventive measures have been advocated and adopted, and much has been accomplished. The public has been advised of its ravages and has a well-grounded fear of its effect. It is a communicable disease as matter of fact, and is so declared to be by § 5099, Comp. Laws 1915. The maintenance of a hospital for the treatment of this communicable disease in a strictly residential district cannot fail to deprive residents of near-by homes of the comfort, well-being, and enjoyment of their homes to which they are entitled, and this, coupled with their financial loss, justifies an appeal to a court of equity for relief. Upon principle the instant case is controlled by our former decisions above cited, and we need not consider the sustaining authorities from other states, some of which are cited in the opinion in the Birchard Case.

**Injunction—
against
maintenance of
tuberculosis
hospital.**

In the brief of defendant's counsel and upon the oral argument much stress was laid upon the fact that this proceeding was not launched until something like a year after the defendant had commenced the operation of the hospital, and the doctrine of laches is invoked to defeat the relief. Defendant claims to have invested considerable money in remodeling, repairing, and fitting the house for use for a tuberculosis hospital, and claims to have obligated himself for the payment of a very considerable additional sum, and he insists that all this was done with the full knowledge of the plaintiffs and their attorney that the premises were to be used for a tuberculosis hospital, and that it is therefore unconscionable and inequitable to now prevent such use of the property by injunction. This claim is met by the plaintiffs with testimony tending to show that not only were they without knowledge that the premises were to be used

and were being used for a tuberculosis hospital, but that defendant specifically assured some of them and their attorney that he would not use the premises as a tuberculosis hospital, and that it was but a few days before this bill was filed that they had any definite proof that it was so used. Upon this disputed question of fact the trial judge made the following finding: "The court finds as a fact that the doctor, when he made the investment,—bought this property,—had notice of the fact that it was in a residential district, that he made the investment with his eyes open to the fact, and that the institution he was about to establish was established as a tubercular hospital for the treatment of tubercular patients would be a detriment to the community. He gave the residents to understand that it was not what might technically be called a tubercular institution; and that impression remained until he made the formal statement February 24, 1920, at which time it became apparent that he could no longer dodge the issue that such was the purpose of the institution."

A reading of the somewhat conflicting testimony in this record is convincing that the trial judge, who heard and saw the witnesses, correctly disposed of this question of fact. We are satisfied that at the very inception of defendant's project he was informed by plaintiff's

attorney that, if he intended to maintain a tuberculosis hospital, plaintiffs would apply for an injunction; and that he assured the attorney he would not conduct a tuberculosis hospital; one plaintiff he assured he would treat only cases of slight chest ailments; to another he said he should not conduct a tuberculosis sanatorium; and in a carefully worded announcement in the press he gave the public and plaintiffs to understand that the institution would not be a tuberculosis hospital as such an institution is generally understood to be. On February 24, 1920, he made application to the city commission for a sewer on the street, and therein stated that he was conducting a tuberculosis sanatorium. This was the first definite, positive proof plaintiffs had of the character of the institution. Shortly thereafter this bill was filed. Under these circumstances defendant cannot invoke the doctrine of an equitable estoppel.

**Estoppel—
against enjoin-
ing hospital—
permitting
expenditures.**

The decree will be affirmed, with costs of this court to plaintiffs.

NOTE.

For pesthouse or contagious-disease hospital as a nuisance, see annotation following *COOK v. FALL RIVER*, post, 122.

ALBION C. COOK et al., Appts.,

v.

CITY OF FALL RIVER.

Massachusetts Supreme Judicial Court—May 31, 1921.

(— Mass. —, 131 N. E. 346.)

Injunction — against tuberculosis hospital.

1. Injunction will not lie against the construction by a municipal corporation under legislative command of a tuberculosis hospital in the vicinity of residences because it will affect the comfortable enjoyment of the neighboring property and may depreciate its market value, where it is found that there is no valid reason to fear contagion if the hospital is well conducted.

[See note on this question beginning on page 122.]

Appeal — admission of evidence — nonprejudicial error.

2. There is no reversible error in admitting, in a suit to enjoin the erection of a tuberculosis hospital, a report of experts merely recommending the site chosen for the hospital, or the written approval of the site by the state board of health.

Witness — competency — discretion of master.

3. The determination of the competency of an expert witness rests largely in the discretion of the master before whom the testimony is offered.

[See 11 R. C. L. 574.]

APPEAL by plaintiffs from a decree of the Superior Court for Bristol County (Thayer, J.) confirming the report of a master, and dismissing a bill filed to enjoin the erection of a tuberculosis hospital as a nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John W. Cummings, Charles R. Cummings, and John B. Cummings, for appellants:

The facts found by the master entitle the plaintiffs to a decree.

Everett v. Paschall, 61 Wash. 47, 31 L.R.A.(N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128; Cherry v. Williams, 147 N. C. 452, 125 Am. St. Rep. 566, 61 S. E. 267, 15 Ann. Cas. 715; Grover v. Zook, 44 Wash. 494, 7 L.R.A.(N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192.

Injury to comfortable enjoyment or beneficial use of property, and not depreciation in value, is the real test.

Stotler v. Rochelle, 83 Kan. 86, 29 L.R.A.(N.S.) 49, 109 Pac. 788; Baltimore v. Fairfield Improv. Co. 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; Walker v. Brewster, L. R. 5 Eq. 25, 37 L. J. Ch. N. S. 33, 17 L. T. N. S. 135, 16 Week. Rep. 59; Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272; Densmore v. Evergreen Camp, 61 Wash. 230, 31 L.R.A.(N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206; Goodrich v. Starrett, 108 Wash. 437, 184 Pac. 220; Giles v. Rawlings, 148 Ga. 575, 97 S. E. 521; Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519; Stevens v. Rockport Granite Co. 216 Mass. 486, 104 N. E. 371, Ann. Cas. 1915B, 1054; Manning v. Bruce, 186 Mass. 282, 71 N. E. 537.

Even if the board had power to approve the site, its approval is not conclusive against the plaintiffs.

Metropolitan Asylum Dist. v. Hill, L. R. 6 App. Cas. 193, 50 L. J. Q. B. N. S. 353, 44 L. T. N. S. 653, 29 Week. Rep. 617, 22 Eng. Rul. Cas. 80.

The danger to the health of the plaintiffs and their families is also an adequate reason for enjoining the erection of the hospital building.

Board of Health v. Tupper, 210 Mass. 378, 96 N. E. 1096.

Mr. David R. Radovsky, for respondent:

In fixing on the location of the hospital, the trustees were exercising the discretion which the legislature required them to exercise as public officers. Their decision on the question, being quasi judicial or quasi legislative, was final, and could not be reviewed by the court.

Barry v. Smith, 191 Mass. 78, 5 L.R.A.(N.S.) 1028, 77 N. E. 1099, 6 Ann. Cas. 817; High, Inj. 4th ed. § 1240; Manning v. Bruce, 186 Mass. 282, 71 N. E. 537.

Depreciation in the value of land is not considered as ground for an injunction.

Barry v. Smith, 191 Mass. 89, 5 L.R.A.(N.S.) 1028, 77 N. E. 1099, 6 Ann. Cas. 817.

One cannot assume in advance that a hospital will be a nuisance.

Manning v. Bruce, *supra*.

The determination of witness Borden's qualification as an expert was discretionary with the master.

22 C. J. 526, § 610; Jordan v. Adams Gaslight Co. 281 Mass. 186, 120 N. E. 654.

De Courcy, J., delivered the opinion of the court:

This is a bill in equity to enjoin the erection of a tuberculosis hospital on the ground that it will constitute a nuisance. The case was sent to a master, and he found the following salient facts: By virtue of Stat. 1912, chap. 151, it became the duty of the city of Fall River to establish and maintain within its limits a hospital for persons having

tuberculosis; and it was subject to a penalty of not more than \$500 for each refusal or neglect to do so when requested by the state board of health. The city had been using the Bay street hospital for tuberculosis patients since 1910. The state board of health, and its successor, the state department of health, disapproved of this building as a permanent structure on account of its inadequacy as to size, location, and facilities; from time to time requested the city to erect and maintain a suitable hospital for the care and treatment of tuberculosis patients; and on March 25, 1915, threatened to take action through the attorney general if the city should fail to do so by the 1st of September. The location of the required hospital excited a great deal of public attention, and engaged the active interests of representatives of various organizations of the city, in addition to the board of health, and the board of trustees of hospitals for the city of Fall River, established under Stat. 1913, chap. 259. The board of hospital trustees called in three eminent experts to advise them as to the proper site; and after viewing various locations, these unanimously reported that the Highland site (the one in question) was the best. This location was approved also by the local board of health and the state department of health.

The locus is portion of a 40-acre tract owned by the city, and known as the Poor Farm land. Here are maintained the City General Hospital, built in 1895, and a temporary hospital for contagious diseases. Tuberculosis patients were treated there in shacks and tents until 1910. In February, 1920, the city turned over to the board of hospital trustees approximately 15 acres of this tract. The trustees are having plans prepared for the erection of a tuberculosis hospital for the accommodation of from 150 to 200 patients, at an estimated cost of \$400,000 to \$450,000.

The plaintiffs reside in the Highland district, but the land of only

two of them is immediately adjacent to the hospital location. They are strongly opposed to having in the vicinity of their homes a hospital which will bring together for treatment many patients who are suffering from this infectious disease, because it will affect comfortable enjoyment of their property, and may depreciate its market value. The master finds, however, that there is very little danger of infection, provided the hospital is well managed, and that there will be no substantial depreciation of land values after the hospital has been in existence for a time. Practically the same conditions prevail as to all the sites considered, and the local health authorities consider this site more suitable from a public health point of view than any other that is available. The controlling fact is that the master is "unable to find that the erection and maintenance of a well equipped and controlled tuberculosis municipal hospital will inevitably create a nuisance." He finds: "Experience has demonstrated that there is no real danger from a well-conducted hospital or sanatorium and there is no valid reason for fear in regard to it. Whatever danger of infection there may be will be no greater to the neighborhood in the Highland section than there would be wherever said hospital would be located, and, if there is any danger to be expected from patients traversing the streets in traveling to and from the hospital, that danger would be the same wherever the hospital would be located."

On these facts the judge could not enjoin the defendant without virtually nullifying the statute which requires the city to maintain a tuberculosis hospital within its limits, as the objections raised by these petitioners apply with at least equal force to every other available site. Hospitals for contagious diseases must be established and maintained for the protection of the general public; and it is not to be assumed in advance that such a hospital, well

equipped and managed under the supervision of public health boards, will be a nuisance. *Manning v. Bruce*, 186 Mass. 282, 71 N. E. 537. In *Anonymous*, 3 Atk. 750, 751, 26 Eng. Reprint, 1230, on a motion for an injunction to stay the building of a house to inoculate for the small-pox, it was said by Lord Hardwicke: "The fears of mankind, though they may be reasonable ones, will not create a nuisance."

Without going so far as to say that purely mental discomfort cannot constitute a nuisance, certainly the law will not enjoin the erection of a municipal hospital on facts such as are disclosed by this record, in

**Injunction—
against
tuberculosis
hospital.**

order to protect the plaintiffs from dangers which are found to be unreal.

Frost v. King Edward VII. Welsh Nat. Memorial Asso. [1918] 2 Ch. 180; *Board of Health v. North American Home*, 77 N. J. Eq. 464, 78 Atl. 677. Depreciation of the market value of the petitioners' land, assuming it to be proved, would not be decisive in their favor. *Barry v. Smith*, 191 Mass. 78, 89, 15 L.R.A. (N.S.) 1028, 77 N. E. 1099, 6 Ann. Cas. 817. In *Everett v. Paschall*, 61 Wash. 47, 31 L.R.A. (N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128, relied on by the petitioners, the defendant maintained in his cottage, adjoining the lots of the plaintiffs, a private sanatorium for the treatment of tuberculosis patients; and the injunction was granted, partly at least, under the influence of a statute of that state which broadened the definition of "nuisance." There is nothing in that case, nor in *Cherry v. Williams*, 147 N. C. 452, 125 Am. St. Rep. 566, 61 S. E. 267, 15 Ann. Cas. 715, to

support a claim that a public hospital for the treatment of tuberculosis is a nuisance per se. In view of the findings of the master we should have to go substantially to this extreme in order to say that the trial judge was not warranted in dismissing the bill for an injunction.

There were certain exceptions to the master's report relating to the admission of evidence. We find no reversible error in the admission of the report made by Dr. Woodward and two other experts to the trustees of hospitals, which merely recommended the Highland site as the most desirable one among those specified. The same is true of the written approval of this site

**Appeal—
admission of
evidence—non-
prejudicial
error.**

by the state board of health, which was required by statute, and the records of their meeting at which the approval was voted. Stat. 1912, chap. 151. The master, in his discretion, admitted this evidence for a limited purpose; that of showing why this site was selected, and probably to meet any insinuation of lack of good faith or sound discretion on the part of the trustees. The other exceptions relate to the qualification of Mr. Borden as an expert, and the admissibility of his testimony. The determination of his competency rested largely in the discretion of the master. It seems to have been exercised properly. *Jordan v. Adams Gaslight Co.* 231 Mass. 186, 120 N. E. 654. We find no substantial error in the particular questions objected to, in view of his testimony as a whole.

**Witness—
competency—
discretion of
master.**

Decree affirmed, with costs.

ANNOTATION.

Pesthouse or contagious disease hospital as nuisance.

This annotation is supplementary to that in 4 A.L.R., beginning at page 995, discussing the decisions rendered since the preparation of that note.

In *COOK v. FALL RIVER* (reported herewith) ante, 119, it is held that the erection by a city of a tuberculosis hospital will not be enjoined at the

instance of the owners of property immediately adjacent to the proposed location of the hospital. The decision is rested on the ground that there is no presumption that the hospital will constitute a nuisance.

In *Le Bourgeois v. New Orleans* (1919) 145 La. 274, 82 So. 268, the court likewise refused to enjoin the erection of a municipal tuberculosis hospital, but rested its holding chiefly on the location of the property of the complaining taxpayers, saying: "Two of them have moved away from the neighborhood, and may, therefore, be considered to be out of the case in so far as suing in their individual capacity. Another of them lives 600 feet from the square in question. He also may be considered to be practically out of the case, so far as the question of nuisance is concerned; for to hold that a tuberculosis hospital cannot be located within 600 feet of any residence would be practically to hold that it cannot be located at all in a city or town, and, we imagine, no one would so contend. The fourth plaintiff's residence does not face the square in question, but is on the near corner of one of the adjoining squares. If it were proved with certainty that this hospital would endanger the health of this plaintiff or his family, perhaps a case might be presented for judicial interference. But the very opposite is conclusively shown by the evidence, which is all one way, to the effect that a well-kept tuberculosis hospital is not a menace to the health of the people living in its vicinity; and the presumption is that this hospital will be well kept. The square in question, or proposed hospital site, is 346 by 326 feet, and is vacant. And so are two of the squares adjoining it, the one in back, and the one to the right,

if we assume it to face Carrollton avenue, and so is the territory further on in that direction, a distance of several squares except for some saw-mills. Carrollton avenue is a wide street, with two roadways and a neutral ground. On the square on the other side of it, opposite the hospital site, the constructions on that side facing the avenue are two cottages, one gasolene station, and a vulcanizing plant. The square to the left, on the other side of Ulloa street, has, on the side facing Ulloa street, only two structures, one of which, we understand, is a sort of factory, and the other a residence. This residence faces Carrollton, but is near the corner of Ulloa. One of the cornering squares on the other side of Carrollton avenue is occupied by a baseball park; one of the cornering squares on the other side of Ulloa street is vacant. If on such a spot as this a hospital could not be located, where else could one be located, except entirely outside of city limits? And to locate it out of city limits would rob it of the greater part of its usefulness. Our conclusion is that the suit is groundless in so far as it is sought to be founded on the apprehended injurious character of the proposed hospital."

But in *BRINK v. SHEPARD* (reported herewith) ante, 116, the court, upon the authority of *Birchard v. Board of Health* (1918) 204 Mich. 284, 4 A.L.R. 990, 169 N. W. 901, to which the earlier annotation was appended, upheld an injunction, granted in a suit by residents in the vicinity, restraining the maintenance in a strictly residential district of a private sanatorium for the treatment of tuberculosis, the plea of laches being held, in the circumstances, not to have been well founded. W. A. S.

FRED A. VAUGHAN, Secretary of State, Appt.,
v.
NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY.

Kentucky Court of Appeals — June 24, 1921.

(192 Ky. 137, 232 S. W. 411.)

Corporation — domestication of foreign corporation.

1. A foreign railroad does not become a domestic corporation, so as to be subject to the payment of the tax upon capital stock required by statute to be paid as a condition to incorporation, when it complies with constitutional and statutory provisions declaring that it shall not own real estate or exercise the power of eminent domain within the state until it shall have become a body corporate in accordance with the local laws which require the filing of its charter and the acceptance of the Constitution.

[See note on this question beginning on page 130.]

— creation of separate corporations.

2. There cannot be a creation of a single corporation by two or more states or sovereignties.

[See 7 R. C. L. 89.]

— creation of separate corporations.

3. The creation by two or more states of corporations having the same name, same powers, the same management, and the same principal office creates a separate and distinct corporation in each state; not a single corporation in all the states.

[See 7 R. C. L. 89.]

— how intent ascertained.

4. Whether a state providing for domesticating a foreign corporation intends to create a new corporation, or only confer certain powers on the

foreign one, is to be gathered from the language employed in the constitutional or statutory provisions prescribing the method.

— what must appear to indicate intent.

5. Before an intention will be inferred on the part of the legislature to create anew a foreign corporation for the domestication of which it provides, such intention must appear from the language employed, as well as the intent to confer upon it all the powers usually exercised by similar domestic corporations, and to reserve to the state power to exercise the authority over it that is usually exercised over its originally created and wholly domestic ones.

APPEAL by defendant from a judgment of the Circuit Court for Franklin County granting a writ of mandamus requiring him to accept and file plaintiff's articles of incorporation, without requiring payment of an organization tax. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles I. Dawson, Attorney General, for appellant:

When a foreign railroad corporation organizes under § 763 of Kentucky Statutes, it loses its identity as a foreign corporation, so far as Kentucky is concerned, and becomes solely a Kentucky corporation and must pay its organization tax as any other Kentucky corporation is required to do, and this requirement and exaction on the part of the state may not be defeated by a plea that it interferes with interstate commerce.

Plummer v. Chesapeake & O. R. Co. 143 Ky. 102, 33 L.R.A.(N.S.) 362, 136 S. W. 162; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; Southern R. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Messrs. Helm Bruce and Bruce & Bullitt, for appellee:

A foreign corporation which merely becomes "domesticated" or "naturalized" in Kentucky is not required

to pay an organization tax under Kentucky Statutes, § 4225.

Cincinnati, N. O. & T. P. R. Co. v. Com. 119 Ky. 196, 83 S. W. 562.

Compliance by a foreign railroad company with § 765 of Kentucky Statutes is but a "domestication" or "naturalization" of the foreign railroad company, and not the creation of an original corporation.

Plummer v. Chesapeake & O. R. Co. 143 Ky. 102, 83 L.R.A.(N.S.) 362, 136 S. W. 162.

A construction of a statute which would make it unconstitutional, or even raise a serious doubt as to its constitutionality, will be avoided if possible.

United States ex rel. Atty. Gen. v. Delaware & H. R. Co. 213 U. S. 366, 53 L. ed. 835, 29 Sup. Ct. Rep. 527; Union P. R. Co. v. Laramie Stock Yards Co. 231 U. S. 190, 58 L. ed. 179, 34 Sup. Ct. Rep. 101.

If the statutes involved, when properly construed, require a foreign railroad corporation, engaged in interstate commerce, to pay to the state of Kentucky a tax upon its entire capital stock as a condition to purchasing property there, necessary for the carrying on of its interstate business, then they are contrary both to the commerce clause and to the due process clause of the Federal Constitution.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Thomas, J., delivered the opinion of the court:

The sole question involved on this appeal is whether or not a foreign railroad corporation, which was incorporated in the state creating it long before the adoption of our present Constitution, and which from about that time owned and operated a portion of one of its railroad lines located in this state, and has also long since complied with §§ 570 and 841 of our Statutes, entitling it to "possess, control, maintain, or operate" a railroad in this state, must pay the organization tax of $\frac{1}{10}$ of 1 per centum of its capital stock, as provided in § 4225 of the Statutes, upon becoming naturalized, domesticated, or incorporated in the manner provided by § 765 of the Statutes.

The question arises in this way: The appellee and plaintiff below, Nashville, Chattanooga, & St. Louis Railway, is a corporation created under the laws of the state of Tennessee about December 11, 1848. It soon thereafter constructed, or became the owner of, a line of railroad running from Nashville, Tennessee, to Hickman, Fulton county, Kentucky, with something like 10 miles of railway trackage in this state. It has since acquired other lines running into different states, and has been engaged since that time as an interstate carrier of passengers and freight. About 1896 it leased a line of railroad running from Paducah, Kentucky, via Jackson, Tennessee, to Memphis, Tennessee, and has since then operated that line as lessee thereof. In the meantime it accepted the provisions of the Constitution of this state as provided by § 570 of the Statutes, and it also complied with the provisions of § 841 of same by filing in the office of the secretary of state, at Frankfort, and in the office of the railroad commission of this state, a duly certified copy of its charter and articles of incorporation, as required by that section, and thereby, as provided therein, became "a corporation, citizen, and resident of this state," and it received from the secretary of state a certificate of such incorporation. A short while before the filing of this action by it against the appellant and defendant below, Fred A. Vaughan, secretary of state for the commonwealth, it concluded to become domesticated or incorporated in this state pursuant to the provisions of § 765 of the Statutes, so as to enable it to own in fee-simple title land in the state of Kentucky necessary for its purposes as a common carrier, and to enable it to exercise the right of eminent domain so as to acquire land for that purpose, and it prepared the necessary papers and documents in the manner specified in that section, and in § 763, which is referred to therein, and offered to file them with the defendant as secretary of

state, and he declined to accept them or to file them in his office, unless plaintiff would first pay the organization tax required by § 4225, *supra*, which, since the capital stock of plaintiff was \$16,000,000, amounted to \$16,000. Plaintiff declined to pay that tax, and filed this action against defendant in the Franklin circuit court, praying that a writ of mandamus issue against him, commanding him to file the executed writings presented to him, and to give it an attested copy thereof to be filed in the office of the railroad commission, and to do so without exacting or demanding of it any part of the \$16,000 organization tax. The petition alleged in due form all the facts hereinbefore recited, and filed copies of its Tennessee charter with the papers presented to the secretary of state. A demurrer filed to the petition was overruled, and, defendant declining to answer, the court issued the mandatory writ prayed for, and to reverse that judgment he has appealed.

Before attempting a discussion of the merits of the question involved, it may be stated that the regularity of the steps taken by plaintiff to become incorporated in the manner provided by § 765 is not attacked, since it is conceded by counsel for defendant that the provisions of that section, as well as the one referred to therein (763), were strictly followed.

Section 211 of the Constitution says: "No railroad corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business in this state, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth."

Section 765 of the Statutes provides that: "No railroad corporation, organized or created by or under the laws of any other state,

shall have the right to condemn land for, or acquire the right of way for, or purchase or hold land for its depots, tracks, or other purposes, until it shall have first filed in the office of the secretary of state of this state, in the manner provided in the first article of this chapter, its acceptance of the Constitution of this state, and shall have become organized as a corporation under the laws of this state, which it may do by filing in the offices of the secretary of state and the railroad commission articles of incorporation in the manner and form provided in § 763 of this article."

And § 763, referred to therein, provides the method by which a newly created railroad corporation may be organized in this state by any number of persons, not less than seven, executing original articles of incorporation specifying and enumerating the things therein required, and proven by the affidavits of two of the named directors therein, and that such articles shall then be filed in the office of secretary of state and in the office of the railroad commission, and, when a certificate of the facts shall be issued by the officers before whom the articles are required to be filed, the persons executing them "shall be a body corporate by the name specified in the articles."

Section 841 of the statutes provides how a foreign corporation may become a domestic one for the purpose of possessing, controlling, maintaining, or operating a railway, or any part thereof, in this state, which it may do "by filing in the office of the secretary of state, and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association, or corporation shall at once become and be a corporation, citizen and resident of this state. The secretary of state shall issue to such corpora-

tion a certificate of such incorporation."

Section 4225 of the Statutes, which is the one that provides for the collection of the organization tax demanded by the defendant, says: "Every corporation which may be incorporated by or under the laws of this state, having a capital stock divided into shares, shall pay into the state treasury one tenth of one per centum upon the amount of capital stock which such corporation is authorized to have, and a like tax upon any subsequent increase thereof. Such tax shall be due and payable on the incorporation of the company and on the increase of the capital stock thereof, and no such corporation shall have or exercise any corporate powers until the tax shall have been paid, and upon payment it shall file a statement thereof with the secretary of state."

Counsel for plaintiff, both in the petition and in brief filed on this appeal, take the position that: (a) It was the intention of the legislature in enacting the last-inserted section to demand and require the payment of the organization tax, therein provided for, only from corporations created in this state for the first time, and that it was not intended that such organization tax should be collected from a prior created foreign corporation, which still desired to maintain its foreign identity, when it sought to become domesticated in the manner pointed out in § 765, supra, in order that it may become vested with the powers set forth in § 211 of the Constitution; and that (b) if those sections are susceptible to the construction that it was the intention of the legislature to impose the organization tax upon foreign railroad companies seeking to become domesticated in the manner pointed out, then such an intention and purpose were beyond its power to enact, and that § 4225, in so far as it provides for such a purpose, if it does do so, is unconstitutional and void, as im-

posing an unlawful burden upon interstate commerce.

The attorney general, in behalf of the secretary of state, contests the correctness of both of these propositions. In support of the second one—(b)—counsel for plaintiff cites and relies on the case of *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; but the question there involved, as we interpret that opinion, was the domestication of the foreign corporation in a manner similar to that provided by § 841, supra, of our Statutes, in order to permit it to transact business in the domesticating state. No question relating to the conferring of authority on the foreign corporation to own real property within the borders of that state, or conferring upon it power to exercise the right of eminent domain therein, was involved in that case. Whether a different rule would prevail if those questions had been involved we will not attempt to discuss or determine, since we have arrived at the conclusion that contention (a) of plaintiff's counsel is correct, which disposes of the necessity of determining the other one.

Strictly speaking, there is no such thing known to the law as the creation of a single corporation by two or more states or sovereignties. 14a C. J. 1227-1230.

But, while this is true, different states may, and sometimes

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creation in
different
sovereignties.

do, create under their own laws corporations having the same name, the same powers, the same management, and with their principal offices in one of the creating states, but, as stated in the text of the work just referred to: "The result of such legislation is in law to create a separate and distinct corporation in each state not a

—creation of
separate
corporations.

single corporation in all the states, 'but two [or more] corporations of the same name having a different pater- nity,' each of which is, for purposes of jurisdiction and in other cases in

which residence or citizenship is material, a citizen and a resident or inhabitant of the state by or under the laws of which it was created."

Whether the method provided by the domesticating state, to which the applying corporation is a foreign

—how intent ascertained. one, was intended to create a new corporation, or

only to confer certain powers upon the foreign corporation, is a question of intention to be gathered from the language employed in the constitutional or statutory provisions prescribing the method. *C. J. supra*, 1332, and 8 *Fletcher, Cyc. Corp.* § 5709, pp. 9304-9309. From the same sources, and from other authorities which might be cited, we learn that before such an intention will be inferred it must appear from the language employed that the purpose was to create the corporation

—what must appear to indicate intent. anew, and to confer upon it all the powers usually

exercised by similar domestic corporations, and to reserve to the state the power to exercise such authority over the corporation as is usually exercised over its originally created and wholly domestic ones. "The mere grant of privileges or powers to an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." *C. J. supra*, 1232; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, and numerous other cases cited in note 34 to the above text.

Section 211 of the Constitution only purports to confer two rights: one to own real estate in this state, and the other the power to acquire it by condemnation through the exercise of the right of eminent domain; and it is only upon foreign railroad corporations that even those two rights may be conferred by that section. Both it and § 765 of the Statutes recognize the continued existence of the foreign railroad corporation after their provisions have been complied with by it.

There is no intimation in either of them that, after being clothed with the power and authority attempted to be conferred, the creature or entity thereby becoming possessed of them has been made a new creature by being born again. The section of the Constitution withholds from such foreign corporations either of the two rights referred to, "until it shall have become a body corporate," etc. Logically there would no longer be a foreign corporation to which the pronoun "it" could apply, if the domesticating method extinguished the foreign corporation by creating an entirely new one under the laws of this state. Likewise § 765 of the Statutes, in providing the method by which the same rights may be conferred upon a foreign railroad corporation, withholds them "until it" (not individuals proposing to form a new corporation) shall do the things prescribed in the section. Indeed, if the contention of the secretary of state and of his counsel, the attorney general, be true, i. e., that it was the intention of § 211 of the Constitution and of § 765 of the Statutes to create outright a new corporation in Kentucky, and that none but domestically created corporations can exercise the rights proposed to be conferred by those sections, then there would have been no use for their enactment, since in that case it would have been sufficient to say, both in the Constitution and the Statutes, that no railroad corporation "shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other purposes," unless it be one created exclusively under the laws of this state. All the references to a foreign corporation in each of the sections, and to what "it" must do, and to the powers which "it" will receive thereafter, can have no meaning unless it was the intention to recognize "it" as a continuing foreign corporation.

It must, furthermore, not be overlooked that the sections of the Constitution and of the Statutes now

under consideration propose only to confer upon the corporation the limited powers above referred to. They do not pretend to confer all of the corporate powers usually given to and exercised by newly created corporations. If the effect of a compliance with the sections of the Constitution and Statutes under consideration is complete domestication for all purposes, so as to convert the foreign corporation into a newly created Kentucky one, the result would be that the foreign corporation would become citizenized here so as to deprive it of the status of a foreign corporation, and bar its right to invoke the jurisdiction of Federal courts upon the ground of diverse citizenship.

In the case of Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, the Supreme Court of the United States had before it facts substantially the same as we have here, and it held that the foreign corporation did not extinguish its foreign identity, or lose its status as a citizen of the foreign state (Indiana), by becoming incorporated in Kentucky so as to enable it to purchase and own real estate here for railroad purposes, and to exercise in this state the right to acquire such property by condemnation under the power of eminent domain. In that case the Louisville, New Albany, & Chicago Railway Company had been incorporated and organized under the laws of the state of Indiana, and in 1880 the legislature of this state passed an act incorporating it in this state as a Kentucky corporation, which method of incorporating companies in this state, by special act of the legislature, was both legal and common at that time, but has since been abolished by our present Constitution. The special act incorporating that company in this state conferred upon it, not only the powers above enumerated, but all the powers incident to a corporation, and which are possessed by all other corporations created under the laws of this

state. The company accepted its Kentucky charter, and thereafter, on a number of occasions and in a number of transactions, described itself as a Kentucky corporation. It filed a suit in the circuit court of the United States for the district of Kentucky, the defendants in which were citizens of Kentucky. They contested the jurisdiction of the court upon the ground that the plaintiff therein was a citizen of Kentucky, and could not invoke the jurisdiction of the Federal court on the ground of a diversity of citizenship. The Supreme Court in rejecting that contention said: "As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States. *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 663, 42 L. ed. 315, 316, 17 Sup. Ct. Rep. 925; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 106, 42 L. ed. 964, 966, 18 Sup. Ct. Rep. 526."

If the baptismal ceremony administered to the foreign corporation in that case did not have the effect of extinguishing it and making of it an entirely new creature, so as to destroy its foreign identity in Kentucky, it is difficult to see how the administration of our present provided ceremony would have that effect, since it goes no further toward manifesting such an intention on the part of the legislature than did the domesticating acts in the case referred to; and manifestly the or-

ganization tax demanded of plaintiff is not required by § 4225 of the Statutes of any other corporations than those created (sometimes referred to as "born") here, and those terms can have no application to a corporation which still has its former foreign existence.

This court in the case of *Cincinnati, N. O. & T. P. R. Co. v. Com.* 119 Ky. 196, 83 S. W. 562, held that the organization tax sought to be collected in the instant case as imposed by the section of the Statutes, *supra*, could not be exacted of a foreign railroad company which had complied with the provisions of § 841, although the section says that a foreign corporation complying with its terms "shall at once become and be a corporation, citizen, and resident of this state."

In the case of *Plummer v. Chesapeake & O. R. Co.* 143 Ky. 102, 33 L.R.A.(N.S.) 362, 136 S. W. 162, there were presented to this court questions relating to the domesticating of foreign railroad corporations pursuant to the method provided by, and for the purposes contained in, § 765, *supra*, of the Statutes, and it was expressly held in that case that the process of domestication provided by the two sections (765 and 841) were for distinct and separate purposes, but, as said in the opinion, so we may say now: "Why this distinction was made it is not essential, in the consideration of the question before us, to inquire."

In that opinion this court discussed the legal effect of a compliance by a foreign corporation with those two sections of the Statutes, the one making it "a corporation, citizen, and resident of this state,"

and the other making it one "organized as a corporation under the laws of this state," and then said: "It would therefore seem that, so far as our laws can affect the question, the corporation that has complied with § 841 is to the same extent a Kentucky corporation as is a foreign corporation that complies with § 765. The only difference between the two sections is in the means or method by which the foreign corporation is converted into or becomes a Kentucky corporation. . . . So far as the principle involved is concerned, the requirements imposed by one section cannot be distinguished from those imposed by the other."

It naturally follows that if a compliance with § 841 would not domesticate the complying corporation, so as to destroy its foreign identity and to render it amenable to the payment of the organization tax required by § 4225, *supra*, as held in the case of *Cincinnati, N. O. & T. P. R. Co. v. Com.* *supra*, a compliance with the provisions of § 765, *supra*, would also not have that effect.

Upon the whole case we conclude that it was not the intention of the legislature, in enacting § 4225 of the Statutes, to include therein foreign corporations seeking domestication under the provisions of § 765, and that plaintiff cannot be required to pay the organization tax demanded of it by the defendant. He should have accepted and filed the papers tendered him without the payment of that tax, and the judgment appealed from, conforming to these views, is affirmed.

—domestication
of foreign
corporation.

ANNOTATION.

Effect of domestication of foreign corporations.

- I. Distinction between licensing to do domestic business and domesticating foreign corporation, 131.
- II. Distinction between creation of domestic corporation united to, and domestication of, foreign corporation, 133.
- III. Mutuality of action by state and corporation to effect domestication of foreign body, 134.
- IV. Residence of domesticated foreign corporation, 135.
- V. Citizenship of domesticated foreign corporation, 135.

VI. Amenability of domesticated foreign corporation to legal process of domestic courts, 140.

VII. Local taxation of domesticated foreign corporation, 141.

VIII. Conclusion, 142.

1. Distinction between licensing to do domestic business and domesticating foreign corporation.

Every corporation, unless the law or its charter forbids, may be permitted to transact corporate business beyond the limits of its own state. *Canada Southern R. Co. v. Gebhard* (1883) 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Galveston, H. & S. A. R. Co. v. Gonzales* (1894) 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401.

A mere grant of privileges or powers to a foreign corporation, without more, does not make it a domestic one. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094. Thus, the mere consent of a state to the extension within its territory of the line of a foreign railroad corporation, and to the carrying on of the business of such railroad within the state, does not make the railroad company a domestic corporation. *Ibid.*

The domestication of a foreign corporation does not result from compliance with the Texas statute that provides, in substance, that foreign corporations shall obtain from the secretary of state permission to do business, and shall designate a chief office within the state, and shall then have and enjoy all the rights and privileges conferred by law upon domestic corporations. *Coca Cola Co. v. Allison* (1908) 52 Tex. Civ. App. 54, 113 S. W. 308.

It, confessedly, is not easy to differentiate a legislative purpose to create a new domestic corporation, owing its life to the statute creating it, out of a foreign corporation, from a legislative intent to enable a corporation of another state to function within the domestic territory. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094. According to this case, the language of the statute designed to effect the domestication of a foreign corpora-

tion must be such as to imply the creation or adoption of the corporation in a form that clothes the state with powers usually exercised by it over its own domestic corporations, and that requires the foreign body to render to that state the allegiance which a corporation owes to its creator.

This proposition has been reaffirmed, and may be asserted to be the law of the United States Supreme Court. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (1899) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817.

The consolidation of a foreign and a domestic corporation effected in strict compliance with statutes of the domestic state conferring upon the combined organization the status, rights, powers, and privileges of a domestic corporation, and subjecting it to all the duties and liabilities of such a corporation, makes the consolidated body, to all intents and for all purposes, a domestic corporation, governed by and subject to the laws of the domestic state. *State ex rel. Leese v. Chicago, B. & Q. R. Co.* (1888) 25 Neb. 156, 2 L.R.A. 564, 41 N. W. 125.

A statute naming a railroad corporation chartered by the legislature of an adjoining state, and authorizing it to extend and construct its line between designated points through the territory of the enacting state, and providing that, if such company should avail itself of the privilege thereby granted, it should, as to all its rights, franchises, property, powers, duties, and obligations within the state, be subject to all the provisions of the laws thereof, was construed to create a domestic corporation of such railroad. *Goshorn v. Ohio County* (1865) 1 W. Va. 308.

The purchase by a foreign railroad company of the railroad and franchises of a domestic one, and its acquisition by statute of authority to have, use, and enjoy them and the rights, powers, and privileges of its

vendor, subject to all the latter's duties and liabilities, make it, in respect of what it has thus acquired, a domestic corporation in its vendor's home state. *Clark v. Barnard* (1883) 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

Where the legislation of a state permits the sale of the property and franchises of one of its railroads, and provides that upon its taking place the corporation shall forthwith be dissolved and the purchaser shall immediately become a new corporation of the state, which shall succeed to all the franchises, rights, and privileges, and perform all the duties that would or should have been performed by the first corporation. But for such sale and the conveyance pursuant to it, a foreign corporation which acquires a domestic railroad by purchase at a mortgage foreclosure sale, and takes possession of and operates the purchased road within the state, becomes ipso facto a domestic corporation of the state as fully and as completely as was the defunct corporation. *Carolina Coal & Ice Co. v. Southern R. Co.* (1907) 144 N. C. 732, 57 S. E. 444.

Under the Kentucky Constitution (§ 211), providing that a foreign railway corporation shall not have the right of eminent domain or power to acquire a right of way or real estate for depot or other uses in the state, until it shall have become a body corporate pursuant to and in accord with the laws of Kentucky, and the statutes (Ky. Stat. § 765) prescribing the method for a foreign railroad corporation to become a body corporate in Kentucky, it is a condition precedent to the right of a foreign railroad company to purchase or own any domestic railroad, and to function as such in Kentucky, that it shall comply with the statutory requirements and be domesticated. *Plummer v. Chesapeake & O. R. Co.* (1911) 143 Ky. 102, 33 L.R.A. (N.S.) 362, 136 S. W. 162.

A foreign corporation becoming domesticated in Tennessee by complying with the laws thereof requiring the filing and registration of a

copy of its foreign charter, and acquiring thereby the entry to the state courts and subjection to the local jurisdiction, supervision, and control of the state as fully as corporations created originally under the laws thereof, nevertheless becomes a domestic corporation only as respects its property, operations, and conduct within the state, and differs essentially from corporations of other states with distinct local incorporators, domestic directors, local stock issues, and other earmarks of domesticity in states where they have sought and obtained additional charters. *Adams v. Chattanooga Co.* (1913) 128 Tenn. 505, 161 S. W. 1131.

It was said by one Federal judge that he had no doubt but that a foreign railroad corporation would become a domestic one by complying with legislation enacted by the domestic state, declaring that a foreign railway company, by building its road within the state and filing its articles of incorporation with the secretary of state, should be a domestic corporation with respect of all its transactions within such state. *Stout v. Sioux City & P. R. Co.* (1881) 3 McCrary, 1, 8 Fed. 794.

A foreign corporation which, pursuant to the statutes of Tennessee, filed and registered in that state a copy of its foreign charter, and thereby became domesticated, was held by the state supreme court, notwithstanding a legislative pronouncement that such corporations should be "deemed and taken to be corporations of this state and . . . may sue and be sued in the courts of this state and shall be subject to the jurisdiction of the state as fully as if created under the laws of Tennessee," did not become a new and distinct entity, but only a domestic corporation quoad hoc any property and acts within the jurisdiction of the state, and, therefore, the state courts could not and would not take jurisdiction of a suit in equity by stockholders to dissolve such corporation and distribute its property and assets. *Adams v. Chattanooga Co.* (1913) 128 Tenn. 505, 161 S. W. 1131.

The effect of a domestication of a foreign railroad corporation entering and operating its line within the state, by legislation appropriate for such a result, has been held to make the corporation competent to receive aid by means of bonds issued by local counties under authority of statutes authorizing counties to subscribe to the capital stock of domestic railroads, and aid them in that manner, and hence to make bonds so issued and delivered valid public obligations according to their tenor and effect. *Goshorn v. Ohio County* (1865) 1 W. Va. 308.

II. Distinction between creation of domestic corporation united to, and domestication of, foreign corporation.

As a rule, when a railroad of one state is authorized by the laws of another state to extend its line into and operate in the latter, and exercises the privilege of doing so, it really becomes in the new territory, not a domesticated foreign corporation, but a new and distinct domestic body corporate. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094.

Two states have no power to join in legislation as an amalgamated sovereignty, to create a single body corporate constituting a single legal entity of both, rather than a distinct corporation of each or of one of them. *Quincy R. Bridge Co. v. Adams County* (1878) 88 Ill. 615; *Newport & C. Bridge Co. v. Woolley* (1880) 78 Ky. 523.

When two states enact legislation similar in verbiage, creating a corporation to build and operate a bridge across a river which forms their common boundary, having the same name, like powers and duties, and the same persons as directors and administrative officers, they each call into existence a separate body corporate in their respective territories, and neither domesticates a corporation of the other. *Newport & C. Bridge Co. v. Woolley* (Ky.) *supra*.

If, pursuant to legislation in similar terms enacted by two states, two distinct and separate railroad corpo-

rations, one created by one state and the other by the other state, are merged and consolidated into a continuous line under the same management, with the same stockholders, each constituent corporation will remain a domestic one, and retain its separate identity in the state of its origin, and will continue to be, as before the union, a foreign corporation in the other state. *Muller v. Dows* (1877) 94 U. S. 444, 24 L. ed. 207; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (1890) 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Racine & M. R. Co. v. Farmers' Loan & T. Co.* (1868) 49 Ill. 331, 95 Am. Dec. 595; *State v. Northern C. R. Co.* (1862) 18 Md. 213; *Baltimore & O. R. Co. v. Glenn* (1868) 28 Md. 287, 92 Am. Dec. 688; *Chicago & N. W. R. Co. v. Auditor General* (1884) 53 Mich. 79, 18 N. W. 586; *Rece v. Newport News & M. Valley Co.* (1889) 32 W. Va. 164, 3 L.R.A. 572, 9 S. E. 212.

A railroad company chartered by, and operating in, two or more states, is regarded as a domestic corporation in each for all local government purposes apart from matters under the exclusive jurisdiction of Congress. *Stone v. Farmers' Loan & T. Co.* (1886) 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Graham v. Boston, H. & E. R. Co.* (1886) 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009.

Whenever a corporation of one state becomes by legislative sanction also a corporation of another state, either by consolidation or otherwise, the acts it afterwards does in the latter state are done as a domestic and not as a foreign corporation. *Missouri P. R. Co. v. Meeh* (1895) 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753.

The effect of a statute declaring that the lessees, their associates, successors, and assigns, of a foreign railroad company operating in the enacting state, shall be a railroad corporation in that state, is to make it a domestic corporation there. *Indianapolis & St. L. R. Co. v. Vance* (1878) 96 U. S. 450, 24 L. ed. 752.

A statute which authorizes and empowers a foreign corporation to create and establish in the enacting state, under the control of local directors, one or more branch departments, whenever a stated sum as capital stock for the same shall be subscribed and paid, or satisfactorily secured by local citizens, and which declares that, when any such department or departments shall thus be created and established, such corporation shall be regarded as a domestic body and be entitled to exercise and enjoy all the rights, privileges, exemptions, and immunities of similar domestic corporations, has the legal effect of creating a domestic corporation, the same in name and possessing the same franchises as the foreign one, and of calling into being a distinct legal entity. And regardless of whatever may have been the legislative purpose in enacting such statute, it did not either merely license the foreign corporation to do business in the state, or domesticate it, but resulted in making a new corporation, so that there was one in each state and each one was confined to the territory of the sovereign from which it derived its existence. *Grangers' Life & Health Ins. Co. v. Kamper* (1882) 73 Ala. 325.

III. Mutuality of action by state and corporation to effect domestication of foreign body.

The power of a state legislature by appropriate legislation to authorize a foreign corporation, which does or desires to do business within its borders, to become a domestic corporation upon prescribed conditions in respect of its property, conduct, duties, and liabilities within the domestic territory, is generally conceded and nowhere denied. *Ohio & M. R. Co. v. Wheeler* (1862) 1 Black (U. S.) 286, 17 L. ed. 130; *Baltimore & O. R. Co. v. Harris* (1871) 12 Wall. (U. S.) 65, 20 L. ed. 354; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (1899) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Carolina Coal & Ice Co. v. Southern R. Co.* (1907) 144 N. C. 732, 57 S. E. 444; *Stonega Coke &*

Coal Co. v. Southern Steel Co. (1910) 123 Tenn. 428, 31 L.R.A.(N.S.) 278, 131 S. W. 988. And see 14a C. J. p. 1227, § 3934, and cases cited.

A state may in this manner adopt a foreign corporation and make it a domestic one, instead of giving it a mere license to do domestic business. And in giving the corporation a domestic status, the state may, at will, either invest it with the same franchises and powers, and impose the same duties, that it enjoyed or was bound to discharge in the state of its origin, or may confer upon it greater or less powers and privileges and subject it to more or fewer obligations. *Com. v. United Cigarette Mach. Co.* (1916) 119 Va. 447, 89 S. E. 935.

And a state legislature may not only license a foreign corporation to enter and carry on its corporate business within the borders of the state, but may, in addition, without going so far as to domesticate it, grant it powers usually reserved to domestic corporations exclusively; for example, the power to exercise the right of eminent domain. *New York, N. H. & H. R. Co. v. Welsh* (1894) 143 N. Y. 411, 42 Am. St. Rep. 734, 38 N. E. 378.

A foreign corporation which becomes a domestic one by legislative sanction derives all its powers to act as a body corporate, in the state of its adoption, from the local laws. *Missouri P. R. Co. v. Meeh* (1895) 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753.

The United States Supreme Court has declared that a foreign corporation adopted and domesticated by law in another state, and there invested with full corporate powers, does not become a corporation of the latter state until it does some act signifying its acceptance of the domestic status and its purpose to be governed by the domesticating statute. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094.

When a foreign railroad corporation accepts a legislative grant of permission to be domesticated and to exercise its functions in another state, it may be treated by the latter

state as a domestic corporation. *St. Louis & S. F. R. Co. v. James* (1896) 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

A state which created a corporation has no ground for revoking its charter in the fact that it accepts incorporation from another state. *Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co.* (1868) 58 Pa. 26.

IV. Residence of domesticated foreign corporation.

As a general rule, a corporation has its legal existence in the state which created it, and is incapable of passing beyond its boundaries. *Lafayette Ins. Co. v. French* (1856) 18 How. (U. S.) 404, 15 L. ed. 451; *Canada Southern R. Co. v. Gebhard* (1883) 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363.

It cannot change its residence, but must dwell and have its sole legal home in the state where it was chartered. *Ex parte Schollenberger* (1878) 96 U. S. 369, 24 L. ed. 853.

It may be allowed to transact its business outside of the home state, but it does not, by doing so, acquire a residence elsewhere. *Germania F. Ins. Co. v. Francis* (1871) 11 Wall. (U. S.) 210, 20 L. ed. 77; *Baltimore & O. R. Co. v. Koontz* (1881) 104 U. S. 5, 26 L. ed. 643; *New York, L. E. & W. R. Co. v. Estill* (1893) 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; *Galveston, H. & S. A. R. Co. v. Gonzales* (1894) 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co.* (1868) 58 Pa. 26.

A statute requiring a foreign corporation which desires to carry on business in the state to designate a place within the state as its chief office therein, and to procure a permit from the secretary of state, does not give a corporation of another state which complies with its terms a local domicile as a domestic corporation. *Coca Cola Co. v. Allison* (1908) 52 Tex. Civ. App. 54, 113 S. W. 308.

This is the established rule, but nevertheless, to a limited extent and for certain purposes, a foreign corporation domesticated in another state

may have a residence in such state, regardless of its technical citizenship and domicile in the state of its origin. *Gaunt v. Nemours Trading Corp.* (1921) 194 App. Div. 668, 186 N. Y. Supp. 92; *Bernhardt v. Brown* (1896) 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 527, 715, rehearing denied in (1896) 119 N. C. 506, 36 L.R.A. 407, 26 S. E. 162; *Young v. South Tredegar Iron Co.* (1886) 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Stonega Coke & Coal Co. v. Southern Steel Co.* (1910) 123 Tenn. 428, 31 L.R.A. (N.S.) 278, 131 S. W. 988; *Com. v. United Cigarette Mach. Co.* (1916) 119 Va. 447, 89 S. E. 985.

Legislation in North Carolina, clearly intended to create a new domestic corporation rather than to license an existing foreign one to do business within the state, has been held to domesticate a foreign body corporate which unreservedly accepts and acts under it, and to make such body, for all purposes, a resident domiciled in that state. *Carolina Coal & Ice Co. v. Southern R. Co.* (1907) 144 N. C. 732, 57 S. E. 444.

V. Citizenship of domesticated foreign corporation.

The doctrine of the Supreme Court of the United States, early adopted and consistently adhered to, that every corporation conclusively is presumed to be a citizen of the state which created it, in every litigation to which it is a party and for all purposes of jurisdiction of the Federal courts on the ground of diverse citizenship, has given rise to the general rule in the Federal courts, to which they admit no exception, that the domestication, as distinguished from a new incorporation, of a foreign corporation, does not affect its status as a citizen of the state in which it originated.

The statement finds ample support in the following cases: *Ohio & M. R. Co. v. Wheeler* (1862) 1 Black (U. S.) 286, 17 L. ed. 130; *St. Louis v. Wiggins Ferry Co.* (1871) 11 Wall. (U. S.) 423, 20 L. ed. 192; *Chicago & N. W. R. Co. v. Whitton* (1872) 13 Wall. (U. S.) 270, 20 L. ed. 571;

Muller v. Dows (1877) 94 U. S. 444, 24 L. ed. 207; *Ex parte Schollenberger* (1878) 96 U. S. 369, 24 L. ed. 853; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *St. Louis & S. F. R. Co. v. James* (1896) 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (1899) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Southern R. Co. v. Allison* (1903) 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; *Patch v. Wabash R. Co.* (1907) 207 U. S. 277, 52 L. ed. 204, 28 Sup. Ct. Rep. 80, 12 Ann. Cas. 518; *Missouri P. R. Co. v. Castle* (1912) 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606; *Missouri P. R. Co. v. Meeh* (1895) 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753; *Walters v. Chicago, B. & Q. R. Co.* (1900) 104 Fed. 377; *Re Standard Oak Veneer Co.* (1909) 173 Fed. 103.

This doctrine has been accepted in certain states. *Calvert v. Southern R. Co.* (1902) 64 S. C. 139, 41 S. E. 963; *Wilson v. Southern R. Co.* (1902) 64 S. C. 162, 36 S. E. 701, 41 S. E. 971, overruling *Mathis v. Southern R. Co.* (1898) 53 S. C. 246, 31 S. E. 240; *Rece v. Newport News & M. Valley Co.* (1889) 32 W. Va. 164, 3 L.R.A. 572, 9 S. E. 212.

It is impossible for a corporation to cast off its allegiance to the sovereign which gave it a charter. *Com. ex rel. Atty. Gen. v. Pittsburg & C. R. Co.* (1868) 58 Pa. 26.

Of the above-cited cases, some may profitably be referred to more in detail.

For example: A foreign railroad corporation may acquire control and possession of other railroads in a neighboring state and operate them under contracts with their owners, which nevertheless continue their corporate existences and maintain their separate organizations; it may, too, comply with all the laws of such neighboring state, and, by virtue of so complying, be subject to the supervision and governmental control of such state, to the full extent and in the same way that a domestic corpora-

tion of that state would be; yet, it does not lose its identity as a corporation and a citizen of the state of its origin, nor become a corporation of the neighboring state so as to affect the jurisdiction of the courts over a litigation between it and a citizen of its original state. *St. Louis & S. F. R. Co. v. James* (1896) 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

In *Missouri P. R. Co. v. Castle* (1912) 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606, the defendant railroad was sued by one of its employees, a citizen of Nebraska, for damages for personal injuries received by its negligence, a cause of action given by a statute of that state. The plaintiff alleged in his complaint, and the defendant admitted in its answer, that the railroad company was a corporation organized under and existing by virtue of the laws of Missouri, and a citizen of that state. Because of these averments and admissions in the pleadings the court refused to assent to the validity of the defendant's contention on argument that, although it had been originally created a Missouri corporation, it had, before suit, become in law and in fact a domestic corporation of Nebraska in virtue of the requirements of the Constitution and statutes of that state, with which it had complied, and consequently that the parties were both citizens of Nebraska so that the diverse citizenship necessary to give the Federal courts jurisdiction of the cause was wanting.

The legislation of Tennessee concerning foreign corporations established and doing business in that state, investing them with sundry powers, rights, and privileges theretofore exclusively belonging to domestic corporations, was held not so far to domesticate them as to entitle a foreign corporation, which had complied with the terms of, and accepted, such legislation, to a preference given by statute to citizens and domestic corporations of the state, who might be creditors of insolvent local debtors, in the distribution of assets as provided by a special statute in that

behalf. *Re Standard Oak Veneer Co.* (1909) 173 Fed. 103. The court in this case, after referring to this legislation as having at the outset provided that a foreign corporation that should comply with the initial act should be deemed and taken to be a domestic corporation, subject to the jurisdiction of the state courts, capable of suing and suable therein like domestic corporations, and, later, that such a foreign corporation should, after its compliance with the terms of the pertinent statutes, "be to all intents and purposes a domestic corporation," with a status in the courts "just as though it were created under the laws of this state," cited a later amendatory statute (Acts 1895, p. 123, chap. 81) which omitted the previous provision that a foreign corporation, on complying with these statutes, should become "to all intents and purposes a domestic corporation," and deemed such omission significant evidence of the legislative intent that a foreign corporation shall not acquire a permanent home or habitation in the state, or be treated as a domestic corporation for purposes other than those of jurisdiction of the state courts.

A railroad corporation organized under the laws of and created by the state of Virginia, having stockholders conclusively presumed by the Federal courts to be citizens of that state, notwithstanding its domestication in South Carolina where its line extends and its corporate functions are exercised in conformity with the Constitution and statutes of that state (Const. art. 9, § 8, and 22 Stat. at L. 114), which make a foreign corporation that complies with the provisions thereof ipso facto a domestic one, enjoying all the rights and subject to all the liabilities of South Carolina corporations, and capable of suing and being sued in the state courts, and subject to the state's jurisdiction as fully as if it had been originally created under the laws of South Carolina, remains a citizen of Virginia and continues, in consequence, entitled to remove, on the ground of diverse citizenship, into the United

States court, a suit brought against it by a citizen of South Carolina upon a cause of action arising in that state. *Calvert v. Southern R. Co.* (1902) 64 S. C. 139, 41 S. E. 963; *Wilson v. Southern R. Co.* (1902) 64 S. C. 162, 36 S. E. 701, 41 S. E. 971, overruling *Mathis v. Southern R. Co.* (1898) 53 S. C. 246, 31 S. E. 240.

There were strong dissenting opinions from two or three members of the court in these cases but the majority felt impelled to the stated conclusion by the decisions of the Supreme Court of the United States and recognized a "distinction between the creation of a new corporation out of natural persons and the mere adoption of a foreign corporation for local purposes."

A state statute declaring foreign railroad corporations doing business in the enacting state shall be held, and taken to be, and treated as domestic corporations in all suits and legal proceedings, and which requires every such corporation to file an agreement to the same effect, does not and cannot constitutionally operate to take away from a foreign corporation its right to remove, on the ground of diverse citizenship, into the Federal courts, a litigation brought against it in the state court. *Rece v. Newport News & M. Valley Co.* (1889) 32 W. Va. 164, 3 L.R.A. 572, 9 S. E. 212.

The supreme court of North Carolina has taken the opposite stand.

A statute (Pub. Laws 1899, chap. 62) of that state provided that every foreign telegraph, telephone, express, transportation, or insurance company desiring to carry on business in North Carolina should, by filing with the secretary of state copies, duly authenticated, of its charter and by-laws, immediately become a domestic corporation and enjoy the rights and privileges and be subject to the liabilities of a domestic corporation the same as if originally it had been created by the laws of North Carolina; and, further, that it should sue and be sued in, and be subject to the jurisdiction of the state courts, like any domestic corporation. A tele-

phone company of New York and a fraternal insurance company of the District of Columbia each complied with this statute, and under it established itself and carried on its business in North Carolina. Each was held by so doing to have become a naturalized citizen of, and in legal effect to have reincorporated in, the state, and thereby to have abrogated its right as a foreign citizen to remove into the Federal courts, on the ground of diversity of citizenship, a suit brought against it in the state court by a citizen of North Carolina. *Debnam v. Southern Bell Teleph. & Teleg. Co.* (1900) 126 N. C. 831, 36 S. E. 269; *Layden v. Endowment Rank, K. P.* (1901) 128 N. C. 546, 39 S. E. 47. In these decisions it was the view of the court that by enacting the statute under consideration the legislature intended not merely to license these foreign corporations to do business within the state, but to require them actually to become domestic corporations, either by reincorporation or by adoption, and that the legal effect of the statute was to charter, and not simply to grant permission to carry on business in the state.

The Supreme Court of the United States afterwards held that this could not be accomplished by the mere filing of a copy of the act of incorporation, or organization papers and by-laws, and accepting the statutory terms. A foreign corporation might comply fully with the statute, and yet remain a foreigner and a citizen of its home state. Nothing short of an actual creation as a domestic corporation would accomplish the asserted result. It, therefore, condemned the two decisions just cited as unsound, and reaffirmed its long-maintained position to the contrary. *Southern R. Co. v. Allison* (1903) 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713. We have, said the court in that case, read with respectful consideration the cases of *Debnam v. Southern Bell Teleph. & Teleg. Co.* and *Layden v. Endowment Rank, K. P.* (N. C.) *supra*, in which the North Carolina supreme court came to a different con-

clusion from that which we have reached in regard to the jurisdiction of the Federal courts, in a case where a foreign corporation has been domesticated in North Carolina pursuant to compliance with legislation of that state, but we cannot concur in the doctrine announced in those cases. We feel bound by the decisions of this court upon that subject.

It is none the less quite possible for a foreign corporation to become a domestic one in another state than that of its origin, and thereby lose its right to remove a litigation from the state to the Federal court on the ground of diverse citizenship.

By a statute naming an existing corporation of another state and incorporating it in the enacting state, manifesting throughout a purpose to create a domestic corporation and to confer upon it all the powers, privileges, and franchises of such a body, and subject it to all the duties and liabilities thereof, there comes into being a full-fledged domestic body corporate, which may not, when afterwards sued by a citizen of the same state, remove the litigation into the Federal courts on the ground of diverse citizenship. *Memphis & C. R. Co. v. Alabama* (1883) 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432.

This case afterwards was explained and distinguished by saying that, while it held that a railroad corporation previously created in Tennessee had been made an Alabama corporation, so that it could not remove into the United States circuit court a suit brought in Alabama by a citizen of that state, it was because the company, by the Alabama legislation, had been required to open stock subscription books in that state, and at its first meeting of stockholders designate a principal office therein, and consequently had, in virtue thereof, become an original Alabama corporation, created and controlled by that state. *Southern R. Co. v. Allison* (1903) 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713.

A foreign corporation which becomes domesticated in another state by complying with, and accepting,

and acting under legislation enacted therein, plainly expressing a purpose to create a new, and not simply to license an old, corporation, becomes a citizen of such state by naturalization and adoption, and abrogates its right to remove into the Federal courts, on the ground of diverse citizenship, a suit brought against it in the state courts by a citizen of such state. *Carolina Coal & Ice Co. v. Southern R. Co.* (1907) 144 N. C. 732, 57 S. E. 444.

The court in that case distinguished *Southern R. Co. v. Allison* (1903) 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713, by reasoning that the case at bar was not against the foreign corporation of the name of defendant but against the new domestic corporation it had become, and hence that there was no diversity of citizenship between the litigants.

A united railroad corporation operating a line in two separate states, holding a charter from each in substantially the same terms, with the same name, and clothed with the same capacities and powers, designed to accomplish the same objects and to discharge the same duties in each state, and referred to in the laws of each as a single corporate body, is nevertheless a distinct legal entity in each state which is not domesticated in the other, so as to acquire therein the status of a citizen for the purposes of jurisdiction of the Federal courts. *Ohio & M. R. Co. v. Wheeler* (1862) 1 Black (U. S.) 286, 17 L. ed. 130.

A railroad company incorporated in each of several states in which it operates a continuous line, must be deemed, for the purposes of jurisdiction of the Federal courts, a citizen of the state in which a suit is brought against it by a citizen thereof, upon a cause of action arising therein, regardless of whether or not it was originally incorporated in another state, when, by the Constitution and laws of the state of the forum, it is required to keep a general office therein and to have a majority of its directors residents of such state.

Patch v. Wabash R. Co. (1907) 207 U. S. 277, 52 L. ed. 204, 28 Sup. Ct. Rep. 80, 12 Ann. Cas. 518.

A railroad company with a continuous line partly in one and partly in an adjoining state, first incorporated by one and then by the other of such states, is a separate corporation in each, and, in a suit brought against it in either state by a citizen thereof, must, for the purposes of jurisdiction of the courts, be deemed a citizen of the state of the forum. *Allegheny County v. Cleveland & P. R. Co.* (1865) 51 Pa. 228, 88 Am. Dec. 579.

A corporation incorporated for the same general business and objects by two or more states, and perfecting its organization under each charter, becomes a citizen in each state, entitled to its protection and amenable to its laws. *Mobile & O. R. Co. v. Barnhill* (1892) 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21.

It must be regarded as settled beyond doubt or controversy, according to one Federal court, speaking a quarter of a century ago, that two states of this Union cannot by joint action create a corporation which will be a single corporate entity and, for jurisdictional purposes, a citizen of each state. One state may create a corporation of a given name, and the legislature of the other may declare that it shall be a corporation of that state also, and be entitled within its borders to function through the same directors and officers, but nevertheless a single corporation is not thereby created, but two corporations, alike in name, of different parentage. *Missouri P. R. Co. v. Meeh* (1895) 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753.

A foreign life insurance company, engaged in business in the state of New York by permission and license of the insurance department, is, so far as any litigation in the courts of that state is concerned, deemed a citizen of New York. *Webster v. Columbian Nat. L. Ins. Co.* (1909) 131 App. Div. 837, 116 N. Y. Supp. 404, affirmed in (1909) 196 N. Y. 523, 89 N. E. 1114.

VI. *Amenability of domesticated foreign corporation to legal process of domestic courts.*

A foreign corporation which has filed its designation pursuant to the laws of New York, and been licensed to do business in that state, is considered a resident thereof for the purposes of jurisdiction of the New York courts. *Gaunt v. Nemours Trading Corp.* (1921) 194 App. Div. 668, 186 N. Y. Supp. 92.

A foreign corporation domesticated pursuant to law in North Carolina by being chartered, rather than simply licensed to do business in the state, is not open to an attachment against its property as a nonresident. *Bernhardt v. Brown* (1896) 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 715, rehearing denied in (1896) 119 N. C. 506, 36 L.R.A. 407, 26 S. E. 162.

And in Tennessee a foreign corporation, allowed by law to carry on its business in that state upon certain prescribed conditions, pursuant to a statute declaring it to be a domestic corporation, to all intents and purposes, if it complies with such statute and meets the stated conditions, is immune from an attachment of its property as a nonresident of the state. *Stonega Coke & Coal Co. v. Southern Steel Co.* (1910) 123 Tenn. 428, 31 L.R.A. (N.S.) 278, 131 S. W. 988.

A foreign corporation which not only complies with the Tennessee statutes requiring it to file and register its charter in that state, and be thereby deemed a domestic body, subject to the jurisdiction of the local courts like all domestic corporations, but goes beyond this, and establishes in that state a general office where it keeps its corporate seal, holds meetings of stockholders and directors, has all its property, and carries on all its corporate operations, and whose officers all reside in Tennessee, has acquired such a situs and become so far domesticated in that state as to be lawfully and validly subject to legal process emanating from a state court in an action by a creditor of one of its nonresident stockholders, attaching his shares in such corporation. *Young v. South Tredegar Iron*

Co. (1886) 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

That case was unusual, if not unique, in its facts, and was explained later and limited in *Adams v. Chattanooga Co.* (1913) 128 Tenn. 505, 161 S. W. 1131, where the court declined jurisdiction of a bill in equity filed by stockholders of a domesticated foreign corporation, to dissolve the company and distribute its assets. The court in the latter case said of the former one that it held that, while the iron company was a foreign corporation in one sense, it was, in view of its acts, to be deemed a domestic one as far forth as to give it a domestic situs for attachment of its shares of stock in Tennessee; that those "acts within the territorial jurisdiction" were adequate to drawing the corporate situs for the indicated purpose into the local jurisdiction, as the place of the actual home office of the company; that that "fact was allowed to overrule legal fiction." But, the court added, it was not meant to be there ruled that every corporation which complies with our statutes acquires by virtue thereof a situs for stock attachment purposes.

A statute of Virginia concerning a foreign railroad corporation, entitled, "An Act to Confirm a Law of the Foreign State Incorporating Such Corporation," setting out such act in extenso, and then conferring the same rights and privileges within the state upon that corporation, and subjecting it to the same pains, penalties, and obligations that the original charter imposed and reserved to the creative foreign state and its citizens, operates, it was held, to adopt, naturalize, or reincorporate such corporation as a domestic body, and to render it amenable to regular legal process of the domestic courts. *Baltimore & O. R. Co. v. Gallahue* (1855) 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

A foreign corporation which procures a permit to do business in Texas from the secretary of state, and thereby, according to statute, has and enjoys all the rights and privileges conferred by law upon domestic

corporations, notwithstanding it has designated, as required by law, a chief office within the state, remains a foreign corporation still, and is subject to the jurisdiction of the local courts just like other foreign corporations. *Coca Cola Co. v. Allison* (1908) 52 Tex. Civ. App. 54, 113 S. W. 308.

VII. Local taxation of domesticated foreign corporation.

However powerless may be a state to make a foreign corporation a citizen within the meaning of the Constitution and laws of the United States, it may none the less domesticate a corporation of another state so as to subject it to taxation upon all its property, tangible and intangible, within the state. *Com. v. United Cigarette Mach. Co.* (1916) 119 Va. 447, 89 S. E. 935.

Irrespective of where may be the technical citizenship of a foreign corporation, one which has taken advantage of a state statute enabling foreign corporations to carry on their corporate business in the enacting state and requiring all those who desire to do so to comply with the local laws, to be subject to the jurisdiction of the local courts, and to be deemed and treated as domestic corporations for all purposes relating to contracts made, property located, and franchises exercised within the state, and which, being thereunto empowered in its articles of association, has established its chief offices, is carrying on all its business, keeping all its property and effects, and maintaining all its executive and administrative officers in such state (virtually reducing to a branch office its original home office in the place of its origin), has made itself, for all local taxing purposes, at least, a domestic corporation of the state. *Ibid.*

A railroad corporation formed by the consolidation of companies chartered by more than one state, and by statute of each entitled to all the privileges and advantages, and clothed with all the powers, exercised by its local constituent; and a bridge company incorporated in similar terms by two adjoining states to build and op-

erate a bridge across a river, the common boundary of both, are, in each state subject to taxation upon so much of their property and franchises as may be within or derived from such state. *Philadelphia, W. & B. R. Co. v. Maryland* (1850) 10 How. (U. S.) 376, 13 L. ed. 461; *Covington & C. Bridge Co. v. Mayer* (1877) 31 Ohio St. 317.

A statute imposing a tax upon domestic railroad corporations having capital stock divided into shares does not apply to a foreign railroad which has simply complied with another statute of the same state, and filed with the secretary of state and the railroad commission a copy of its articles of incorporation, in order to operate its line within that state. *Cincinnati, N. O. & T. P. R. Co. v. Com.* (1904) 119 Ky. 196, 83 S. W. 562.

A religious corporation originally chartered in Pennsylvania and renamed by an act of the legislature of that state in 1846, and the same year, by special statute of Massachusetts, continued a body corporate in that commonwealth, and later, by legislation in New York reciting its previous incorporation in the other states, constituted a corporation by the same name, was held to be a single body with a single organization reincorporated so as to become a domestic corporation of New York, and hence, under the laws thereof, immune from liability to pay a transfer tax upon a legacy given it by name, with the addendum, "Boston, Mass.," in the last will of a testatrix. *Re Lyon* (1911) 144 App. Div. 104, 128 N. Y. Supp. 1004. "Theoretically," it was remarked in the majority opinion in that case, "it may be said that there is a distinct legal entity in each of the three states, but the substance is the same in all. It is a single body, possessing the franchises and privileges of a domestic corporation in three states. To say that the bequest is to a foreign corporation, merely because the testatrix named the place where its principal office is located, is to substitute form for substance. If she had distinctly said that she intended the bequest to go to

the New York corporation, it would have gone into the same treasury and have been disbursed in the same manner and by the same people."

In the reported case (*VAUGHAN v. NASHVILLE, C. & ST. L. R. CO.* ante, 124) the court explicitly and intentionally left undecided the question raised by counsel for the railroad, of the constitutionality of legislation designed to impose organization taxes upon foreign corporations engaged in interstate commerce, which sought to become domesticated or naturalized in the legislating state, pursuant to laws enacted long after they had been admitted to do business in such states, and had conformed fully with all the statutes thereof entitling them to do so.

VIII. Conclusion.

A domesticated foreign corporation should be viewed as a body corporate originating in one state, which another state has by appropriate action allowed to become established within its borders to carry on its corporate operations, and to which the latter state has granted sundry powers, rights, and privileges not usually exercised and enjoyed by foreign corporations merely licensed to do business in the state, and short of those usually belonging to original domestic corporations.

Whether a legislative act respecting a foreign corporation authorized to do business in the state constitutes an adoption, domestication, or naturalization of it, or a mere permission or license to function within the state, is ever a question of the construction and interpretation of the enabling statute, and of the intention and purpose of the legislature in enacting it. 14a C. J. 1231, § 3935.

A statute whose only effect is to recognize the legal existence of a foreign corporation, and to allow it to exercise its powers and to function in the enacting state, does not make it a domestic corporation, but merely licenses it to do business in the domestic territory, leaving its status as a foreign corporation unchanged, and

its domicile and citizenship in the state of its origin. 14a C. J. 1231, § 3935.

It is a generally accepted doctrine that a corporation chartered by different states under the same name, clothed with the same powers, for the same purposes, meant to accomplish the same results, and bound to discharge the same duties in each state, is a separate and distinct body in each. 7 R. C. L. title Corp. subd. VII. § 111, p. 140; 14a C. J. 1231, § 3935.

The authorities are in accord in holding that, to complete the domestication of a foreign corporation, mutuality of action by the state and the corporation is requisite. There must be, on the part of the state, legislation looking to that result, and on the part of the corporation an acceptance of, or assent to, the status. See 14a C. J. 1232, § 3936.

In the reported case (*VAUGHAN v. NASHVILLE, C. & ST. L. R. CO.* ante, 124) an organization tax imposed by statute on every stock corporation incorporated under Kentucky laws was held not chargeable to a foreign railroad company, upon its applying for domestic incorporation or naturalization, where it had been chartered in its home state, and had operated in Kentucky before the adoption of the state Constitution forbidding foreign railroads which did, or purposed doing, business in the state, from exercising the right of eminent domain or acquiring real estate for rights of way, stations, or other uses, without first incorporating in Kentucky, and where also the applicant had many years before complied with the Kentucky statutes entitling it to construct, maintain, and operate its road as it had done. The reasons the court gave for its conclusion were that the legislature never intended to impose the organization tax in such a case, and that in requiring domestication of existing roads that body had no intention to create new corporations, but only to clothe old ones with sundry attributes and powers. It is logical to say that if the statute relied upon to sustain the claim of the state to recover an organization

tax did not provide for the organization of a distinct body corporate, but merely accorded to one already fully organized certain rights and privileges, and imposed correlative obligations, it afforded no authority

for imposing an organization tax. A fair interpretation of the statute inclines to the conclusion that it was only meant to domesticate a foreign corporation, and not to create a domestic corporation. J. B. G.

C. O. BUTTS, Plff. in Err.,
v.
UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Eighth Circuit — May 4, 1921.

(273 Fed. 35.)

Poison — entrapment into violation of Drug Act — defense.

1. One who has been in the habit of using morphine to alleviate the pain of a malady cannot be prosecuted for violation of the Drug Act, where, having never sold the drug, and having no intention of doing so, the government officials induced an acquaintance of his to persuade such person to secure morphine for him from a stranger, furnishing the money for the transaction, for the purpose of entrapping him into commission of the offense.

[See note on this question beginning on page 146.]

Officer — duty of officer with respect to inciting to crime.

2. It is not the duty of a government official to incite to and create

crime for the purpose of prosecuting and punishing it.

[See 8 R. C. L. 129.]

ERROR to the District Court of the United States for the District of Nebraska (Woodrough, Dist. J.) to review a judgment convicting defendant of violating the Antinarcotic Act. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Sanborn and Carland, Circuit Judges, and Lewis, District Judge.

Messrs. John H. Hopkins and E. D. O'Sullivan, for plaintiff in error:

No valid and binding prosecution can be had upon a clear case of entrapment, and no conviction can be had upon any evidence secured in any such manner as was that secured by agents of the government, officers, and other persons.

Woo Wai v. United States, 137 C. C. A. 604, 223 Fed. 412; Sam Yick v. United States, 153 C. C. A. 96, 240 Fed. 60; Taylor v. United States, 113 C. C. A. 543, 193 Fed. 968; United States v. Healy, 202 Fed. 349; United States v. Jones, 80 Fed. 513; United States v. Adams, 59 Fed. 674; United

States v. Echols, 253 Fed. 862; Peterson v. United States, 166 C. C. A. 509, 255 Fed. 433; Holsman v. United States, 160 C. C. A. 271, 248 Fed. 193; Brown v. United States, 171 C. C. A. 490, 260 Fed. 752; United States v. Amo, 261 Fed. 106; Fiunkin v. United States, — C. C. A. —, 265 Fed. 1.

Messrs. T. S. Allen and Frank A. Peterson, for defendant in error:

The crime which the defendant was charged with having committed did not originate in the minds of the agents of the government and other persons and officers.

12 Cyc. 160; United States v. Amo, 261 Fed. 106; Fiunkin v. United States, — C. C. A. —, 265 Fed. 1; Sims v. United States, — C. C. A. —, 263 Fed. 48.

Sanborn, Circuit Judge, delivered the opinion of the court:

Clarence O. Butts, the defendant below, was indicted, convicted, and sentenced for a violation of the Antinarcotic Act (Comp. Stat. §§ 6287g, 6287h, 4 Fed. Stat. Anno. 2d ed. pp. 177, 178), in that he, being a person who dealt in, sold, and dispensed narcotic drugs, without registering with the collector of internal revenue or paying the special tax imposed upon such dealers by this act, sold to H. Rudolph three fourths of an ounce of morphine sulphate, of the value of \$190, about April 7, 1920.

Counsel for the defendant below have specified many alleged errors in the trial of this cause, one of the most serious of which is that the trial court denied a request of counsel for the defendant to instruct the jury that the defendant claimed that he was entrapped into delivering to Rudolph the morphine in question by the instigation of the government agents; that, had it not been for the importunities and false statements made by Rudolph, pursuant to the directions of the government agents, who started out admittedly for the purpose of entrapping the defendant into the commission of the offense charged against him, he would not have conceived or committed it; and that if the jury believed from the evidence that the defendant was induced by the importunities of Rudolph, acting under the orders and in conjunction with the government agents, to violate the law, and that, through the instigation of these men, the defendant was induced to sell or deliver to Rudolph the morphine, and that he would not otherwise have violated the law, they ought to return a verdict of not guilty. At the close of the trial, when this request was made, these facts had been established by the evidence:

The defendant, during fourteen years prior to April 6, 1920, had suffered eighteen operations for tuberculosis of the bones, and he

had been and was addicted to the use of morphine when he was in pain. He had never sold or dealt in the article prior to the transaction of about the 7th of April, 1920, which was the basis of his prosecution in this case. H. Rudolph was addicted to the use of morphine, and these two men were acquainted each with the other, and each knew that the other was addicted to this use. Rudolph had never obtained any morphine from the defendant prior to this transaction. Rudolph had been arrested about two weeks prior to the 2d of April for the violation of this Narcotic Act. Previous to that arrest he had been convicted of a prior violation of the act, and had served a year and a day at Leavenworth. Clyde Lake was a narcotic inspector in the Internal Revenue Service of the United States. He had arrested Rudolph about two weeks before April 7, 1920. Rudolph testified that while he was thus under arrest Mr. Lake sent for him to meet him at Green Davenport's house; that they met there; that Lake told him that he would let him go if he would help him catch some of the law violators; that after they had talked this proposition over, and made an agreement between him and Lake and other officers of the government to catch Butts, he called the latter up on the telephone, told him he wanted some morphine, and Butts answered that he had none, and then Rudolph asked him if he could get an ounce, and how much it would be, and the defendant told him to call him the next day. He testified that he did not intend to use this ounce of morphine, but intended to get it so that the officers could arrest Butts, and he could be a friend of the officers; that the next day he called Butts again, and Butts told him he could get the morphine for \$190; that Lake furnished Rudolph with the \$190, and sent him to get the morphine, and as it was delivered by Butts to Rudolph the officers arrested Butts. Lake testified that the telephone calls and

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conversations of Rudolph with Butts were had when he was present with Rudolph; that he furnished the \$190 and directed all the proceedings in which Rudolph took part. Butts testified that Rudolph called him on the telephone and asked him if he could get him some morphine; that Rudolph told him that he was sick and that his wife was sick (Rudolph denied that he told Butts of this sickness); and he (Butts) told Rudolph he could not get any, and he did not have any himself, and Rudolph replied that he would call again the next day; that Rudolph called him again the next day, and he told him he had no morphine; that Rudolph then asked him if he could not get him some off of somebody, and thereupon he did get a box of it of Joe Green, and arranged to meet Rudolph and deliver it to him; that he did not buy the morphine from Green, but was to give to Green just what he got from Rudolph for it. There was some other evidence in the case, but it was not material to the question under consideration.

When the entire evidence in this record is considered, it conclusively proved (1) that the defendant was not and never had been engaged in dealing in morphine, and that he never sold any of it to anyone before the transaction here in issue; and (2) that the conception of and the intention to do the acts which the defendant did in this matter did not originate in his mind or with him, but were the products of the fertile brains of the officers of the government, which they instilled into the mind of the defendant, and, by deceitful representations and importunities, lured him to put into effect.

It is not denied that, in cases where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes

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no defense to such a prosecution. *Price v. United States*, 165 U. S. 311, 315, 41 L. ed. 727, 17 Sup. Ct. Rep. 366; *Grimm v. United States*, 156 U. S. 604, 610, 39 L. ed. 550, 552, 15 Sup. Ct. Rep. 470; *Goode v. United States*, 159 U. S. 663, 669, 40 L. ed. 297, 300, 16 Sup. Ct. Rep. 136; *Andrews v. United States*, 162 U. S. 420, 423, 40 L. ed. 1023, 1024, 16 Sup. Ct. Rep. 798; *Fiunkin v. United States*, — C. C. A. —, 265 Fed. 1.

But when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefor, is and

Poison—
entrapment into
violation of
Drug Act—
defense.

ought to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty. *Peterson v. United States*, 166 C. C. A. 509, 255 Fed. 433; *United States v. Echols* (D. C.) 253 Fed. 862; *Sam Yick v. United States*, 153 C. C. A. 96, 240 Fed. 65; *Voves v. United States*, 161 C. C. A. 227, 249 Fed. 192; *Peoples v. McCord*, 76 Mich. 200, 42 N. W. 1108, 8 Am. Crim. Rep. 117; *Woo Wai v. United States*, 137 C. C. A. 604, 223 Fed. 414. There was ample, if not conclusive, evidence in this case to sustain a finding of the jury that this case fell under the latter rule. The defendant had never committed any such offense as the officers of the government arrested and prosecuted him for, prior to the time when they induced him to do the acts disclosed by this testimony. There is no evidence that he had ever contemplated, much less intended, to sell any morphine. He had never done so,—he had none to sell. The officers, through their agent, Rudolph, in-

cited, lured, and persuaded him by false representations to go to a third person and get the morphine for his acquaintance, the officer's agent, and to consent either to sell it or to act as the agent of the party from whom he received it in the sale the officers betrayed him into.

The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is uncon-

Officer—duty of officer with respect to inciting to crime.

scionable, contrary to public policy, and to the established law of the land, to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it. It was fatal error to refuse to instruct the jury as requested, and it is unnecessary to discuss the other alleged errors at the trial, because, if they existed, they will probably not be committed again.

Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial.

ANNOTATION.

Entrapment to commit crime with view to prosecution therefor.

I. General principles:

- a. Where criminality of act is not affected by question of consent:
 1. Criminal intent originating in mind of accused, 146.
 2. Criminal intent originating in mind of entrapping person, 149.
- b. Where criminality of act is affected by question of consent, 149.

II. Particular crimes:

- a. Abortion, 151.
- b. Bribery or offer to bribe, 152.
- c. Burglary, 155.
- d. Conspiracy, 158.
- e. Counterfeiting, 160.
- f. Criminal libel, 160.
- g. Embezzlement, 160.
- h. Espionage Act violation, 160.
- i. Extortion, 161.
- j. False pretenses, 161.
- k. Illegal sales:
 1. Goods bearing counterfeit labels, 162.
 2. Intoxicating liquor:
 - (a) Persons generally, 162.
 - (b) Indians, 168.

I. General principles.

- a. Where criminality of act is not affected by question of consent.
 1. Criminal intent originating in mind of accused.

Where the doing of a particular act

II. k—continued.

3. Lottery tickets, 169.
4. Narcotics, 170.
5. Obscene matter, 171.
- l. Immigration Law violation, 171.
- m. Interstate Commerce Act violation, 171.
- n. Larceny, 172.
- o. Manufacture of explosives, 178.
- p. Narcotic Act violation, 178.
- q. Passing forged instrument, 178.
- r. Postal Law violation:
 1. Sending nonmailable matter, 179.
 2. Stealing from mails, 181.
 3. Using mails to defraud, 185.
- s. Practice of dentistry without license, 186.
- t. Procuring women for immoral purposes, 186.
- u. Pure Food and Drug Act violation, 187.
- v. Receiving stolen property, 187.
- w. Robbery, 189.
- x. Subornation of perjury, 191.
- y. Trading with slave, 191.
- z. Traffic ordinance violation, 192.

is a crime regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused, and the criminal offense is completed, the fact that an opportunity is furnished, or that the

accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. To the argument that the act is done at the instigation or solicitation of an agent of the government, the courts have responded that the purpose of the detective is not to solicit the commission of the offense, but to ascertain if the defendant is engaged in an unlawful business. *Grimm v. United States* (1895) 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470 (sending obscene matter through mails); *Goode v. United States* (1895) 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136 (stealing matter from mails).

Likewise it has been held to be no defense that detectives pretended to co-operate with the accused. *People v. Ritchie* (1895) 12 Utah 180, 42 Pac. 209 (criminal libel). See also *Re Wellcome* (1899) 23 Mont. 450, 59 Pac. 445 (bribery). So it is no defense that a person, acting as a decoy, furnished an opportunity for the commission of the offense.

United States.—*Jung Quey v. United States* (1915) 138 C. C. A. 314, 222 Fed. 766 (Narcotic Act offense); *Goldstein v. United States* (1919) 168 C. C. A. 159, 256 Fed. 813 (sale of liquor to soldier in uniform); *Fetters v. United States* (1919) 171 C. C. A. 178, 260 Fed. 142, certiorari denied in (1919) 251 U. S. 554, 64 L. ed. 418, 40 Sup. Ct. Rep. 119 (sale of liquor to soldier in uniform); *United States v. Amo* (1919) 261 Fed. 106 (sale of liquor to Indian); *Partan v. United States* (1919) — C. C. A. —, 261 Fed. 515, certiorari denied in (1920) 251 U. S. 561, 64 L. ed. 418, 40 Sup. Ct. Rep. 220 (sale of matter in violation of Espionage Act); *Fiunkin v. United States* (1920) — C. C. A. —, 265 Fed. 1 (sale of narcotic); *Ramsey v. United States* (1920) — C. C. A. —, 268 Fed. 825 (sale of liquor); *Saucedo v. United States* (1920) — C. C. A. —, 268 Fed. 830 (sale of liquor); *Farley v. United States* (1921) — C. C. A. —, 269 Fed. 721 (sale of liquor); *Rothman v. United States* (1920) — C. C. A. —, 270 Fed. 31 (Narcotic Act violation); *Billingsley v. United States* (1921) —

C. C. A. —, 274 Fed. 86 (transporting liquor). See also *United States v. Rapp* (1887) 80 Fed. 818 (stealing from mails).

Alabama.—*Borck v. State* (1905) — Ala. —, 89 So. 580 (sale of liquor); *Swope v. State* (1915) 12 Ala. App. 297, 68 So. 562 (sale of liquor); *Strotter v. State* (1916) 15 Ala. App. 106, 72 So. 566 (sale of liquor).

Arizona.—*Duff v. State* (1918) 19 Ariz. 361, 171 Pac. 133 (sale of liquor).

California.—*People v. Bunkers* (1905) 2 Cal. App. 197, 84 Pac. 864, 370 (bribery); *People v. Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440 (sale of liquor).

Colorado.—*Simmons v. People* (1921) — Colo. —, 199 Pac. 416.

Georgia.—*Gordon v. State* (1910) 7 Ga. App. 691, 67 S. E. 893 (sale of liquor).

Illinois.—*Evanston v. Myers* (1898) 172 Ill. 266, 50 N. E. 204, reversing (1897) 70 Ill. App. 205 (sale of liquor). See also *Chicago v. Brendecke* (1912) 170 Ill. App. 25 (sale of narcotic).

Indiana.—*Niswonger v. State* (1913) 179 Ind. 653, 46 L.R.A.(N.S.) 1, 102 N. E. 135 (sale of narcotic).

Iowa.—*State v. See* (1916) 177 Iowa, 316, 158 N. W. 667 (sale of liquor).

Kansas.—*State v. Spiker* (1913) 88 Kan. 644, 129 Pac. 195 (sale of liquor).

Louisiana.—*State v. Dudoussat* (1895) 47 La. Ann. 977, 17 So. 685 (bribery).

Maryland.—*Hummelshime v. State* (1915) 125 Md. 563, 98 Atl. 990, Ann. Cas. 1917E, 1072 (conspiracy to demand bribe).

Massachusetts.—*Com. v. Graves* (1867) 97 Mass. 114 (sale of liquor).

Michigan.—*People v. Murphy* (1892) 93 Mich. 41, 52 N. W. 1042 (sale of liquor); *People v. Liphardt* (1895) 105 Mich. 80, 62 N. W. 1022 (bribery); *People v. Everts* (1897) 112 Mich. 194, 70 N. W. 430 (sale of liquor); *People v. Rush* (1897) 113 Mich. 539, 71 N. W. 863 (sale of liquor).

Minnesota.—*State v. Gibbs* (1909) 109 Minn. 247, 25 L.R.A.(N.S.) 449, 123 N. W. 810 (sale of liquor).

Missouri.—*State v. Quinn* (1902) 94 Mo. App. 59, 67 S. W. 974, affirmed

in (1902) 170 Mo. 176, 70 S. W. 1117 (sale of liquor); *State v. Lucas* (1902) 94 Mo. App. 117, 67 S. W. 971 (sale of liquor); *State v. Richie* (1915) — Mo. App. —, 180 S. W. 2 (sale of liquor). See also *State v. Feldman* (1910) 150 Mo. App. 120, 129 S. W. 998 (sale of liquor to minor).

Montana.—*State v. O'Brien* (1907) 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006 (sale of liquor).

New Jersey.—*State v. Dougherty* (1915) 86 N. J. L. 525, 93 Atl. 98 (bribery).

New York.—*People v. Gardner* (1894) 144 N. Y. 119, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003, 9 Am. Crim. Rep. 82 (extortion); *People v. Krivitzky* (1901) 168 N. Y. 182, 61 N. E. 175 (counterfeit trademark); *People v. Hilfman* (1901) 61 App. Div. 541, 70 N. Y. Supp. 621 (counterfeit trademark); *People v. Mills* (1904) 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786, affirming (1904) 91 App. Div. 331, 86 N. Y. Supp. 529 (larceny of public property); *People v. Conrad* (1905) 102 App. Div. 566, 92 N. Y. Supp. 606, affirmed in (1905) 182 N. Y. 529, 74 N. E. 1122 (abortion); *People v. Moore* (1911) 142 App. Div. 402, 127 N. Y. Supp. 98, affirmed in (1911) 201 N. Y. 570, 95 N. E. 1136 (procuring women for immoral purposes). See also *Excise Comrs. v. Backus* (1864) 29 How. Pr. 33 (action for penalty for unlawful sale of liquor); *People v. Bock* (1910) 69 Misc. 543, 125 N. Y. Supp. 301, affirmed without opinion in (1911) 148 App. Div. 899, 132 N. Y. Supp. 1141 (offer to bribe).

North Carolina.—*State v. Smith* (1910) 152 N. C. 798, 30 L.R.A.(N.S.) 946, 67 S. E. 508 (sale of liquor); *State v. Hopkins* (1911) 154 N. C. 622, 70 S. E. 394 (sale of liquor); *State v. Salisbury Ice & Fuel Co.* (1914) 166 N. C. 366, 52 L.R.A.(N.S.) 216, 81 S. E. 737, Ann. Cas. 1916C, 456, affirmed on rehearing in (1914) 166 N. C. 403, 52 L.R.A.(N.S.) 219, 81 S. E. 956, Ann. Cas. 1916C, 728 (false pretenses).

Ohio.—*State v. Diegle* (1911) 21 Ohio Dec. 557, affirmed in (1912) 86 Ohio St. 310, 99 N. E. 1125 (bribery).

Oklahoma.—*De Graff v. State* (1909)

2 Okla. Crim. Rep. 519, 108 Pac. 538 (sale of liquor); *Caveness v. State* (1910) 3 Okla. Crim. Rep. 729, 109 Pac. 125 (sale of liquor); *Stack v. State* (1910) 4 Okla. Crim. Rep. 1, 109 Pac. 126 (sale of liquor); *Moss v. State* (1910) 4 Okla. Crim. Rep. 247, 111 Pac. 950 (sale of liquor); *Cunningham v. State* (1910) 4 Okla. Crim. Rep. XIII, 111 Pac. 959 (sale of liquor).

Pennsylvania.—*Com. v. Wasson* (1910) 42 Pa. Super. Ct. 38 (bribery).

Rhode Island.—See *Tripp v. Flanigan* (1871) 10 R. I. 128 (action for penalty for unlawful sale of liquor).

South Carolina.—*State v. Anone* (1819) 11 S. C. L. (2 Nott & M'C.) 27 (trading with slave); *State v. Sonnerkalb* (1820) 11 S. C. L. (2 Nott & M'C.) 280 (trading with slave).

Tennessee.—*Hyde v. State* (1914) 131 Tenn. 208, 174 S. W. 1127 (prescription for narcotic).

Texas.—*Rath v. State* (1895) 35 Tex. Crim. Rep. 142, 33 S. W. 229 (offer to bribe); *Smith v. State* (1911) 61 Tex. Crim. Rep. 328, 135 S. W. 154 (sale of liquor); *Scott v. State* (1913) 70 Tex. Crim. Rep. 57, 153 S. W. 871 (sale of liquor); *Davis v. State* (1913) 70 Tex. Crim. Rep. 524, 158 S. W. 288 (offer to bribe), overruling *O'Brien v. State* (1879) 6 Tex. App. 665 (offer to bribe).

Utah.—*Salt Lake City v. Robinson* (1912) 40 Utah, 448, 125 Pac. 657 (sale of liquor).

Washington.—*State v. Littooy* (1909) 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292 (practice of dentistry without license).

England.—*Rex v. Ady* (1835) 7 Car. & P. 140 (false pretenses); *Reg. v. Bannen* (1844) 1 Car. & K. 295, 2 Moody, C. C. 309 (counterfeiting); *Reg. v. Carlile* (1845) 1 Cox, C. C. 229 (sale of obscene matter); *Rex v. Holden* (1810) 2 Leach, C. L. 1019. Russ. & R. C. C. 154, 2 Taunt. 334, 127 Eng. Reprint, 1107, 11 Revised Rep. 600 (passing forged instrument).

Such conduct is held not to procure the offense to be committed, the theory being that the offender acts of his own volition, and is simply caught in his own devices. *State v. Salisbury Ice & Fuel Co.* (1914) 166 N. C. 366, 52 L.R.A.(N.S.) 216, 81 S. E. 737, Ann.

Cas. 1916C, 456, affirmed on rehearing in (1914) 166 N. C. 403, 52 L.R.A. (N.S.) 219, 81 S. E. 956, Ann. Cas. 1916C, 728 (false pretenses).

It has been said that where a person, acting as a decoy, merely furnishes an opportunity for the commission of the crime, and in no way procures its commission, the accused is not a passive instrument in the hands of the entrapping parties, but commits the crime voluntarily, with full knowledge of the subject and the consequences that flow therefrom. *People v. Conrad* (1905) 102 App. Div. 566, 92 N. Y. Supp. 606, affirmed in (1905) 182 N. Y. 529, 74 N. E. 1122 (abortion).

2. Criminal intent originating in mind of entrapping person.

Where the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense charged in order to prosecute him therefor, it is the general rule that no conviction may be had, though the criminality of the act is not affected by any question of consent.

United States.—*United States v. Healy* (1913) 202 Fed. 349 (sale of liquor to Indian); *Woo Wai v. United States* (1915) 137 C. C. A. 604, 223 Fed. 412 (immigration offense); *Sam Yick v. United States* (1917) 153 C. C. A. 96, 240 Fed. 60 (immigration offense); *Voves v. United States* (1918) 161 C. C. A. 227, 249 Fed. 191 (sale of liquor to Indian); *Peterson v. United States* (1919) 166 C. C. A. 509, 255 Fed. 433 (sale of liquor); *United States v. Eman Mfg. Co.* (1920) 271 Fed. 353 (violation of Pure Food and Drug Act). And see the reported case (*BUTTS v. UNITED STATES*, ante, 143). See also *United States v. Echols* (1918) 253 Fed. 862 (sale of liquor); *Billingsley v. United States* (1921) — C. C. A. —, 274 Fed. 86 (transporting liquor).

California.—See *People v. Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440 (sale of liquor).

Idaho.—*State v. Mantis* (1920) 82 Idaho, 724, 187 Pac. 268 (procuring women for immoral purposes).

Missouri.—*State v. Feldman* (1910) 150 Mo. App. 120, 129 S. W. 998 (sale of liquor to minor).

Pennsylvania.—*Com. v. Bickings* (1903) 12 Pa. Dist. R. 206 (subornation of perjury).

Utah.—*State v. McCornish* (1921) — Utah, —, 201 Pac. 637.

Wisconsin.—*Koscak v. State* (1915) 160 Wis. 255, 152 N. W. 181 (manufacture of explosives).

Philippine Islands.—*United States v. Phelps* (1910) 16 Philippine, 440 (Narcotic Act violation).

In *United States v. Echols* (1918) 253 Fed. 862, the court said: "It is clearly the law that, while it may be true that the mere aiding of one in the commission of a criminal act by a government officer or agent does not preclude the conviction of the party committing the crime, yet, where the officers of the law have incited or induced the commitment of the crime, and lured the defendant on to its commission, the law will not authorize a verdict of guilty. . . . This rule does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible, nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea, or the real origin of the criminal act, sprang from the defendant, and not from the officer. . . . But this statement in no manner authorizes government officers, employed to prevent crime and apprehend criminals, to thus conceive and set on foot the commission of an offense merely in order to make an arrest."

b. Where criminality of act is affected by question of consent.

In the case of those crimes into which enters as an essential element the violation of individual rights of persons, the situation is somewhat different. Here, it will be seen, the entrapment must not be under such circumstances as will amount to the consent of the person affected, or a necessary ingredient of legal guilt, the want of such consent, will be wanting, and the crime will not have been committed. The line of distinc-

tion seems to be whether there has been an active, as distinguished from a passive, inducement to the taking on the part of the person affected or his duly authorized agent; and where such active inducement can be shown, no conviction can be had.

United States.—*United States v. De Bare* (1875) 6 Biss. 358, Fed. Cas. No. 14,935 (receiving stolen property); *United States v. Rapp* (1887) 30 Fed. 818 (stealing from mails).

Alabama.—*Allen v. State* (1867) 40 Ala. 334, 91 Am. Dec. 477 (burglary); *Adams v. State* (1915) 13 Ala. App. 380, 69 So. 357 (burglary).

California.—*People v. Collins* (1878) 53 Cal. 185 (burglary). See also *People v. Hanselman* (1888) 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425 (larceny).

Colorado.—*Connor v. People* (1893) 18 Colo. 373, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159 (robbery).

Florida.—See *Lowe v. State* (1902) 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956 (larceny).

Georgia.—*Williams v. State* (1875) 55 Ga. 391, 1 Am. Crim. Rep. 413 (larceny).

Illinois.—*Love v. People* (1896) 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710 (burglary); *People v. Jenkins* (1918) 210 Ill. App. 42 (larceny).

Kansas.—*State v. Stickney* (1894) 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714 (burglary). See also *State v. Jansen* (1879) 22 Kan. 498 (larceny).

Louisiana.—*State v. Geze* (1853) 8 La. Ann. 52 (sale of liquor to slave).

Missouri.—*State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283 (receiving stolen goods); *State v. Loeb* (1916) — Mo. —, 190 S. W. 299 (larceny). See also *State v. Hayes* (1891) 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514 (burglary), overruled on another point in *State v. Barton* (1898) 142 Mo. 450, 44 S. W. 239; *State v. West* (1900) 157 Mo. 309, 57 S. W. 1071 (robbery).

Michigan.—*People v. McCord* (1889) 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117 (burglary).

New York.—*People v. Jaffe* (1906) 185 N. Y. 497, 9 L.R.A.(N.S.) 263, 78 N. E. 169, 7 Ann. Cas. 348 (receiving stolen property).

North Carolina.—*State v. Adams* (1894) 115 N. C. 775, 20 S. E. 722 (larceny); *State v. Goffney* (1911) 157 N. C. 624, 73 S. E. 162 (burglary).

North Dakota.—See *State v. Currie* (1905) 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875.

Oklahoma.—*Roberts v. Territory* (1899) 8 Okla. 326, 57 Pac. 840, 11 Am. Crim. Rep. 193 (burglary).

Oregon.—*State v. Hull* (1898) 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159 (larceny).

Tennessee.—*Dodge v. Brittain* (1838) Meigs, 84 (larceny); *Kemp v. State* (1850) 11 Humph. 320.

Texas.—*Speiden v. State* (1877) 3 Tex. App. 156, 30 Am. Rep. 126 (burglary); *Woodworth v. State* (1886) 20 Tex. App. 375 (conspiracy to commit burglary); *McGee v. State* (1902) — Tex. Crim. Rep. —, 66 S. W. 562, 19 Am. Crim. Rep. 413 (larceny); *Bird v. State* (1905) 49 Tex. Crim. Rep. 96, 122 Am. St. Rep. 803, 90 S. W. 651 (burglary). See also *Johnson v. State* (1878) 3 Tex. App. 590; *Crowder v. State* (1906) 50 Tex. Crim. Rep. 92, 96 S. W. 934.

Wisconsin.—*Topolewski v. State* (1906) 130 Wis. 244, 7 L.R.A.(N.S.) 756, 118 Am. St. Rep. 1019, 109 N. W. 1037, 10 Ann. Cas. 627 (larceny).

England.—*Rex v. Fuller* (1820) Russ. & R. C. C. 408 (robbery); *Rex v. Whittingham* (1801) 2 Leach, C. L. 912 (embezzlement); *Reg. v. Johnson* (1841) Car. & M. 218 (burglary); *Reg. v. Dolan* (1855) 6 Cox, C. C. 449, Dears. C. C. 436, 3 C. L. R. 295, 24 L. J. Mag. Cas. N. S. 59, 1 Jur. N. S. 72, 3 Week. Rep. 177 (receiving stolen property) [overruling *Reg. v. Lyons* (1841) Car. & M. 217 (receiving stolen property) and *Reg. v. Lawrance* (1850) 4 Cox, C. C. 438 (larceny)]; *Reg. v. Schmidt* (1866) 10 Cox, C. C. 172, 35 L. J. Mag. Cas. N. S. 94, L. R. 1 C. C. 15, 12 Jur. N. S. 149, 13 L. T. N. S. 679, 14 Week. Rep. 286 (receiving stolen goods); *Reg. v. Hancock* (1878) 14 Cox, C. C. 119, 38 L. T. N. S. 787 (receiving stolen property); *Reg. v. Vilensky* [1892] 2 Q. B. 597, 61 L. J. Mag. Cas. N. S. 218, 5 Reports, 16, 41 Week. Rep. 160, 56 J. P. 824 (receiving stolen goods).

But where a person knows or sus-

pects that a crime affecting him is about to be committed, he may, without being deemed to have consented thereto, remain passive and make no effort to prevent its commission, to the end that the criminal may be apprehended.

California.—*People v. Hanselman* (1888) 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425 (larceny).

Florida.—*Lowe v. State* (1902) 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956 (larceny).

Georgia.—*O'Halloran v. State* (1860) 31 Ga. 206 (sale of liquor to slave); *Garris v. State* (1866) 35 Ga. 247 (larceny).

Indiana.—*Thompson v. State* (1862) 18 Ind. 386, 81 Am. Dec. 364 (burglary).

Iowa.—*State v. Abley* (1899) 109 Iowa 61, 46 L.R.A. 862, 77 Am. St. Rep. 520, 80 N. W. 225, 12 Am. Crim. Rep. 279 (burglary).

Kansas.—See *State v. Stickney* (1894) 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714 (burglary).

Massachusetts.—*Com. v. Nott* (1883) 135 Mass. 269 (larceny from building).

Missouri.—*State v. West* (1900) 157 Mo. 309, 57 S. W. 1071 (robbery).

Nebraska.—*State v. Sneff* (1887) 22 Neb. 481, 35 N. W. 219 (burglary).

North Carolina.—See *State v. Adams* (1894) 115 N. C. 775, 20 S. E. 722 (larceny).

North Dakota.—*State v. Currie* (1905) 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875 (burglary).

Pennsylvania.—*Com. v. Hollister* (1893) 157 Pa. 13, 25 L.R.A. 349, 27 Atl. 386 (larceny).

South Carolina.—*State v. Covington* (1832) 18 S. C. L. (2 Bail.) 569 (larceny).

Tennessee.—*Sanders v. State* (1877) 2 Shannon, Cas. 606 (larceny); *McAdams v. State* (1881) 8 Lea, 456 (larceny).

Texas.—*Conner v. State* (1887) 24 Tex. App. 245, 6 S. W. 138 (larceny); *Robinson v. State* (1895) 34 Tex. Crim. Rep. 71, 53 Am. St. Rep. 701, 29 S. W. 40 (burglary); *Tones v. State* (1905) 48 Tex. Crim. Rep. 363, 1 L.R.A.(N.S.)

1024, 122 Am. St. Rep. 759, 88 S. W. 217, 13 Ann. Cas. 455 (robbery).

Utah.—*People v. Morton* (1886) 4 Utah, 407, 11 Pac. 512 (burglary).

West Virginia.—*State v. Piscoineri* (1910) 68 W. Va. 76, 69 S. E. 375 (robbery).

England.—*Norden's Case* (1754) Fost. C. L. 129 (robbery).

Ireland.—*Rex v. Bigley*, 1 *Craw. & D. C. C.* 202 (burglary); *Rex v. Egginton* (1801) 2 Bos. & P. 508, 126 Eng. Reprint, 1410, 2 Leach, C. L. 913, 2 East, P. C. 494, 666, 5 Revised Rep. 689 (larceny).

Likewise, where the criminal design originates in the mind of the accused, it is no defense that the agent of the owner pretends to co-operate with the accused. *People v. Smith* (1911) 251 Ill. 185, 95 N. E. 1041 (larceny); *Vanner v. State* (1884) 72 Ga. 745 (larceny); *State v. Duncan* (1844) 8 Rob. (La.) 562 (larceny); *State v. Smith* (1910) 33 Nev. 438, 117 Pac. 19 (larceny); *Alexander v. State* (1854) 12 Tex. 540 (larceny); *Reg. v. Williams* (1843) 1 Car. & K. (Eng.) 195 (larceny); *Rex v. Chandler* [1913] 1 K. B. (Eng.) 125, 82 L. J. K. B. N. S. 106, 108 L. T. N. S. 353, 77 J. P. 80, 29 Times L. R. 83, 57 Sol. Jo. 160, 23 Cox, C. C. 330 (burglary). Nor is it a defense that detectives pretend to co-operate in the execution of the criminal design, provided no act is done which, in law, amounts to the owner's consent to the taking. *People v. DuVeau* (1905) 105 App. Div. 381, 94 N. Y. Supp. 225 (robbery); *Pigg v. State* (1875) 43 Tex. 108 (larceny); *Crowder v. State* (1906) 50 Tex. Crim. Rep. 92, 96 S. W. 934 (larceny). See also *Slaughter v. State* (1901) 113 Ga. 284, 84 Am. St. Rep. 242, 38 S. E. 854 (larceny); *Saunders v. People* (1878) 38 Mich. 218 (larceny).

II. Particular crimes.

a. Abortion.

In a prosecution for an attempt to commit an abortion, it is no defense that the woman on whom the abortion was attempted deliberately entrapped the defendant into attempting to perform it, and caused his arrest while so engaged. *People v. Conrad* (1905) 102 App. Div. 566, 92 N. Y. Supp. 606,

affirmed in (1905) 182 N. Y. 529, 74 N. E. 1122. In that case it appeared that a woman acting under the direction of the officers of a county medical society went to the defendant, a physician, and asked him to commit an abortion on her. The defendant agreed to do so and arrangements were made for the commission of the offense. Just as the defendant had prepared his instruments and placed the woman in a position convenient for their use, by a prearranged signal given by the woman, detectives entered and arrested him. The court, holding that the entrapment was no defense, said: "The conviction of the defendant was brought about by means of a trap arranged by the officers of the County Medical Society. It is claimed that, as the defendant was lured into the commission of the claimed overt acts, he cannot be punished therefor. This contention has recently been the subject of examination by this court and by the court of appeals, and decided adversely to the contention of the defendant. He was not a passive instrument in the hands of the entrapping parties. He did the act with which he was charged voluntarily, with full knowledge of the subject, and of the consequences which would flow therefrom. Under such circumstances, setting a trap by which he was caught is not a defense."

b. Bribery or offer to bribe.

Where the criminal intent originates with the accused, and he suggests or asks for a bribe, the fact that his request is acceded to for the sole purpose of obtaining the necessary evidence for his prosecution is no defense. *People v. Bunkers* (1905) 2 Cal. App. 197, 84 Pac. 364, 370; *State v. Dudoussat* (1895) 47 La. Ann. 977, 17 So. 585; *Hummelshime v. State* (1915) 125 Md. 563, 93 Atl. 990, Ann. Cas. 1917E, 1072 (conspiracy to demand bribe); *People v. Liphardt* (1895) 105 Mich. 80, 62 N. W. 1022. See also *Re Wellcome* (1899) 23 Mont. 450, 59 Pac. 445.

Thus, in *People v. Liphardt* (1895) 105 Mich. 80, 62 N. W. 1022, *supra*, wherein it appeared that the sugges-

tion of willingness to take money was first made by the defendant, a member of the board of education, it was held to be no defense that the prosecuting witness encouraged another member of the board to advise the defendant that the witness would accept a proposition from the defendant to sell his vote, and that the witness informed the mayor of this, and they, with the police, made plans to entrap and detect the defendant in receiving a bribe paid by the witness for the sole purpose of so detecting the defendant. The court said: "We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. . . . If the facts were shown as stated, the defendant cannot excuse the receipt of money as a consideration for promised official action, merely because he was solicited by Atcherson, even if it were done at the instigation of the officers of the city, who have no right to compromise public justice in any such way."

So, on the prosecution of a state senator for asking and receiving a bribe, the fact that, after the accused had offered to receive the bribe, a plot was formed to entrap him and other senators, has been held not to render inadmissible against the accused the testimony of those implicated in the entrapment. *People v. Bunkers* (Cal.) *supra*, wherein the court said: "The defendant stands convicted of one of the most dangerous crimes catalogued in the Penal Code. The murderer deprives an individual of life. The thief despoils a single citizen of property. The judge who forgets the sacred responsibility resting upon him can injure comparatively few by bartering his honor and violating his oath. But the venal legislator is a menace to the impartiality and probity of that system of law which is the palladium of all rights pertaining to citizenship, and the foundation stone of public safety and security. This crime is secret in its nature, and as baneful as it is insidious in its effects. The social fabric

could not long survive if its frequent commission was tolerated, and hence the preservation of our institutions, and the integrity of our system of government, demand that any tendency in that direction be sternly and effectually checked. The offer to receive a bribe, if satisfied, must lead to consequences as serious as they are evident; while a rebuff to the bribe seeker gives rise to dangers born of resentment, which are scarcely capable of estimation. It is, therefore, highly important that a crime fraught with so much danger to the state, as well as to individuals, should be detected and punished. Recognizing the secrecy which usually attends its commission, the age and probable intelligence of those in a position to commit it, and the consequent difficulty of obtaining proof to bring the perpetrator to just punishment, it seems clear to us that a wise public policy must lend sanction to evidence obtained in the manner here assailed. No danger to the honest or innocent lurks in a rule upholding its competency under the circumstances here described. Honest lawgivers do not wait for or seek temptation, nor do they withhold proper official action until interested parties can be seen. True, neither the gravity of the crime nor considerations of public policy will warrant a departure from well-settled rules of evidence, but in this, as in most cases, public policy is seconded and sustained by law, for we believe this testimony was admissible under a rule of evidence long sanctioned by our highest court. The appellant was guilty of a crime when he asked for or offered to receive the bribe, and his acceptance of it neither added to his guilt nor to the penalty already entailed. Hence, the plan to 'entrap' him amounted to nothing more than procuring corroborative evidence essential to conviction. Such methods, under these circumstances, are not within the rule against encouraging crime, merely to procure its commission, to the end that those willing to become offenders may be punished. They fall within that other rule which justifies dissemblance in order to pro-

cure additional and necessary evidence of guilt."

In *State v. Dudoussat* (1895) 47 La. Ann. 977, 17 So. 685, it was held to be no defense to the prosecution of a city councilman for receiving a bribe, that, after he had made a proposal to the prosecuting witness that, for \$100, he would, in his official capacity as a councilman, procure him a permit to conduct a barroom, the witness and others arranged and carried out a plan to entrap the defendant by giving him marked money to the amount required, in the presence of other persons secreted as witnesses. The court said, however, that if the "trap" prepared and arranged to procure evidence had been an inducement offered and a temptation presented to commit the crime, the defendant should have been found not guilty.

The defense of entrapment is not available in a prosecution of public officials for a conspiracy to demand a bribe for their official action, the commission of the crime of bribery not being dependent on the want of consent of anyone. *Hummelshime v. State* (1915) 125 Md. 563, 93 Atl. 990, Ann. Cas. 1917E, 1072.

Similarly, where a public official is suspected of having received bribes, it has been held that an inducement to accept a bribe offered by a person seeking to entrap the accused, with a view to a prosecution, is no defense to a prosecution based on the acceptance of the offer. *State v. Dougherty* (1915) 86 N. J. L. 525, 93 Atl. 98, reversed on other grounds (as to which, see subdivision II. d, *infra*) in (1915) 88 N. J. L. 209, L.R.A.1916C, 991, 96 Atl. 56, Ann. Cas. 1917D, 950; *State v. Diegle* (1911) 21 Ohio Dec. 557, affirmed in (1912) 86 Ohio St. 310, 99 N. E. 1125; *Com. v. Wasson* (1910) 42 Pa. Super. Ct. 38.

"The principle evolved from the cases appears to be that, in a prosecution for an offense against the public welfare, such as accepting a bribe, the defense of entrapment cannot be successfully interposed; and this is so, when it appears that there was ground of suspicion or belief of the existence of official graft and a conspiracy by

officials to obtain bribes, in which the persons caught were not the passive tools of the entrapping party, but knowingly received the bribe, especially since the persons entrapping them had no intention to participate in the wrong." *State v. Dougherty* (N. J.) *supra*.

To the same effect, see *State v. Diegle* (1911) 21 Ohio Dec. 557, affirmed in (1912) 86 Ohio St. 310, 99 N. E. 1125, wherein the court said: "It is a conceded doctrine in the philosophy of law that legislation involves pure ethics; that the exercise of the legislative duty is concededly of a purer type than even the judicial act. Though that is the sanctioned doctrine among the philosophers of the law, there are many of us who cannot acquiesce in its full statement. But, as the science of law places the legislative duty on such a high plane, it follows that the duty imposed upon the legislator cannot be considered obligatory primarily for individual benefit, as in property rights, but is solely and entirely for the benefit of the state and the whole people. There is but a very limited class of public officials who owe duties of a private and proprietary character. It is sufficient to state in this connection that the duty of the legislator is never private or proprietary, but always public, for the benefit of all the people. No persons or class of persons, nor any public official, can do any act towards compromising the public duty, or in any wise estopping the enforcement of the penalty of the law for the violation of such duty. There cannot be anything stronger than the unreported decision of *Fox v. State*, 53 Bull. 28, where the entrapment was at the direct instance and conduct of the prosecuting attorney, and the court, by refusing to entertain that case, where the error complained of was a charge that the entrapment was a defense, is a direct authority which this court is bound to follow. I confidently assert that the rules of law which have been announced by the various judicial pronouncements which constitute entrapment into crime a defense to its prosecution are

limited to that class where individual right is primarily involved, and the penalty of the law imposed as a deterrent to crime."

In *Com. v. Wasson* (Pa.) *supra*, wherein it appeared that the defendant had been suspected of accepting bribes prior to his entrapment by a detective, the court said: "If there is any ground upon which the facts as to the part the detectives took in the formation of the conspiracy can be held to be a defense, it is upon the ground of public policy; and it is strenuously contended that an acquittal should have been directed for that reason. In general, one who has committed a criminal act is not entitled to be shielded from its consequence merely because he was induced to do so by another. There has been much discussion in the courts of this country and by the text-writers as to the relation of detectives to crime, and many of their methods have been severely denounced. A few exceptional cases can be found where, upon grounds of public policy, the courts have refused to sustain convictions because of the abhorrent methods adopted to lure the accused into crime. Upon the other hand, there are many cases wherein the courts, while in some instances condemning the methods employed by the detectives, have sustained the convictions, although the particular crime charged would not have been committed had it not been for the deceptions or subterfuges or the suppression of the truth resorted to by the detective. . . . Again, in considering the question of public policy, the clear distinction, founded on principle as well as authority, is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices; particularly if such criminal practices vitally affect the public welfare rather than individuals. Without declaring that, under no circumstances, ought the courts to direct an acquittal of a crime clearly proved,

upon the ground that the accused was entrapped into it by immoral and illegal detective methods, we are quite clear that there is enough evidence that the purpose was to secure the conviction and punishment of those suspected to be engaged in criminal practices to bring this case within the second class above mentioned, and that the court did not err in refusing to direct an acquittal upon the ground of public policy."

Likewise, it is no defense to a prosecution for offering a bribe to a public officer, that the officer accepted the bribe for the sole purpose of prosecuting the defendant. *Rath v. State* (1895) 35 Tex. Crim. Rep. 142, 33 S. W. 229; *Davis v. State* (1913) 70 Tex. Crim. Rep. 524, 158 S. W. 288, overruling *O'Brien v. State* (1879) 6 Tex. App. 665.

In *Davis v. State* (1913) 70 Tex. Crim. Rep. 524, 158 S. W. 288, *supra*, the court pointed out that the lack of any criminal intent on the part of the public official sought to be bribed could in no manner inure to the benefit of the accused, for the reason that the intent to bribe was complete, regardless of the motive of the officer in accepting the bribe. It was said: "The offer to bribe a public official is a transgression of a public right, and the consent or nonconsent of the officer cannot affect the criminality of the act of the person who makes the offer; and even though Mr. Wilson, by his words, acts, and conduct, may have been the inducing cause of the offer to bribe, yet, if appellant did, in fact, tender money to the officer with the intention and for the purpose of influencing his action as such officer, he would be guilty under our statute. It would not be an offense against Mr. Wilson, so much as an offense against the public welfare; and one which no officer would have the authority nor power to give his consent to. Therefore, we are of the opinion that the court erred in holding that, if Mr. Wilson induced appellant, by his words, acts, and conduct, to make a proposition to pay him so much money to influence his action as an official, and appellant did make the propo-

sition under such circumstances, he would be guilty of no offense. However, under such circumstances, Mr. Wilson would, under the rules of evidence, be held to be an accomplice, and appellant could not be convicted upon his testimony alone, and the court should have instructed the jury that, if Mr. Wilson made the first proposition and induced appellant to make the tender, he would be an accomplice, even though he did not intend to accept the bribe, and by his acts was but seeking to entrap or detect appellant in the commission of an offense; and, under such circumstances, he must be corroborated in those facts which connected defendant with the commission of the offense, if an offense had been committed."

In *People v. Bock* (1910) 69 Misc. 543, 125 N. Y. Supp. 301, affirmed without opinion in (1911) 148 App. Div. 899, 132 N. Y. Supp. 1141, it was held to be no defense to a prosecution for the statutory crime of bribery of a representative of a labor organization, that the latter lied to and "bluffed" the defendants for the purpose of entrapping them. The court said that though the representative went further than laying a trap, and actually solicited the defendants to commit the crime, it would furnish no defense to them, since he was not a prosecuting officer, or other public official of any kind.

c. Burglary.

As to the defense of entrapment in the prosecution of other crimes, where the want of consent of the person affected is an essential element, see *infra*, II. n, v, w, y.

If a person committing a burglary is induced to do so by the person who will be affected by the act, or his duly authorized agent, to the end that he may be entrapped and apprehended, the entrapment is a defense to a prosecution for the burglary.

Alabama.—*Allen v. State* (1867) 40 Ala. 334, 91 Am. Dec. 477; *Adams v. State* (1915) 13 Ala. App. 330, 69 So. 357.

Illinois.—*Love v. People* (1896) 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710.

Kansas.—*State v. Stickney* (1894) 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714. See also *State v. Jansen* (1879) 22 Kan. 498.

Michigan.—*People v. McCord* (1889) 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117.

North Carolina.—*State v. Goffney* (1911) 157 N. C. 624, 73 S. E. 162.

North Dakota.—See *State v. Currie* (1905) 13 N. D. 655, 60 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875.

Oklahoma.—*Roberts v. Territory* (1899) 8 Okla. 326, 57 Pac. 840, 11 Am. Crim. Rep. 193.

Texas.—*Speiden v. State* (1877) 3 Tex. App. 156, 30 Am. Rep. 126; *Bird v. State* (1905) 49 Tex. Crim. Rep. 96, 122 Am. St. Rep. 803, 90 S. W. 651. See also *Johnson v. State* (1878) 3 Tex. App. 590.

In *Love v. People* (1896) 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710, the court said: "Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity, so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him, that they may seek to punish."

The rule heretofore stated is based on the reasoning that the owner of the premises, by his conduct, consents to the breaking and entering by the alleged burglar, whereas it is essential to the crime of burglary that the breaking and entering should be against the consent of the owner. *Allen v. State* (1867) 40 Ala. 334, 91

Am. Dec. 477; *People v. McCord* (1889) 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117; *State v. Goffney* (N. C.); *Speiden v. State*; and *Bird v. State* (Tex.) supra.

In *People v. McCord* (1889) 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117, the court said: "It would be a disgrace to the law if a person who had taken active measures to persuade another to enter his premises and take his property can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong in law to the instigator."

For the same reason, there can be no conviction for a conspiracy to commit a burglary between a person contemplating the crime and the owner of the building to be burglarized, or one who has undertaken to entrap him, and enters into the plan for that purpose. *Woodworth v. State* (1886) 20 Tex. App. 375.

So, it has been held that there was no burglary where the entry was instigated and participated in by one who acted with the knowledge and assent of the occupant of the building, as a decoy, for the purpose of apprehending the defendant, and the defendant relied on the other's statement that he was authorized to enter. *Roberts v. Territory* (Okla.) supra.

Nor can there be any burglary where the owner is connected with the original design to have his house broken for the purpose of having the defendant prosecuted therefor, and leaves the key of the house at a point agreed on with another, for the purpose of enabling him and the defendant to go into the house and unlock the door, the entry being with the owner's consent. *Bird v. State* (Tex.) supra.

In *State v. Goffney* (N. C.) supra, it appeared that the owner of a building, through a servant, induced the defendant to break into his store, and that the servant and the defendant entered the store together. It was held that the crime of breaking and entering was not committed, because of the proprietor's consent.

But in *Johnson v. State* (Tex.) supra, it was held that the subsequent

consent of the owner to a burglary was no defense to a prosecution for a conspiracy to commit burglary. The fact of the conspiracy once being established, the subsequent consent of the owner, or his duly authorized agent, that the conspirators might enter the building, would not affect their guilt in the least, unless the evidence showed that the owner or his agent suggested the offense, or in some way created the original intent or agreement to commit the offense as charged.

Where the owner of a building, on being advised of the intended burglary, makes no effort to prevent it, but remains passive, and provides a force to secure the apprehension of the burglars, a conviction may be had.

Indiana.—*Thompson v. State* (1862) 18 Ind. 386, 81 Am. Dec. 364.

Iowa.—*State v. Abley* (1899) 109 Iowa, 61, 46 L.R.A. 862, 77 Am. St. Rep. 520, 80 N. W. 225, 12 Am. Crim. Rep. 279.

Nebraska.—*State v. Sneff* (1887) 22 Neb. 481, 35 N. W. 219.

North Dakota.—*State v. Currie* (1905) 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875.

Texas.—*Robinson v. State* (1895) 34 Tex. Crim. Rep. 71, 53 Am. St. Rep. 701, 29 S. W. 40.

Utah.—*People v. Morton* (1886) 4 Utah, 407, 11 Pac. 512.

England.—*Rex v. Chandler* [1913] 1 K. B. 125, 82 L. J. K. B. N. S. 106, 108 L. T. N. S. 353, 77 J. P. 80, 29 Times L. R. 83, 57 Sol. Jo. 160, 23 Cox, C. C. 330.

Ireland.—*Rex v. Bigley*, 1 Craw. & D. C. C. 202.

In such a case, whether the facilitation of the offense amounts to a consent is a question for the jury. Thus, in *State v. Jansen* (1879) 22 Kan. 498, wherein it appeared that the owner knew of the intended burglary, and unlocked the door at 2 o'clock in the morning, but left it closed, the court upheld the refusal of the trial judge to instruct that the owner consented to the entry.

So, where the offense of burglary is instigated by a police officer, and the owner of the premises offers no active

inducement to the burglary, the offense is not excused, as the owner does not consent thereto. *State v. Abley* (Iowa) *supra*.

Where the criminal intent to commit a burglary originates in the mind of the defendant, and he proposes to a third person to assist in it, and that person, seeking to entrap the defendant and secure his conviction, assents to the scheme and carries it out, the defendant cannot be convicted unless he participates in all the acts necessary to constitute the crime. *People v. Collins* (1878) 53 Cal. 185; *State v. Hayes* (1891) 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514, overruled on another point in *State v. Barton* (1897) 142 Mo. 450, 44 S. W. 239; *Reg. v. Johnson* (1841) Car. & M. (Eng.) 218. Thus, in the case last cited, wherein it appeared that a servant opened the door to the defendants, it was held there was no burglary. And in *State v. Hayes* (1891) 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514, *supra*, wherein it appeared that the defendant did not enter the building, the court said: "We find that defendant did not commit every overt act that went to make up the crime. He did not enter the warehouse, either actually or constructively; and hence he did not commit the crime of burglary, no matter what his intent was, it clearly appearing that Hill was guilty of no crime. To make defendant responsible for the acts of Hill, they must have had a common motive and common design. The design and the motives of the two men were not only distinct, but dissimilar; even antagonistic."

But where the defendant participates in all the acts necessary to constitute the offense, entrapment is no defense. Thus, in *Rex v. Chandler* (Eng.) *supra*, it appeared that the defendant suggested to the employee of a pawnbroker a plan by which the defendant might burglarize the shop, and the employee pretended to agree to the proposed scheme, but in fact informed the police authorities and his employer. Thereafter, acting under the instructions of the police, with the pretended object of assisting the defendant to carry out his scheme, the

employee lent him the keys of the shop, of which the defendant made duplicates, and the defendant unlocked a padlock securing the outer door, and entered the shop, where he was arrested by police officers, who were keeping watch near by. It was held that there was no such assent on the part of the shop owner to the entry as would prevent the conviction of defendant of the offense of shop breaking. The court said: "In our opinion, although the prosecutrix may have been fully aware of what was going to be done, she did not assent to the breaking and entering of her premises by the prisoner for the purpose of stealing. The keys were only supplied to the prisoner by the servant of the prosecutrix in order that he might be detected in the commission of the offense; that did not make the servant an accomplice of the prisoner, nor make the breaking and entering lawful."

d. Conspiracy.

The cases involving the defense of entrapment as applied to a prosecution for conspiracy to commit a particular crime are collated in the subdivision dealing with that crime. See *supra*, II. b and c; also *infra*, II. p and w. They are here considered with reference to their bearing on the crime of conspiracy.

The decisions appear to warrant the generalization that, where the conspiracy charged is with the person who was acting for the purpose of entrapping the defendant, the defendant cannot properly be convicted of the offense of conspiracy (*State v. Dougherty* (1915) 88 N. J. L. 209, L.R.A.1916C, 991, 96 Atl. 56, Ann. Cas. 1917D, 950; *Woodworth v. State* (1886) 20 Tex. App. 375); but that where the conspiracy charged is with others, the fact that one entered into such conspiracy for the purpose of entrapping the conspirators (as in *Johnson v. State* (1878) 3 Tex. App. 593; *Com. v. Wasson* (1910) 42 Pa. Super. Ct. Rep. 38; *Jung Quey v. United States* (1915) 138 C. C. A. 314, 222 Fed. 766) does not preclude a conviction. But persons cannot be con-

victed of conspiracy if they merely adopt a scheme which is suggested to them by a detective, and which has received the approval of the owner of the property. *Connor v. People* (1893) 18 Colo. 373, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159.

In discussing the point, it was said in *State v. Dougherty* (N. J.) *supra*: "We think it is unnecessary to consider the very interesting and important question so ably discussed by counsel, whether it is a good defense to an indictment that the defendants were entrapped into the alleged criminal conduct by representatives of the state. Cases may be found where this defense was rejected, and others where it was held good. We limit our decision to the particular facts of this case. The charge is that there was a conspiracy to pervert the due administration of the laws relating to the municipal government of Atlantic City by corruptly passing an ordinance for bribes to be paid by Harris, a person interested in securing its passage. The indictment is not for bribery, but for conspiracy; and not for conspiracy among the defendants alone to sell their votes or to force 'Harris' to pay money. The charge is that the conspiracy was with 'Harris;' that he was to pay and did pay money. The conspiracy with 'Harris' as the prime mover and an essential party is not only the conspiracy charged in the indictment, but the conspiracy on which the state, in fact, relied at the trial. It was only that alleged conspiracy that made admissible, so far as it was admissible, the testimony as to interviews between 'Harris' and Phoebus on December 5, 1911, at which the two planned for the corruption of the other defendants. It was this conspiracy between 'Harris' and Phoebus into which the defendants are said to have come subsequently. The nature of the charge in the indictment relieves us from the necessity of considering the effect of entrapment by the state, which would confront us if the indictment were for a conspiracy by the defendants alone to sell their votes or to extort money as the condition of passing an ordi-

nance introduced in good faith and meant to become effective legislation of the city. The question is the much simpler one, whether a conspiracy originated by 'Harris,' under employment of the law officers of the state, with Phoebus as either stool pigeon or go-between, for the well-meant purpose of testing the virtue of public officials and preventing injury to the public by exposing and bringing them to punishment if they proved corrupt, was a conspiracy to pervert the due administration of the laws relating to the municipal government of Atlantic City. If it was not, the defendants are not guilty as charged, however reprehensible their conduct and character may have been. Since the indictment charges but one conspiracy, and 'Harris' was a necessary party to the conspiracy proved, the prime mover therein, and the man who was to and did furnish the money, and since the conspiracy had no existence without him, the only conspiracy for which the defendants could be convicted is that organized by 'Harris.' Unless that conspiracy is criminal, the defendants are not guilty as charged. If it is criminal, 'Harris' is also guilty. To so hold, it would be necessary to hold that 'Harris's' act was a perversion of the due administration of the law. To avoid that absurdity, it is necessary to hold that the conspiracy was not a conspiracy to pervert the due administration of the law, as charged in the indictment. It was, in fact, an arrangement to secure the due administration of the law by demonstrating the readiness of the councilmen to be corrupted, in a made-up plan not meant to be executed, in order to prevent, by exposure, similar corruption in the genuine legislation of the city. Without the complicity of 'Harris' the conspiracy is not proved; with him it ceases to be a conspiracy to pervert the due administration of the laws, and is no crime. We are less reluctant to reach this result than we could otherwise be, for the reason that the state sought, by indicting the defendants for conspiracy, to make available statements made by 'Harris' and Phoebus in the absence of the

other defendants, even before they had come into the conspiracy, and by Phoebus after the object of the conspiracy had been obtained. The state, having sought and obtained the advantage of an indictment for conspiracy, must in fairness be subjected to its disadvantages. It cannot be permitted, by splitting the single conspiracy in two, to say one was criminal and the other meritorious; that in one the councilmen alone were involved in the other 'Harris' was also a party, when the fact is that 'Harris' was a necessary party throughout. As the Supreme Court of the United States has recently said: 'The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.' *United States v. Patten* (1913) 226 U. S. 525, 544, 57 L. ed. 333, 342, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141, 145. The case is analogous to the old case where a man arranged through a third party for a highway robbery to be committed upon himself, with a view to receiving a reward offered for the apprehension of highway robbers. It was held that the defendant could not be convicted, since the force requisite to constitute a highway robbery had not been used, the alleged victim having himself authorized it. *M'Daniel's Case* (1755) *Fost. C. L. (Eng.)* 121; *Rex v. Fuller* (1820) *Russ. & R. C. C. (Eng.)* 408. On an indictment for burglary, the entry was held not burglarious because made with assent of detectives, who were in the occupancy and control of a bank with the consent of the owners. 'This cannot be burglary,' said the court, 'in contemplation of law, however much the defendant was guilty in purpose and intent. *Speiden v. State* (1877) 3 *Tex. App.* 156, 30 *Am. Rep.* 126; *Rex v. Johnson* (1841) *Car. & M. (Eng.)* 218. On an indictment for bribery, where an officer first suggested his willingness to accept a bribe, and apparently joined the defendant in a criminal act suggested by the officer merely to entrap the defendant, the case was held not within the spirit of the Criminal Code.

O'Brien v. State (1879) 6 Tex. App. 665. In larceny, where the entrapment is by the owner or a detective, or by his agent, their participation takes away the essential element of a conversion against the will of the owner. Whart. Crim. Law, § 917. These cases were decided upon the ground that an essential element of the crime was absent. We do not approve the distinction attempted in the Ohio case of *State v. Diegle* (1911) 21 Ohio Dec. 557, a report of which was furnished by the prosecution, between an injury to a private citizen, as in the case of highway robbery, burglary, or larceny, and an injury to the public, as in the case of bribery. All crimes alike, under our modern legal theories, are crimes against the public, and all are classified as public wrongs by Blackstone."

In *Woodworth v. State* (1886) 20 Tex. App. 375, it was held that there could be no conviction for a conspiracy to commit a burglary between a person contemplating the commission of a burglary and one who had undertaken to entrap him, and had entered into the plan for that purpose.

In *Com. v. Wasson* (1910) 42 Pa. Super. Ct. 38, *supra*, it was held that members of the common council of a city were properly convicted of a conspiracy to cheat and defraud the city and to do other dishonest, malicious, and unlawful acts, to the prejudice of the city, and to do certain acts involving bribery of members of the council relative to the paving of the streets of the city, although it appeared that the conspiracy was formed in consequence of the representations of detectives that they were representatives of a lumber company, and desired to have streets designated for paving with wood blocks, in order to secure a market.

In *Johnson v. State* (1878) 3 Tex. App. 593, *supra*, it was held that the subsequent consent of the owner, or his duly authorized agent, that the conspirators might enter the building, was no defense to a prosecution for a conspiracy to commit burglary.

e. Counterfeiting.

It is no defense to a prosecution for

counterfeiting trademark labels that the offense was committed at the instance of the owners of the labels, and paid for with their money, where it was the purpose of the owners to ascertain if the accused was engaged in the business of counterfeiting their labels, and the accused was not employed to print the labels for the owners, but for the use of one apparently designing to perpetrate a fraud. *People v. Krivitzky* (1901) 168 N. Y. 182, 61 N. E. 175.

In *Reg. v. Bannen* (1844) 1 Car. & K. (Eng.) 295, 2 Moody, C. C. 309, wherein it appeared that, after an order had been given for the construction of dies from which shillings could be struck, the manufacturer receiving the order communicated the fact to the officers of the mint, who told him to proceed with the order, which was done, it was held that the entrapment was no defense.

As to the defense of entrapment in a prosecution for selling goods bearing counterfeit labels, see *infra*, II. k.

f. Criminal libel.

On a prosecution for criminal libel, it has been held to be no defense that the person libeled, having been informed and believing that the defendant designed to publish a libel, employed a detective to watch him and take every step to detect him if he committed the offense, and even to cooperate with him for that purpose, and to allow the crime to be committed, for the purpose of detecting and prosecuting the defendant, where the latter was not solicited to commit the crime. *People v. Ritchie* (1895) 12 Utah, 180, 42 Pac. 209.

g. Embezzlement.

The cases dealing with the crime of embezzlement are collated *infra*, II. n.

h. Espionage Act violation.

In *Partan v. United States* (1919) 261 Fed. 515, certiorari denied in (1920) 251 U. S. 561, 64 L. ed. 415, 40 Sup. Ct. Rep. 220, the defendants were convicted under one of several counts of an indictment which charged them with violation of § 3 of the Espionage Act (Act of June 15, 1917, 40 Stat. at

L. 219, chap. 30, as amended by Act of Congress of May 16, 1918, chap. 75, § 1, 40 Stat. at L. 553, Comp. Stat. § 10, 212c, Fed. Stat. Anno. Supp. 1918, p. 122), providing, in part, as follows: "Whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about . . . the military or naval forces of the United States, . . . intended to bring . . . the military or naval forces of the United States . . . into contempt, scorn, contumely, or disrepute." The substance of the charge was that the defendants, with intent to violate the statute, gave away, sold, and distributed among certain persons, a book containing matter prohibited by the statute. It appeared that government agents purchased the books for the sole purpose of prosecuting the defendants, and the entrapment was alleged as a defense thereto. The court said: "It is true that the employees of the United States did inquire at the bookstore of the publishing company whether the book could be bought, and said they wanted to buy it; but there is evidence tending to show that the sales were made voluntarily by the clerks at the bookstore, and by the authority of defendants, and with their knowledge. We have had occasion before now to say that, if an officer of the law has reason to believe that a crime is being committed, he may proceed to ascertain whether those charged with the commission of the crime are actually committing it, or are otherwise criminally implicated. The detection of a crime in its commission is far from inducing the wrongdoer to commit the crime detected. The district court, in its charge to the jury, was very careful to protect the rights of the defendants by pointing out this distinction."

4. Extortion.

It is no defense to a prosecution for an attempt to commit the crime of extortion, that the person from whom the defendant sought to obtain money by threats, and who paid the money to the defendant, was, at the time, acting

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as a decoy of the police, and trying to induce the defendant to receive money from him under such circumstances as to render the defendant guilty of the crime, and enable the police to arrest and convict him of it. *People v. Gardner* (1894) 144 N. Y. 119, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003, 9 Am. Crim. Rep. 82.

5. False pretenses.

As to the defense of entrapment in a prosecution for using the mails to defraud, see *infra*, II. r.

It was held in *State v. Salisbury Ice & Fuel Co.* (1914) 166 N. C. 366, 52 L.R.A.(N.S.) 216, 81 S. E. 737, Ann. Cas. 1916C, 456, affirmed on rehearing in (1914) 166 N. C. 403, 52 L.R.A.(N.S.) 219, 81 S. E. 956, Ann. Cas. 1916C, 728, that a coal dealer who knowingly sold and delivered 1,750 lbs. of coke as a ton, and charged and received therefor the price of a ton, was guilty of obtaining money by false pretenses, notwithstanding the purchaser had a strong suspicion that the dealer was selling by short weight, and made the purchase for the sole purpose of entrapping the defendant, with a view to his prosecution, it being said that the purchaser merely furnished the opportunity for the commission of the crime.

In *Rex v. Ady* (1835) 7 Car. & P. (Eng.) 140, it was held to be no defense to an indictment for obtaining money under false pretenses that the one from whom it was obtained had laid a plan to entrap the defendant into committing the offense. In that case a clergyman, having received a letter purporting to have come from James Laurie, which promised valuable information for certain compensation, took the letter to the accused, who falsely represented himself to be the partner of Laurie and to be entitled to receive the money. The money was given him, and the information proved valueless. The trap seems to have consisted in showing the letter to the defendant, in order to give him an opportunity to claim the compensation, but in this respect the report of the case is not clear.

*k. Illegal sales.**1. Goods bearing counterfeit labels.*

It is no defense to a prosecution for selling goods bearing counterfeit labels, that the purchaser, acting with a special agent of the owners of the labels counterfeited, knew that the labels on the goods purchased were counterfeits, and made the purchase for the purpose of proving the fact of sale by the defendant, and having him prosecuted. *People v. Hilfman* (1901) 61 App. Div. 541, 70 N. Y. Supp. 621.

As to the defense of entrapment in a prosecution for counterfeiting, see *supra*, II. e.

*2. Intoxicating liquor.**(a) Persons generally.*

As to the defense of entrapment in a prosecution for selling liquor to a slave, see *infra*, II. y.

The great weight of authority supports the view that a person making an unlawful sale of liquor is not excused from criminality by the fact that the sale is induced for the sole purpose of prosecuting the seller.

United States.—*Goldstein v. United States* (1919) 168 C. C. A. 159, 256 Fed. 813; *Fetters v. United States* (1919) 171 C. C. A. 178, 260 Fed. 142, certiorari denied in (1919) 251 U. S. 554, 64 L. ed. 412, 40 Sup. Ct. Rep. 119; *Ramsey v. United States* (1920) — C. C. A. —, 268 Fed. 825; *Saucedo v. United States* (1920) — C. C. A. —, 268 Fed. 830; *Farley v. United States* (1921) — C. C. A. —, 269 Fed. 721.

Alabama.—*Borck v. State* (1905) — Ala. —, 39 So. 580; *Swope v. State* (1915) 12 Ala. App. 297, 68 So. 562; *Strother v. State* (1916) 15 Ala. App. 106, 72 So. 566.

Arizona.—*Duff v. State* (1918) 19 Ariz. 361, 171 Pac. 133.

California. — *People v. Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440.

Colorado. — *Simmons v. People* (1921) — Colo. —, 199 Pac. 416.

Georgia.—*Gordon v. State* (1910) 7 Ga. App. 691, 67 S. E. 893.

Illinois.—*Evanston v. Myers* (1898) 172 Ill. 266, 50 N. E. 204, reversing (1897) 70 Ill. App. 205.

Iowa.—*State v. See* (1916) 177 Iowa, 316, 158 N. W. 667.

Kansas.—*State v. Spiker* (1913) 88 Kan. 644, 129 Pac. 195.

Massachusetts. — *Com. v. Graves* (1867) 97 Mass. 114.

Michigan. — *People v. Murphy* (1892) 93 Mich. 41, 52 N. W. 1042; *People v. Everts* (1897) 112 Mich. 194, 70 N. W. 430; *People v. Rush* (1897) 113 Mich. 539, 71 N. W. 863.

Minnesota.—*State v. Gibbs* (1909) 109 Minn. 247, 25 L.R.A. (N.S.) 449, 123 N. W. 810.

Missouri.—*State v. Quinn* (1902) 94 Mo. App. 59, 67 S. W. 974, affirmed in (1902) 170 Mo. 176, 70 S. W. 1117; *State v. Lucas* (1902) 94 Mo. App. 117, 67 S. W. 971; *State v. Richie* (1915) — Mo. App. —, 180 S. W. 2. See also *State v. Feldman* (1910) 150 Mo. App. 120, 129 S. W. 998.

Montana.—*State v. O'Brien* (1907) 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006.

New York.—See *Excise Comrs. v. Backus* (1864) 29 How. Pr. 33.

North Carolina.—*State v. Smith* (1910) 152 N. C. 798, 30 L.R.A. (N.S.) 946, 67 S. E. 508; *State v. Hopkins* (1911) 154 N. C. 622, 70 S. E. 394.

Oklahoma.—*DeGraff v. State* (1909) 2 Okla. Crim. Rep. 519, 103 Pac. 538; *Caveness v. State* (1910) 3 Okla. Crim. Rep. 729, 109 Pac. 125; *Stack v. State* (1910) 4 Okla. Crim. Rep. 1, 109 Pac. 126; *Moss v. State* (1910) 4 Okla. Crim. Rep. 247, 111 Pac. 950; *Cunningham v. State* (1910) 4 Okla. Crim. Rep. XIII. 111 Pac. 959.

Rhode Island.—See *Tripp v. Flanagan* (1871) 10 R. I. 128.

Texas.—See *Smith v. State* (1911) 61 Tex. Crim. Rep. 328, 135 S. W. 154; *Scott v. State* (1913) 70 Tex. Crim. Rep. 57, 153 S. W. 871.

Utah.—*Salt Lake City v. Robinson* (1912) 40 Utah, 448, 125 Pac. 657.

England.—*Rex v. Titley* (1881) London Law Times, July 30, 1881 (explained in note to *Bates v. United States* (1881) 10 Fed. 92).

As was said in *Duff v. State* (Ariz.) *supra*: "There is no law forbidding the employment of detectives to aid in the discovery and suppression of crime. Such a method is not inherent-

ly bad. Its credibility and weight are therefore for the consideration of the jury."

So, in *Borck v. State* (Ala.) *supra*, it was said: "The fact that Plunkett was an officer of the law can make no difference, since an officer could not, by giving his consent to the sale, any more justify the act on the part of the defendant than would be the consent of any private person."

Similarly, in *Farley v. United States* (Fed.) *supra*, wherein it appeared that all the officers did was to go to the tavern, and, while at their meals, order the waiter to serve them with some cough syrup, which was understood to be whisky, the court said: "The officers had nothing to do with furnishing the whisky, their only purpose being to ascertain whether or not the defendant was dealing in or dispensing drinks of the kind to his customers. That such deportment on the part of the officers does not constitute an entrapment that relieves the defendant from guilt has been recently decided by this court."

To the same effect, see *Saucedo v. United States* (1920) 268 Fed. 830, wherein the court said that the circumstance that the purchaser was a government agent did not preclude a conviction.

In *Strother v. State* (1916) 15 Ala. App. 106, 72 So. 566, the appellate court sustained the refusal of the trial judge to instruct that "if the jury believe from the evidence that the witness for the state sought to entrap the defendant into violating the law, they must acquit," saying: "It does not assert a correct principle of law. The mere fact that defendant yielded to the temptation and solicitation of a witness for the state is no justification for the commission of a crime. This is self-evident, and needs no recitation of authority."

In *Salt Lake City v. Robinson* (1912) 40 Utah, 448, 125 Pac. 657, it was held to be no bar to a prosecution for the illegal sale of liquor without a license that the sale was made to two police officers of the prosecuting city, who went to the defendant's store and asked to purchase the liquor, for

the express purpose of obtaining the necessary evidence to prosecute the defendant. The court said: "While it may be conceded that the particular sale in question here would not have been made if the two officers had not asked to purchase the liquor, yet, in view of the facts and circumstances, the appellant was no more induced to make this sale than he would be induced to make any sale in his place of business. Moreover, the sale in question was seemingly only one of many that appellant was prepared to make. When the intoxicating liquor was called for by the officers, appellant seemed to have a stock of it on hand from which he could supply any reasonable demand. In case the officers had called for intoxicating liquor, and had been informed by appellant that he did not have it for sale, or that he did not keep it in stock, and in such event they had induced him to obtain some for them from someone else, which he did, and after it was so procured upon their solicitation he had sold them what he had procured, the case would be different. Here, however, the sale was freely and voluntarily made from a supply which apparently was on hand in appellant's store, and which could have been kept on hand only for the purpose of making sales to those who desired to purchase. While it is true that one sale constitutes the offense, yet it is clear that it was not the purpose of the officers to induce the appellant to make a sale for the sole purpose of convicting him of making that sale, but it seems their object was to obtain evidence from which it was made manifest that appellant was engaged in the illegal traffic of intoxicating liquors, and that they desired to break up such traffic. As public officers, who, under their oaths, were required to enforce the ordinances of the city, we cannot see wherein they offended against public policy or against good morals in seeking to obtain evidence against a willing offender against the law for the purposes aforesaid."

In *State v. See* (Iowa) *supra*, the court said: "The contention of defendant is that, even though the jury

should find that defendant sold liquor to either of the state agents, that it was procured at their instance and request, and the fact that they were agents for the state, buying the liquor with money furnished or repaid by the state, then the state could claim no liability on the part of the defendant, because the crime of which defendant was charged was committed at the solicitation of and instigated by the state. The statutes referred to are, substantially, that the duty of such state agents is to aid in the capture, detention, arrest, and prosecution of persons committing crime or violating the laws of the state. We think there is no merit in this claim, because there is no evidence to show that the agents at the time in question improperly solicited the defendant to commit the acts. The transaction appears to have been the ordinary one of a person calling for a certain article and purchasing it. The purpose was to ascertain whether defendant was violating the law, and the acts of such agents in procuring testimony in this matter are no different from the act of a detective in procuring evidence. The holdings are that it is not a defense to a prosecution for the illegal sale of intoxicating liquors to show that the purchase was made by a detective or hired informer. There is a clear distinction between inducing a person to do an unlawful act for the purpose of prosecuting him, and catching him in the execution of a criminal design of his own conception."

Likewise it is no defense that a decoy purchased the liquor at the instigation of the police. *Stack v. State* (1910) 4 Okla. Crim. Rep. 1, 109 Pac. 126.

So it is no defense that the prosecuting witness had been given money by the sheriff with instructions to purchase liquor from the defendant, *Simmons v. People* (1921) — Colo. —, 199 Pac. 416.

In *Excise Comrs. v. Backus* (1864) 29 How. Pr. (N. Y.) 33, which was an action to recover a penalty for an unlawful sale of liquor, the court said: "The plaintiffs are in effect a corporation, and they represent in their action

in this case the sovereign power of the state engaged in administering and enforcing its penal laws. The defendant is an alleged violator of the laws, whose detection and punishment it is for the public interest to secure. The mode the plaintiffs adopt to compass this is precisely that which the state or any of its functionaries, or any municipal body, resorts to when it offers a reward for the detection of crime, promises indemnity to a co-adjutor or co-conspirator, or presents pecuniary inducements to informers to testify, by agreeing to share with them the spoils of victory obtained through their aid. This has never been dreamed of as a good plea in bar to the maintenance of an indictment, or any action whatever, brought in behalf of the public authorities to punish crime or collect penalties imposed by law. . . . The mode adopted by the plaintiffs to bring to light the malfeasance of the defendant had no necessary connection with his violation of law. He exercised his own volition, independent of all outside influence or control. Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in *Paradise*: "The serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that, under any code of civilized, not to say Christian, ethics, it never will." See, to the same effect, *Tripp v. Flanigan* (1871) 10 R. I. 128.

But where the accused is lured into an unlawful sale of liquor by government officials, and is a mere passive instrument in their hands, the entrapment bars a prosecution, *Peterson v. United States* (1919) 166 C. C. A. 509, 255 Fed. 433; *Smith v. State* (1911) 61 Tex. Crim. Rep. 328, 135 S. W. 154; *Scott v. State* (1913) 70 Tex. Crim. Rep. 57, 153 S. W. 871. See also *United States v. Echols*

(1918) 253 Fed. 862; *People v. Barkdoll* (1918) 86 Cal. App. 25, 171 Pac. 440; *State v. Feldman* (1910) 150 Mo. App. 120, 129 S. W. 998.

In *Scott v. State* (1913) 70 Tex. Crim. Rep. 57, 153 S. W. 871, *supra*, wherein it was maintained that an inducement by an officer to effect an unlawful sale of liquor was unjustifiable, the court said: "The writer has had occasion heretofore to criticize the character and manner of inducing men to commit crime, as is evidenced by this record. This witness testifies, and is not uncontroverted or contradicted, that the sheriff agreed to give him \$10 for each case he would 'turn in,' and additional money or compensation if a conviction should occur. The officers are not justified in inducing men to commit crime, or in employing others to induce them to commit crime, in order that prosecutions may be instituted. It is his duty as an officer, where he understands that parties are engaged in crime, to use every effort legitimate and permissible by law to detect and ferret out crimes and bring criminals to trial and justice. But this does not justify him in employing parties to go out and induce the citizens to commit crime that prosecutions may be instituted and carried on. We here call the attention of the legislature to such matters, and would suggest that appropriate legislation be enacted to prevent matters of this sort occurring."

And in *Smith v. State* (1911) 61 Tex. Crim. Rep. 328, 135 S. W. 154, *supra*, the investigation of offenses against the liquor law was severely criticized, the court saying: "While it is entirely proper that officers should be diligent in ferreting out crime and violations of the law, yet it does not occur to us that the theory of our law is predicated upon the idea that parties should be induced to violate the law in order that a prosecution may be brought about. The machinery of the state should be put into operation to detect and punish crime, but not to organize and institute it. The prevention of crime

is one of the main purposes of our law, not its encouragement or propagation."

In *State v. Feldman* (Mo.) *supra*, the court said: "I hold that this defendant had no thought whatever of violating any law, had refused to do so, although solicited by the detective; and while the act of a sale to a minor is a violation and an offense, irrespective of any intent on the part of the seller, or knowledge on his part of the age of the ostensible buyer, the sale here made was the direct result of the act of these detectives, in laying a trap for the defendant, into which he fell, in appearance only violating the law. The principal witness for the prosecution, young Wein, testified: 'I have been engaged for two years in trying to get people to violate the law.' A person so acting is 'particeps criminis.' One entrapped by such means should not be held guilty. In brief, I do not think the sale, even if made to the minor, was, under the facts of the case, in violation of the law."

In *People v. Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440, the court said: "Where a person is innocent of any intention to commit a crime, and is inveigled into its commission by an officer of the law for the purpose of advancing his standing for efficiency, or to obtain revenue by fine for the municipality, it might be said to uphold such practices would be repugnant to any just conception of good morals, and violative of sound public policy. But we have no such case here."

It was held in *State v. Feldman* (Mo.) *supra*, that the act of a father in sending his son into a saloon to purchase beer, not for beverage purposes, but solely for the purpose of securing evidence against the accused, was a defense to the crime of selling liquor to a minor, where it appeared that the father gave the money for the purchase to the son, who paid for the liquor in the saloon, and the saloon keeper put the beer in the rear of the witness's buggy, the theory being that the sale was made to the father, and not to the

son. The court said: "The only debatable point is whether the son was a copurchaser,—whether the sale was to both of them, and hence to a minor as well as to a man of full age. Scrutinizing the testimony of the two Weins closely, without taking account of what defendant testified, it is apparent the father was the directing and ruling spirit in the transaction, and the boy was used as a decoy. He had the right to control his son, and there is no proof he had emancipated the boy, or given the latter his wages, which presumably went to the father. . . . The son was a lad not eighteen years old; the father had received money to use in their occupation of detectives for the Anti-saloon League, and had turned over part of it to his son; the father accounted for the beer bought of defendant in his report of expenses. He testified that when they arrived at St. Clements, he told his son to go in and get the beer; not as a beverage, but as evidence of selling to minors; told his son to get the defendant to sell to him (his son), as that would be selling to a minor, and if he did, that it would be a violation of the law. He testified further that he talked with his son when the two left defendant's store after the first visit, and they concluded to go back to St. Clements and try Feldman again. Young Wein testified he and his father agreed that he (the son) 'was the one to be pushed to the front to get him (defendant) to violate the law; and we had that agreement and that understanding between my father and myself.' We hold, on the evidence of the state, the beer was sold to the father, and not to the minor, within the meaning of the statute on which the information is founded, which, in our opinion, was not intended to create an offense on such facts as we have here. The facts show no violation of the statute, considering its spirit and purpose and the offense it was enacted to prevent; hence the judgment will be reversed and the defendant discharged."

In Colorado it is the rule that a

city cannot recover a penalty for the unlawful sale of liquor where the violation was induced by the town or city, through one of its officers. *Ford v. Denver* (1898) 10 Colo. App. 500, 51 Pac. 1015; *People v. Braisted* (1899) 13 Colo. App. 532, 58 Pac. 796; *Walton v. Canon City* (1900) 14 Colo. App. 352, 59 Pac. 840; *Wilcox v. People* (1902) 17 Colo. App. 109, 67 Pac. 343. Compare *People ex rel. Sterling v. Chipman* (1903) 31 Colo. 95, 71 Pac. 1108; *Plue v. People* (1920) 69 Colo. 250, 193 Pac. 496.

In *People v. Braisted* (1899) 13 Colo. App. 532, 58 Pac. 796, *supra*, the court said: "It [the county court] simply held that the town could not recover a penalty for a violation of its ordinance, instigated and procured by its officer. It is entirely clear that the liquor, if it was purchased at all, was not purchased for the private use of any person. It was purchased to involve the seller in a violation of the ordinance, in order that the town attorney might be enabled to pursue him for a penalty. It was peculiarly the duty of Mr. Fairlamb [the town attorney], in view of the office which he filled, to uphold the ordinances of the town, and to discountenance their violation. But in this case we find him actively engaged in procuring the violation of an ordinance, even expending his own money for the purpose. So far as we can see, his only motive was to compel the victim to pay his money into the town treasury. It would be contrary to good morals to allow the plan to succeed. Public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated and contrived by its officers. . . . To sustain this prosecution would be, in effect, to say that such officers have a license to inveigle citizens into the commission of offenses, to the end that money may be extorted from them."

So, in *Ford v. Denver* (Colo.) *supra*, wherein it appeared that the city was instrumental in procuring the sale of liquor, the court said: "It appears that the city was instrumental in procuring the sale of the liquor.

Its purpose was to lay the foundation for a suit in which a judicial opinion as to what would constitute a violation of the ordinance might be procured. Apparently this purpose was unknown to the defendant's clerk when he made the sale, and technically, at least, his act was contrary to the ordinance. But the city is in no position to say that its ordinance was violated. It was as much responsible for the sale of the liquor as the defendant, and it will not be permitted to replenish its treasury from penalties incurred at its instigation. It cannot be heard to complain of an act the doing of which is solicited. It is entitled, in a proper case, to have its ordinance construed, and questions concerning it determined, but it cannot manufacture a case for the purpose, or obtain the information it desires at the expense of a party for whose infraction of its ordinance it is responsible."

But in *People ex rel. Sterling v. Chipman* (1903) 31 Colo. 95, 71 Pac. 1108, wherein it appeared that a town attorney merely employed a detective to ascertain whether liquor was being sold in the town without a permit, and agreed to pay his expenses and certain sums for his services, and the detective thereupon gave to another person money with which the latter purchased the liquor on the sale of which a prosecution for a penalty was based, it was held that the town had not procured the violation of its ordinance so as to be estopped from asserting it. The court said: "A detective was employed by the town attorney of Sterling to ascertain if the said ordinance was being violated. The detective gave to the witness Peyton the sum of \$1. With the money so given him by the detective, the witness bought the whisky. Three cases of the courts of appeals, namely, *Ford v. Denver* (Colo.) *supra*; *People v. Braisted* (1899) 13 Colo. App. 532, 58 Pac. 796; and *Walton v. Canon City* (1900) 14 Colo. App. 352, 59 Pac. 840, are cited by the defendant as sustaining the position. We do not regard the case of *Ford v. Denver* as applicable to the one at bar. The

other two cases are more nearly in point. In these cases, witnesses were furnished money by the officers of the town, with instructions to buy liquor from the defendants, and the court held that the town treasury could not be replenished by fines from defendants who were induced to violate ordinances by persons who bought liquor with money furnished by the officers of the town. In the case here, the detective was employed by the town attorney for the purpose of ascertaining if the ordinances were being violated. The detective, and not the town attorney, procured the witness to buy the liquor, and it was the detective's money that was used for the purpose of buying liquor. Nor does the testimony show that any part of the money advanced the detective was to be used in the purchase of liquor, nor were instructions or directions given by the town attorney to the detective as to the purchase of liquor. The court found that, in employing the detective, the town attorney did not act in his official capacity, and in this case, at least, there appears to have been a legitimate effort to ascertain whether the ordinances were being violated, and not an attempt on the part of a town official to induce a violation of the ordinance for the purpose of replenishing the town treasury. We do not understand that the court of appeals has gone to the extent of saying that a municipal officer cannot employ persons to ascertain whether the ordinances are being violated, and that prosecutions cannot be supported by testimony procured in the way shown in this case; although, if carried to its logical conclusion, the doctrine announced in the two cases referred to might include this case. However, we are not prepared to announce as a doctrine that town attorneys are to be so handicapped in the performance of their duties that prosecutions may not be sustained by the testimony obtained in the manner the testimony in this case was obtained."

In *Plue v. People* (1920) 69 Colo. 250, 193 Pac. 496, it appeared that Klein, a police officer, arranged with

one Woods "to get someone to bring" intoxicating liquor to the residence of J. W. Noon. Woods then went to Noon and asked him to procure some whisky for his (Woods's) friends. Thereafter Noon requested the defendant to bring liquor to his home. The defendant complied with this request, bringing to Noon's house two packages, each containing 12 pints of whisky. Klein and Schneider, another police officer, appeared at Noon's home as the friends for whom Woods acted. They were there when the defendant arrived with the liquor, and arrested him when he delivered the whisky to Noon. Holding there was no such entrapment or instigation as to prevent the defendant's acts from being criminal, the court said: "Noon never had any intention of entrapping the defendant. He was acquainted with him, and merely intended to buy the whisky for others, whom he did not suppose desired to entrap the defendant. There is no evidence that Noon or anyone else induced, or even encouraged, the defendant to violate the law. None of the witnesses for the state, so far as the record shows, had anything to do with the willingness of the defendant to sell, or to have in his possession for sale, intoxicating liquor. In addition to the whisky which he delivered to Noon, for which he expected to receive \$45, the defendant had four more packages of liquor in the automobile in which he arrived at Noon's home. This was a circumstance, in addition to other facts herein mentioned, showing that the defendant was not incited, induced, or even encouraged to violate the law by reason of anything done by any officer or witness for the state."

(b) *Indians.*

Cases dealing with the illegal sale of liquor to Indians are grouped separately for the reason that the defense of entrapment, in this particular instance, is governed by a different principle. Many Indians are not distinguishable from Caucasians, and where the decoy purchaser cannot be so distinguished, the accused, assum-

ing the sale to be otherwise valid, does not knowingly commit the act, the sale being innocent except for the status of the decoy. The case is unlike that of a person who knowingly sells intoxicating liquor where its sale to anyone is prohibited, for in such case the act is criminal regardless of the status of the buyer, and the decoy does not neutralize the criminal quality of the act. The rule, therefore, is well settled that where the decoy is one of concealed disability, the entrapment is a defense to the prosecution. *United States v. Healy* (1913) 202 Fed. 349; *Voves v. United States* (1918) 161 C. C. A. 227, 249 Fed. 191.

In *United States v. Healy* (Fed.) supra, the court said: "Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end, ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. . . . In the case at bar the act is innocent but for the status of the solicitor, and because he is a decoy of concealed disability, the act is blameless, and there is estoppel against conviction. Were it otherwise, honest men could easily be made felons. Many of the government's Indian wards are not distinguishable from Caucasians. Any purveyor of

liquors, and anyone moved by hospitality to share thereof with guests, ignorant of their status, would unhesitatingly sell or give to them. As decoys in the service of government officers, what instruments of oppression they might be to men devoted to law, but ignorant of their disability! That the seller is suspected of voluntary like sales does not justify entrapping as here; for thereby a law-abiding person may as easily be ensnared. And the result proves nothing but overzeal, to put it mildly, of government officers. The practice cannot be tolerated, and a conviction for an offense so procured cannot stand."

To the same effect, see *Voves v. United States* (1918) 161 C. C. A. 227, 249 Fed. 191, wherein the court said: "Grant that the government may use a decoy to discover evidence of a committed crime of whatever nature; that, where one has the intent to commit a malum in se, or the willingness to do a malum prohibitum, a decoy may accompany the wrongdoer and even participate in the offense; that a liquor seller is guilty, despite his honest and reasonable belief respecting the age or race of the purchaser; and even that he must take his chance that a purchaser, who is not a government decoy, may wilfully deceive him by camouflage,—still the question remains: May the government maintain an indictment against a person for doing a malum prohibitum when the government's conduct has misled the person into believing that the prohibited act was a lawful act? In a civil transaction between citizens such conduct as the jury might have found in this case would create an estoppel which would preclude a suit based upon the suppressed truth. Is our government of the superman type that releases the ruler from the obligations of honesty and fairness that are imposed upon the citizens? Is one's liberty or reputation as a law-abider to have less protection than his property? We are strongly of the view that sound public policy estops the government from asserting that an act which involves no criminal intent was volun-

tarily done when it originated in and was caused by the government agents' deception."

"If, however, the decoy is one whose appearance, or otherwise, conveys knowledge of his disability, or is sufficient to put the seller on inquiry, any sale made is voluntary, establishes guilt, and warrants conviction. For in such case the seller is either of guilty intent, or negligent ignorance or recklessness, which relieves the government's participation of any taint of fraudulent concealment or deceit." See *United States v. Healy* (Fed.) supra.

So, in *United States v. Amo* (1919) 261 Fed. 106, wherein it appeared that two full-blooded Indians—strong, stalwart specimens of the race—were hired by government agents to purchase some liquor from the defendants, the entrapment was held to be no defense, the court saying: "In the present case, Indians visit a saloon and buy liquor from a person who is entirely ready and willing to sell to them, without any deceit or persuasion whatever. They simply approach the bar and say 'Whisky?' which may be the only English word they know (and, as one of the Indians said, that is enough to know). They merely gave defendant the opportunity to violate the law, without any persuasion to or deception of a willing lawbreaker, who knowingly and promptly furnishes the liquor, well knowing that whisky is the cause of most of the evils which beset the Indian, most of the crimes on Indian reservations, and that the government has sought in every possible way to keep the poison away from them."

3. Lottery tickets.

In *People v. Noelke* (1883) 94 N. Y. 137, 46 Am. Rep. 128, it appeared that a person bought a lottery ticket for the purpose of securing the conviction of the seller. The defendant did not rely on the entrapment as a defense, but did contend that the person who bought the ticket was an accomplice, on whose uncorroborated testimony a conviction could not be

had. The court affirmed a verdict of guilty.

4. *Narcotics.*

This subdivision includes only cases of the unlawful sale of narcotics. Cases dealing with other violations of the Narcotic Act are collated *infra*, II. p.

It has been held that a physician or druggist who, at the solicitation of a person intending to commence a criminal prosecution, has sold or prescribed a narcotic, in violation of a statute, cannot set up as a defense the fact that he was induced to violate the law for the purpose of prosecution. *Niswonger v. State* (1913) 179 Ind. 653, 46 L.R.A.(N.S.) 1, 102 N. E. 135.

So, in *Hyde v. State* (1914) 131 Tenn. 208, 174 S. W. 1127, wherein it appeared that a physician, at the solicitation of a government officer, gave a prescription for morphine, in violation of a statute, the defense that the crime was induced by the government agent was declared to be unavailing. To the same effect, see *Fiunkin v. United States* (1920) 265 Fed. 1; *Rothman v. United States* (1920) 270 Fed. 31.

In the case last cited, the rule was stated to be that "when a government detective, suspecting that a person is engaged in an unlawful business, seeks information under an assumed name directly from him, and that person responds thereto, violating a law of the United States, he cannot, when indicted for the offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official."

In *Fiunkin v. United States* (Fed.) *supra*, the court said: "The question presented for decision is whether the court erred in not directing a verdict for defendant, upon the ground and for the reason that the government officers lured and incited the defendant to commit the offenses with which he was charged. It is argued that the defendant was induced, through the machinations and instigation of the government officers, to commit the offense; or, in other words, that he was

entrapped by such contrivance of the officers to do the thing which the law condemns. The evidence fails to show, however, that such was the case. The officers had nothing to do with the defendant's having the drugs in his possession. They had nothing to do with his willingness to sell the same for a consideration. They had nothing whatever to do with the conditions that prevailed prior to the time they sent the addict to the store to make the purchase, nor with the defendant's state of mind or purpose of action, should opportunity present itself, of dealing with the drug as a commodity for sale to those who were willing to buy. Nor did they offer any inducement to the defendant to sell, except that they did, through Collins, offer to buy, and proffered the amount of money that defendant fixed as the price he was willing to take. Nothing beyond this appears in the testimony. It is true that the defendant was entrapped by what was done to sell the drug to the government officers, and to put himself in a position of yielding up evidence of his commission of the offense. But this does not signify that the government officers lured him, or incited or induced him, to do what he would otherwise have done if any other addict had applied to him to purchase the drug. The case is not different from those where decoy letters have been sent through the mails to ascertain whether parties are indulging in unlawful practices."

In *Chicago v. Brendecke* (1912) 170 Ill. App. 25, a civil action by a city against a druggist to recover a penalty for a violation of the municipal code, prohibiting the sale of morphine, it was held that no such entrapment of the defendant by the police officers to make the sale in question as would prevent a recovery was shown by evidence that the purchaser had notified a police inspector that she could get morphine from the defendant, and the inspector told an officer to see if the witness could do it, whereupon the officer took the witness to the defendant's store, gave her money with which to make the purchase in question, and waited out-

side the store for her while she made the purchase, and received from her the envelop containing the morphine tablets purchased. The court said: "The police officers had no communication whatever with plaintiff in error prior to the sale of the morphine by him. They merely afforded him an opportunity to voluntarily and deliberately do what they had reason to believe he would so do, if opportunity offered."

But no conviction can be had where the accused is procured to make an unlawful sale of narcotics for the sole purpose of prosecuting him therefor. See the reported case (*BUTTS v. UNITED STATES*, ante, 143).

5. *Obscene matter.*

It is no defense to a prosecution for selling obscene printed matter that the purchase which formed the basis of the prosecution was made by a person in the employ of a society for the suppression of vice, for the express purpose of prosecution. *Reg. v. Carlile* (1845) 1 Cox, C. C. (Eng.) 229.

As to a prosecution for sending obscene matter in interstate commerce, see *infra*, II. m.

As to the defense of entrapment in a prosecution for sending obscene matter through the mails, see *infra*, II. r.

1. *Immigration law violation.*

In *Woo Wai v. United States* (1915) 137 C. C. A. 604, 223 Fed. 412, it appeared that certain government officers persuaded and induced the defendant to commit the crime of bringing Chinamen across the Mexican border, not for the purpose of punishing the defendant for the crime, but for the purpose of forcing the defendant to reveal certain information concerning other violations of the immigration laws. The entrapment was held to be a good defense, the court saying: "We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld

only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in *People v. Mills* (1904) 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus, in *People v. Mills*, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them." To the same effect, see *Sam Yick v. United States* (1917) 153 C. C. A. 96, 240 Fed. 60.

m. *Interstate Commerce Act violation.*

It has been held to be no defense to a prosecution for sending obscene matter in interstate commerce that the purchase which formed the basis of the prosecution was made by a person for the express purpose of prosecution. *Hanish v. United States* (1915) 142 C. C. A. 216, 227 Fed. 584, writ of certiorari denied in (1915) 239 U. S. 645, 60 L. ed. 484, 36 Sup. Ct. Rep. 167. In that case it appeared that the defendant, in response to decoy letters sent by a government inspector, shipped certain obscene books, in violation of the Interstate Commerce Act. The court said: "The system of detecting crime by the use of decoy letters or decoy witnesses is necessary to the proper administration of criminal justice, and is in quite general use. It does not, of itself, excuse the offender, unless a constituent element of the crime be thereby removed. In cases of larceny, if the owner of the property, through a decoy, consents to the taking of the property by the accused, the element

of trespass or tortious taking, essential to the offense of larceny, is absent, as explained in *Love v. People* (1896) 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710, and *Topolewski v. State* (1906) 130 Wis. 253, 7 L.R.A. (N.S.) 756, 118 Am. St. Rep. 1019, 109 N. W. 1037, 10 Ann. Cas. 627. In the case at bar, however, although defendant sent the books pursuant to the decoy letters, and sent them to a fictitious person, yet the gist of the offense still remained, which was the abuse of interstate commerce facilities to carry his obscene books."

As to the defense of entrapment in a prosecution for selling obscene matter, see *supra*, II. k.

As to the defense of entrapment in a prosecution for mailing obscene matter, see *infra*, II. r.

As to the defense of entrapment in a prosecution for making a shipment of misbranded food in interstate commerce, see *infra*, II. u.

n. Larceny.

As to the defense of entrapment in the prosecution of other crimes where the want of consent of the person affected is an essential element in the crime, see *supra*, II. c, and *infra*, II. v, w, and y.

Passive inducement to taking.

It is well established that where the criminal design originates with the accused, and the owner does not, in person or by an agent or servant, suggest the design or actively urge the accused on to the commission of the crime, the mere fact that the owner, suspecting that the accused intends to steal his property, in person or through a servant or agent, exposes the property, or neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property, or avail himself of the facilities furnished, will not amount to a consent in law, even though the agent or servant of the owner, by his instructions, appears to co-operate in the execution of the crime; and the defense of entrapment is inapplicable.

California. — *People v. Hanselman*

(1888) 76 Cal. 460, 9 Am. St. Rep. 233, 18 Pac. 425.

Florida.—*Lowe v. State* (1902) 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956.

Georgia.—*Garris v. State* (1866) 35 Ga. 247; *Varner v. State* (1884) 72 Ga. 745. See also *Williams v. State* (1875) 55 Ga. 391, 1 Am. Crim. Rep. 413; *Slaughter v. State* (1901) 113 Ga. 284, 84 Am. St. Rep. 242, 38 S. E. 854.

Illinois. — *People v. Smith* (1911) 251 Ill. 185, 95 N. E. 1041.

Louisiana.—*State v. Duncan* (1844) 8 Rob. 562.

Massachusetts. — *Com. v. Nott* (1883) 135 Mass. 269.

Nevada.—*State v. Smith* (1910) 33 Nev. 438, 117 Pac. 19.

North Carolina. — See *State v. Adams* (1894) 115 N. C. 775, 20 S. E. 722.

Pennsylvania. — *Com. v. Hollister* (1893) 157 Pa. 13, 25 L.R.A. 349, 27 Atl. 386.

South Carolina.—*State v. Covington* (1832) 18 S. C. L. (2 Bail.) 569.

Tennessee. — *Sanders v. State* (1877) 2 Shannon, Cas. 606; *McAdams v. State* (1881) 8 Lea, 456.

Texas.—*Alexander v. State* (1854) 12 Tex. 540; *Pigg v. State* (1875) 43 Tex. 108; *Conner v. State* (1887) 24 Tex. App. 245, 6 S. W. 138; *Crowder v. State* (1906) 50 Tex. Crim. Rep. 92, 96 S. W. 934.

England.—*Rex v. Eggington* (1801) 2 Bos. & P. 508, 126 Eng. Reprint, 1410, 2 Leach, C. L. 913, 2 East, P. C. 494, 666, 5 Revised Rep. 689; *Rex v. Whittingham* (1801) 2 Leach, C. L. 912 (embezzlement); *Rex v. Headge* (1809) 2 Leach, C. L. 1033, Russ. & R. C. C. 160 (embezzlement); *Reg. v. Williams* (1843) 1 Car. & K. 195. See also *Reg. v. Lawrance* (1850) 4 Cox, C. C. 438.

In *People v. Hanselman* (Cal.) *supra*, the court said: "It is no doubt true, as a general proposition, that larceny is not committed when the property is taken with the consent of its owner; but it is difficult, in some instances, to determine whether certain acts constitute, in law, such 'consent.' And, under the authorities, we

do not think that there is such consent where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no mutual understanding between the two, and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner. And some of the circumstances were present in all the cases cited by counsel for appellant." In that case it appeared that the town constable, for the purpose of detecting thieves, disguised himself and feigned drunkenness, and, at the time of the alleged larceny, was conscious and made no resistance thereto. It also appeared that the constable had no previous suspicion of the accused, and was surprised at his participation in the act.

So, in *Sanders v. State* (Tenn.) supra, it was held to be no defense to a prosecution for larceny that the owner made it known to the accused that he and his family would not be at home at a particular time.

Likewise, in *Crowder v. State* (Tex.) supra, it was held to be no defense to a prosecution for the theft of mules that the owner had employed a detective in order to catch the defendant, who, he believed, had been stealing his stock, and that the detective, by the direction of the owner, apparently encouraged the defendant's design and led him on, provided neither the owner nor the detective induced the original intent on the part of the thief,—though, if the intent and purpose to steal originated with, and were suggested by, the detective, it would be a taking with the consent of the owner, and the defendant would not be guilty.

In a prosecution for larceny it has been held not to be error to instruct the jury as follows: "If one person agree with another that the latter, with a third person, shall steal his, the former's property, this would not be larceny, for larceny cannot be predicated of a taking when a person

consents to or agrees that his property shall be taken. But if, on the other hand, the original design or intent to steal is formed, and the prosecutor should find this out, and agree with another to so arrange matters as that the person who had formed such design to steal should be detected, then, if the design to steal, thus formed, be carried out, it would be larceny, although it might be the prosecutor's property that was taken." *McAdams v. State* (Tenn.) supra.

So, "where the owner has been notified of a design formed to steal his goods, which intent he did not originate or suggest, he may, in order to detect the thief, direct his servant or agent to encourage the design, and afford facilities for the completion of the crime; and . . . the facilities afforded under such circumstances will not affect the criminality of the thief." *State v. Duncan* (1844) 8 Rob. (La.) 562.

Where it appeared that the accused, in preparing to steal cotton from the prosecutor, applied to a third person for the use of a wagon; that the third person informed the owner, who told him to permit the accused to use the wagon, and to go with him, and to inform him (the owner), so that he could detect the accused in the commission of the crime; and that the accused drove to the owner's gin house, and went up to and placed his hands on the cotton, it was held that he was guilty of an attempt to commit larceny. *Varner v. State* (1884) 72 Ga. 745.

In *People v. Smith* (1911) 251 Ill. 185, 95 N. E. 1041, it was held that a person indicted for the larceny of postage stamps belonging to a corporation was not so encouraged or solicited to take the stamps as to prevent his conviction therefor, where postoffice inspectors, having arrested a person who had been obtaining stamps from the accused, arranged with this person and representatives of the corporation to obtain more stamps from the accused, which were marked and later found in the possession of the accused when arrested. The court said: "The criminal design and intent originated

in the mind of [the defendant]. Neither the owner of the stamps nor its agents urged or advised the commission of the crime, but, suspecting the plaintiff in error, it took precautions to ascertain whether he would commit the offense. The law does not prohibit this being done. If it did, it would destroy one of the most effective agencies for the detection of crime."

So, there is no such consent on the part of a gold milling company, through its agents, to the taking of gold amalgam from its mill, as will prevent the taking from constituting larceny, where it appears that an employee, having been approached by conspirators with reference to their obtaining amalgam from the mill, reported this to the company, and, with its knowledge and approval, pretended to act as the accomplice of the thieves, and, in accordance with the arrangement with them, pretended to give one of them a signal when it was safe to take the amalgam, but did not persuade or induce the conspirators to take the property, or himself assist in the actual taking, and merely allowed the amalgam to be taken for the purpose of detecting the thieves. *State v. Smith* (1910) 83 Nev. 438, 117 Pac. 19.

Likewise, an owner does not consent to the commission of the crime of larceny where he hires a detective, who pretends to co-operate with the accused, for the purpose of detecting him in the commission of the crime. *Pigg v. State* (1875) 43 Tex. 108.

Nor is the consent of the owner given to the commission of the crime of larceny where he employs a detective to watch and apprehend the offender. *Com. v. Nott* (1883) 135 Mass. 269.

Active inducement to taking.

Where the owner, in person or by his duly authorized agent, suggests to the accused the criminal design, and actively urges, co-operates with, and assists the accused in the taking of the goods, such conduct amounts to a consent to the taking, and the criminal quality of the act is wanting.

Colorado.—*Connor v. People* (1893)

18 Colo. 373, 25 L.R.A. 341, 86 Am. St. Rep. 295, 33 Pac. 159.

Georgia.—*Williams v. State* (1875) 55 Ga. 391, 1 Am. Crim. Rep. 413.

Michigan.—*Saunders v. People* (1878) 38 Mich. 218.

Missouri.—*State v. Loeb* (1916) — Mo. —, 190 S. W. 299. See also *State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283.

North Carolina.—*State v. Adams* (1894) 115 N. C. 775, 20 S. E. 722.

Oregon.—*State v. Hull* (1898) 83 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159.

Tennessee.—*Dodge v. Brittain* (1838) Meigs, 84.

Texas.—*McGee v. State* (1902) — Tex. —, 66 S. W. 562, 14 Am. Crim. Rep. 413. See also *Crowder v. State* (1906) 50 Tex. Crim. Rep. 92, 96 S. W. 934.

Wisconsin.—*Topolewski v. State* (1906) 130 Wis. 244, 7 L.R.A. (N.S.) 756, 118 Am. St. Rep. 1019, 109 N. W. 1037, 10 Ann. Cas. 627.

England.—*Reg. v. Lawrance* (1850) 4 Cox, C. C. 438.

"The reason is obvious, viz.: The taking in such cases is not against the will of the owner, which is the very essence of the offense, and hence no offense, in the eye of the law, has been committed. The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting." See *United States v. Whittier* (1878) 5 Dill. 35, Fed. Cas. No. 16,688.

In *Topolewski v. State* (Wis.) supra, a leading case on this subject, the court said: "We cannot well escape the conclusion that this case falls under the condemnation of the rule that where the owner of property, by himself or his agent, actually or constructively aids in the commission of the offense, as intended by the wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense, the would-be criminal is not guilty of all the elements of the offense. Here Mr. Layer, acting for the owner of the property, packed or superintended the packing of the four barrels of meat, as suggested by the owner's agent in the

matter, Dolan, and caused the same to be placed on the platform, knowing that the accused would soon arrive to take them, under an arrangement between him and its agent, and directed its platform boss, when he inquired as to the purpose of so placing the barrels, 'Let them go; they are for some man and he will call for them.' He, from the standpoint of such employee, directed the latter to deliver the barrels to the man when he called. . . . He substantially made such delivery, by treating the accused, when he arrived upon the scene, as having a right to take the property. In that the design to trap a criminal went a little too far, at least, in that it included the doing of an act in effect preventing the taking of the property from being characterized by an element of trespass. The logical basis for the doctrine above discussed is that there can be no larceny without a trespass. So, if one procures his property to be taken by another, intending to commit larceny, or delivers his property to such other, the latter purposing to commit such crime, the element of trespass is wanting, and the crime not fully consummated, however plain may be the guilty purpose of the one possessing himself of such property. That does not militate against a person's being free to set a trap to catch one whom he suspects of an intention to commit the crime of larceny, but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner of the property as to put him in the position of having consented to the taking. If I induce one to come and take my property, and then place it before him to be taken, and he takes it with criminal intent, or if, knowing that one intends to take my property, I deliver it to him, and he takes it with such intent, the essential element of trespass, involving non-consent requisite to a completed offense of larceny, does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential

were present. Some writers, in treating this subject, give so much attention to condemning the deception practised to facilitate and encourage the commission of a crime by one supposed to have such a purpose in view, that the condemnation is liable to be viewed as if the deception were sufficient to excuse the would-be criminal, or to preclude his being prosecuted,—that there is a question of good morals involved as to both parties to the transaction, and that the wrongful participation of the owner of the property renders him and the public incapable of being heard to charge the person he has entrapped with the offense of larceny. That is wrong. It is the removal from the completed transaction, which, from the mental attitude of the would-be criminal, may have all the ingredients of larceny, from the standpoint of the owner of the property, of the element of trespass or nonconsent. When such element does not characterize a transaction involving the full offense of larceny, so far as the mental purpose of such would-be criminal is concerned, is often not free from difficulty, and courts of review should incline quite strongly to support the decision of the trial judge in respect to the matter, and not disturb it except in a clear case. It seems that there is such a case before us. If the accused had merely disclosed to Dolan, his ostensible accomplice, a purpose to improve the opportunity, when one should present itself, to steal barrels of meat from the packing company's loading platform, and that had been communicated by Dolan to the company, and it had merely furnished the accused the opportunity he was looking for to carry out such purpose, and he had improved it, the situation would be quite different. The mere fact that the plan for obtaining the property was that of the accused, under the circumstances of this case, is not controlling. Dolan, as an emissary of the packing company, as we have seen, was sent to the accused to arrange, if the latter were so disposed, some sort of a plan for taking some of the company's property with the intention of

stealing it. Though the accused proposed the plan, Dolan agreed to it, which involved a promise to assist in carrying it out, ostensibly as an accomplice, but actually as an instrument of the packing company. That came very near, if it did not involve, solicitation by the company, in a secret way, for the accused to take its property as proposed. With the other element added of placing such property on the loading platform, for the accused to take pursuant to the agreement, with directions, in effect, to the person in charge of the platform, to let the accused take it when he came for that purpose, we are unable to see any element of trespass in the taking which followed. . . . When one keeps in mind the plain distinction between merely furnishing opportunity for the execution of a formed design to commit larceny, and negotiations for the purpose of developing a scheme to commit the offense, regardless of who finally proposes the plan jointly adopted, and not facilitating the execution of the plan by placing the property, pursuant to the arrangement, where it can readily be taken, but, in practical effect, at least, delivering the same into the possession of the would-be thief, one can readily see that the element of trespass, involving consent, is present in the first situation mentioned, and not in the last, and that the latter pretty clearly fits the circumstances of this case."

In *Connor v. People* (Colo.) *supra*, which was a prosecution for a conspiracy to commit larceny, the court said: "We do not wish to be understood as intimating that the services of a detective cannot be legitimately employed in the discovery of the perpetrators of a crime that has been or is being committed, but we do say that when in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked rather than encouraged by the courts."

In *Williams v. State* (1875) 55 Ga. 391, 1 Am. Crim. Rep. 413, wherein it appeared that the agent of the property owner, acting under the owner's direction, actively co-operated with the accused to the extent of depriving the act of its criminality, the court said: "It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete, and if the accused embrace it he will still be criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent, to whom he has intrusted the conduct of the transaction, puts his own hand into the corpus delicti, and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owner and his agent, after making everything ready and easy, wait passively, and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities."

Likewise, in *McGee v. State* (1902) — Tex. —, 66 S. W. 562, 14 Am. Crim. Rep. 413, it was held that there was no larceny where a person acting as a detective, in order to catch cattle thieves, and having the consent of the owner to a taking, inaugurated and actively participated with the defendant in the thieving enterprise.

And in *State v. Adams* (1894) 115 N. C. 775, 20 S. E. 722, it was held to be error to instruct the jury that "if there was a previous intent to steal, the defendant would be guilty, notwithstanding the owner's agent had

told a servant to go to the defendant's house and persuade him to come and steal the sack."

In *State v. Hull* (1898) 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159, the court said: "It appears from the uncontradicted evidence that the animal which they are charged to have stolen was taken, not only by the consent and passive acquiescence of the owner, but by his express direction, and upon the advice and with the active co-operation and assistance of his agent. There was no trespass committed in the taking, and there was no taking without his consent. Prescott, who was acting by his authority and under his direction, with full power to use the animal as he might see proper, was not only present at the time of the taking, but actively assisted in planning the whole affair, and in the perpetration of the acts necessary to constitute the crime. He assisted in rounding up the cattle, and driving them out of the county, by the express consent and authority of the owner. The property having been thus taken with the owner's consent, and by the active assistance of his agent, it makes no difference legally, although it does morally, that the defendants did not know of such direction and consent, and that they supposed and believed they were stealing the property in fact. The case upon this point is no different in principle from what it would have been had the owner, instead of acting through Prescott, acted in person, and himself assisted the defendants in rounding up and taking the animal in question, the defendants not knowing him to be the owner, but believing him to be a thief and a confederate of theirs. In such case it would not be seriously contended that the defendants were guilty of larceny in taking an animal belonging to their supposed confederate, and no more can such a contention be maintained on this record. It follows that, however morally guilty the defendants may have been, their conviction is not justified by the evidence, nor warranted by the law."

Since, in larceny, there must be a criminal taking from the actual or
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constructive possession of the owner, the absence of this element constitutes a defense to the crime although the offender may have had the felonious intent to steal. Thus, in *People v. Jenkins* (1918) 210 Ill. App. 42, a witness for the state testified that, having been called to the house of the prosecuting witness on one or two occasions in regard to missing articles of value, and suspecting the plaintiff in error, he suggested that a dollar bill be placed on the floor of the dining room, in order to ascertain whether she would take it when she swept the floor, which was done, and the dollar disappeared. It was held that the crime of larceny had not been committed. The court said: "Section 167 of chap. 38 of the Criminal Code (Jones & A. ¶ 3792) defines larceny as follows: 'Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property. . . . Private stealing from the person of another, and from a house in the daytime, shall be deemed larceny.' In the instant case, even if we assume the extremest claim on the part of the people, the one dollar bill was merely taken by the plaintiff in error from the floor and placed in the box, where it was subsequently found. At no time was it taken from the premises, and, therefore, out of the possession of the owner. Even if felonious intent existed and the purpose of the plaintiff in error was to steal the bill when she left the premises that day, it does not follow that because it was shown that the bill was taken from the floor of the room and put into the box, standing in some other part of the premises, as it was shown, the plaintiff in error was guilty of larceny. There must be a taking from the actual or constructive possession of the owner. . . . We are further of the opinion that the evidence did not show, beyond a reasonable doubt, that the property was taken by the plaintiff in error from the floor and placed in a box, where it was subsequently found, with a felonious

intention. As neither taking, within the meaning of the law, nor a felonious intent, was shown, the judgment will be reversed." To the same effect, see *Kemp v. State* (1850) 11 Humph. (Tenn.) 320.

It seems that the rule that no larceny is committed where the owner or his agent actively assists in the taking is limited to privately owned property, for it has been held that where the property of the state is delivered by anyone under any circumstances, to any person, for the purpose of having him steal it, there is a trespass and the attempt is a crime. *People v. Mills* (1904) 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786, affirming (1904) 91 App. Div. 331, 86 N. Y. Supp. 529, wherein the court said: "We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it. When it was found that the defendant took into his possession the property of the state with intent to steal it, an offense against public justice was established, and he could not insist as a defense that he would not have committed the crime if he had not been tempted by a public officer whom he thought he had corrupted. He supposed he had bought the assistant district attorney when he handed over the money, but he knew he had not bought the state of New York, and, hence, that the assistant had no right to give him its property for the purpose of enabling him to steal it."

o. Manufacture of explosives.

In *Koscak v. State* (1915) 160 Wis. 255, 152 N. W. 181, wherein it appeared that the defendant was prosecuted for the violation of a statute regulating the manufacture and use of explosives, it was held that the act of a detective or other person in originating and instigating the commission of the crime constituted a good defense. The court said: "The statement in *State v. Currie* (1905) 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875, is a just rule

to govern persons engaged in such transactions: 'The authorities almost unanimously hold that a detective may aid in the commission of an offense in conjunction with a criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense.' This rule is approved in the adjudications of different courts as a proper one in the administration of the criminal law. The question was a proper one for the consideration of the jury under the evidentiary facts and circumstances adduced on the trial, and the court's attention was directed thereto by the defendant's requested instruction. True, the court informed the jury that they must be satisfied affirmatively that defendant intended to and did the acts required under the instructions given to constitute guilt, but the jury were not informed that if the detectives prompted, urged, or originated the perpetration of these offenses, or that they intimidated the defendant and thereby became the active parties to instigate and perpetrate the offense charged, and that the defendant, under the facts and circumstances of the case, was only a passive participant in the crime charged, then he was not guilty."

p. Narcotic Act violation.

The unlawful sale of narcotics is treated *supra*, II, k, 4.

In *Jung Quey v. United States* (1915) 138 C. C. A. 314, 222 Fed. 766, it was held that where government detectives permitted a person to transport opium for the purpose of ascertaining whether the accused was engaged in its illegal importation, the defense of entrapment was not available. The court upheld the action of the trial judge in refusing an instruction that if "the quartermaster, Matthaei, took any opium prepared for smoking purposes from the steamship *China* on January 30, 1914, while she was in the port of San Francisco, and

that he did so with the permission of the government, through its duly authorized officers, . . . that such opium was not being unlawfully transported after its importation, and the receipt of such opium by any person thereafter, from said quartermaster, was not an unlawful act, and therefore cannot be considered by you as an unlawful act done in pursuance of the conspiracy, as alleged in the indictment, and such testimony cannot be considered by you as establishing in any degree the guilt of any of the defendants of the conspiracy as alleged in the indictment."

In *United States v. Phelps* (1910) 16 Philippine, 440, reversing a judgment convicting the defendant of having smoked opium on a certain occasion, in violation of the law, which judgment rested solely on the testimony of a single witness, who was secretly acting as an employee of the Bureau of Internal Revenue, the court said: "According to the statements made by the witness Smith, he not only suggested the commission of this crime, but he (Smith) also stated that he desired to commit the same offense, and would pay his part of the expense necessary for the commission of the prohibited act. Such conduct on the part of a man who is employed by the government for the purpose of taking such steps as are necessary to prevent the commission of the offense, and which would tend to the elevation and improvement of the defendant, as a would-be criminal, rather than further his debasement, should be rebuked rather than encouraged by the courts; and when such acts as those committed by the witness Smith are placed beside the positive testimony of the defendant, corroborated by the Chinaman and the doctor, the testimony of such witness sinks into insignificance and certainly does not deserve credit. When an employee of the government, as in this case, and according to his own testimony, encourages or induces persons to commit a crime in order to prosecute them, such conduct is most reprehensible. We desire to be understood that we base our conclusions as to the conduct of the witness Smith

and the incredibility of his testimony on his own acts, according to his own testimony. We are therefore of the opinion, and so hold, that the appellant is not guilty of this crime. The judgment of the lower court is reversed and the appellant acquitted."

q. Passing forged instrument.

An indictment for disposing of and putting away forged bank notes cannot be defeated by showing that the notes were purchased by persons who knew at the time that the notes were forged, and procured them at their own solicitation, as agents of the bank, for the very purpose of bringing the offenders to justice. *Rex v. Holden* (1810) 2 Leach, C. L. 1019, Russ. & R. C. C. 154, 2 Taunt. 334, 127 Eng. Reprint, 1107, 11 Revised Rep. 600.

r. Postal Law violation.

1. Sending nonmailable matter.

In a prosecution for using the mails for the purpose of sending nonmailable matter, it is no defense that the mails were so used at the instance of an officer of the government, who acted for the purpose of detecting, and not procuring, the commission of the crime. *United States v. Duff* (1881) 19 Blatchf. 9, 6 Fed. 45 (information concerning lotteries); *Bates v. United States* (1881) 11 Biss. 70, 10 Fed. 92 (obscene matter); *United States v. Moore* (1883) 19 Fed. 39 (information concerning lotteries); *United States v. Slenker* (1887) 32 Fed. 691 (obscene matter); *Grimm v. United States* (1895) 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470 (obscene matter); *Rosen v. United States* (1896) 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251 (obscene matter); *Andrews v. United States* (1896) 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798 (obscene matter); *Price v. United States* (1897) 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366 (obscene matter); *Ackley v. United States* (1912) 118 C. C. A. 403, 200 Fed. 217 (information concerning prevention of conception); *Kemp v. United States* (1914) 41 App. D. C. 539, 51 L.R.A.(N.S.) 825, writ of certiorari denied in (1914) 234 U. S.

756, 58 L. ed. 1579, 34 Sup. Ct. Rep. 675 (information concerning abortion). Compare *United States v. Whittier* (1878) 5 Dill. 35, Fed. Cas. No. 16,688; *United States v. Adams* (1893) 59 Fed. 674 (information concerning prevention of conception).

In *Grimm v. United States* (1895) 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470, *supra*, the court said: "It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official,—a detective, he may be called,—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. . . . The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt."

So, in *Andrews v. United States* (1896) 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798, *supra*, it was held to be no defense that the obscene letters were sent in answer to letters written under an assumed name by a government detective, for the sole purpose of obtaining evidence from the defendant on which to base the prosecution.

And on the authority of the *Andrews Case* (U. S.) *supra*, it was held

in *Price v. United States* (1897) 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366, that it was no defense to a prosecution for the mailing of obscene publications that they were sent to the government inspector who instigated the prosecution, in response to decoy letters written by him for the purpose of discovering whether the defendant was engaged in violating the law, and asking the defendant to send the obscene matter through the mails.

In *United States v. Duff* (1881) 6 Fed. 45, the court denied the contention that the trial judge erred in refusing to direct an acquittal on the ground that the circular in question was incapable of delivery, being addressed to a fictitious name, and therefore not within the scope of the statute creating the offense, saying: "Letters addressed to fictitious names are not incapable of delivery, as this case shows. Moreover, the statute says nothing about delivery. It deals with mailing and sending to be mailed. The words are: 'No letter or circular concerning lotteries . . . shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punished,' etc. The case shows that a letter containing a circular concerning a lottery was deposited in the mail. The jury found that the defendant deposited the letter with intent to have it conveyed by mail. The finding was justified by the evidence, and it brought the defendant within the scope of the statute. The letter was none the less a letter deposited in the mail for the purpose of being conveyed by mail, because at the place to which it was conveyed it was delivered to a person who was corresponding under a fictitious name. Nor does it make any difference in the act done by the defendant that the person to whom the letter was delivered was an officer of the United States. The refusal to direct an acquittal was therefore correct."

In *United States v. Whittier* (1878) 5 Dill. 35, Fed. Cas. No. 16,688, it appeared that the defendant deposited a letter in the mail giving information

as to where an article designed to prevent conception could be obtained, the letter being in answer to a decoy letter written by a government agent. It was held that the use of a fictitious address by the agent was a complete defense, the letter being incapable of delivery in the due course of the mails, and hence not within the statute. The court said: "The facts in the case now under consideration show that the defendant is as morally guilty as if the letter he was answering had been written by a person seeking the prohibited information, and not by a detective. But I am of the opinion that these facts do not clearly bring the case within the particular clause of the statute on which the indictment is founded. The indictment charges that the defendant knowingly deposited in the mail a letter giving information where, how, and of whom an article or thing designed and intended to prevent conception could be procured. This was in answer to a fictitious letter of inquiry. The letter written and mailed by defendant was addressed to a person who had no existence. On its face it did not show that it was within the prohibited statute. If it had been suffered to go through the mail to the place to which it was addressed, it would not have been called for, but would have been sent to the dead-letter office, and could not have given to any person the prohibited information. The defendant doubtless intended to give the inhibited information, but the statute does not apply to a letter merely intended by the writer to give such information, but to a letter 'actually' giving the information. If a letter of inquiry seeking the prohibited information had been written by an actual person, although under a feigned name, an answer in reply, giving such information, would present a case distinguishable, it would seem, from the one under consideration. I place my judgment in this case upon the simple ground that the sealed letter written by the defendant, addressed to a person who had no existence, and which on its face gave no information of the prohibited character, and which is

brought within the statute only by the fictitious letter of inquiry written by a detective, is not the 'giving of information' within the meaning of the statute. At all events, it is not certain that Congress intended to punish such an act; and therefore, upon the principle above mentioned, that criminal statutes are not to be extended by judicial construction to cases not clearly and unmistakably within their terms, my judgment is that this prosecution, on the admitted facts, cannot be sustained. It is a case of clear moral guilt, but not of legal criminality. There is no legal crime committed, although the defendant did not know of the fact which deprived his act of its criminal quality." To the same effect, see *United States v. Adams* (1894) 59 Fed. 674. The section of the penal law under which the two foregoing cases arose has since been repealed, the change being designed to perfect the law so that its provisions could not be evaded. See 7 Fed. Stat. Anno. 2d ed. pp. 791, 792.

As to the defense of entrapment in a prosecution for selling lottery tickets, see *supra*, II. k, 3.

As to the defense of entrapment in a prosecution for sending obscene matter, in violation of the Interstate Commerce Act, see *supra*, II. m.

As to the defense of entrapment in a prosecution for selling obscene matter, see *supra*, II. k, 5.

2. *Stealing from mails.*

It is no defense to a prosecution for stealing or embezzling a letter containing money, that it was addressed to a fictitious person, and mailed for the purpose of detecting a suspected person. *United States v. Cottingham* (1852) 2 Blatchf. 470, Fed. Cas. No. 14,872; *United States v. Foye* (1853) 1 Curt. C. C. 364, Fed. Cas. No. 15,157; *United States v. Wight* (1889) 38 Fed. 106, affirmed in (1890) 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *United States v. Dorsey* (1889) 40 Fed. 752; *Walster v. United States* (1890) 42 Fed. 891; *United States v. Bethea* (1891) 44 Fed. 802; *Goode v. United States* (1895) 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136;

Montgomery v. United States (1896) 162 U. S. 410, 40 L. ed. 1020, 16 Sup. Ct. Rep. 797; *United States v. Jones* (1897) 80 Fed. 513; *Hall v. United States* (1898) 168 U. S. 632, 42 L. ed. 607, 18 Sup. Ct. Rep. 237; *Scott v. United States* (1899) 172 U. S. 343, 43 L. ed. 471, 19 Sup. Ct. Rep. 209; *Bromberger v. United States* (1904) 63 C. C. A. 76, 128 Fed. 346; *Byram v. United States* (1905) 25 App. D. C. 546; *Ennis v. United States* (1907) 83 C. C. A. 478, 154 Fed. 842; *McShann v. United States* (1916) 146 C. C. A. 119, 231 Fed. 923. See also *United States v. Rapp* (1887) 30 Fed. 818. But compare *United States v. Denicke* (1888) 35 Fed. 407, and *United States v. Matthews* (1888) 1 L.R.A. 104, 35 Fed. 890.

"A decoy letter is not subject to the criticism frequently properly made in regard to other measures sometimes resorted to, that it is placing temptation before a man, and endeavoring to make him commit a crime. There is no temptation by a decoy letter. It is the same as all other letters to outward appearance, and the duty of the carrier who takes it is the same. The fact that it is to a fictitious person is, in all probability, entirely unknown to the carrier, and, even if known, is immaterial. Indeed, if suspected by the carrier, the suspicion would cause him to exercise particular care to insure its safety, under the belief that it was a decoy." *Scott v. United States* (1899) 172 U. S. 343, 43 L. ed. 471, 19 Sup. Ct. Rep. 209.

"The purpose of the statute is that all mailable matter intrusted to any of the employees, officers, or agents in the postal service shall, without any interference with it, save that required in its necessary transportation, be conveyed from the place where it is delivered to the officers, agents, and employees of the mail service to the point of destination, by the first practicable means; and any unauthorized interference with such mail matter, and its safe and speedy transportation, is a gross breach of trust, if done by any of such employees or agents, and to prevent which was the purpose of Congress in the enactment of the stat-

ute. The evidence shows that this package and contents were duly placed in the possession of the postmaster at Greenwood, and by him delivered to defendant, as the postal clerk, to be by him carried in the mail, as other mail matter, to be delivered to the transfer agent in Jackson, just as were other packages of the same kind. This is admitted by the defendant. And the package was so carried and delivered; that is, the package and the letter conveyed in it were so carried and delivered, and not intercepted by the inspectors until after the delivery to the transfer agent at Jackson. As to what was done after this is not embraced in the present inquiry. The uncontroverted facts shown by the proof, in my opinion, establish the fact that the letter and certificate inclosed in the registered envelop were intended to be conveyed in the mail on that route, within the meaning of the statute, and that it is no defense to the defendant that the purpose was to give him an opportunity to rifle its contents, if he saw proper to do so, though this was the only purpose of its being placed in his possession. This position, I am satisfied, is maintained by both authority and reason. The question, in nearly all the cases relied upon by defendant's counsel, was as to whether or not the letters or mail matters were intended to be placed in the mail for transportation, and therefore they do not apply to the facts in this case; and, so believing, I feel constrained to overrule the motion of defendant to peremptorily instruct the jury to return in his favor a verdict of not guilty." *United States v. Dorsey* (1889) 40 Fed. 752, followed in *United States v. Bethea* (1891) 44 Fed. 802.

"If the word 'letter' were given the technical construction of a written message or communication from one person to another, it would strike at the whole system of decoy or test letters, none of which contain bona fide communications. This would render it practically impossible to detect thefts and embezzlements by employees, since, in a large majority of cases, the letters and their envelops are thrown away or destroyed for the

very purpose of preventing their being identified in case the employee is arrested; and the contents of the letter, which it is ordinarily impossible to identify, only are abstracted. If, however, the contents can be identified, as they always are in test letters, by a private mark put upon them, the discovery of such contents upon the person of the employee affords almost conclusive evidence of the theft of the letter in which they are inclosed. It makes no difference with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession as such carrier, it is his duty to treat it for what it appears to be on its face,—a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employee in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be,—in other words, it is not for him to judge of its genuineness." *Goode v. United States* (1895) 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136.

In *Ennis v. United States* (1907) 83 C. C. A. 478, 154 Fed. 842, it appeared that a postoffice superintendent discovered a misboxed letter, which had been placed in a "dead" pigeonhole at the top of the case, where the accused, a clerk, was engaged in sorting mail. The letter was removed and handed to a postoffice inspector, who took it to the addressee, and, without delivering it, obtained permission to open it. He then returned to the postoffice, unsealed the letter, and took from it an express order for \$2, a statement of account, and a letter from the sender of the money order. After making a copy of the letter, he placed it in the envelop with two marked one-dollar

bills, and forwarded the money order and the statement to the addressee. The envelop containing the letter and bills, having been duly sealed, was returned to the dead pigeonhole, and a short time thereafter was embezzled by the defendant. It was held that the letter, at the time it was returned by the inspector to the dead pigeonhole, had not ceased to be mail matter, and that the defendant was therefore properly convicted.

But in *United States v. Rapp* (1887) 30 Fed. 818, it was held that a letter, prepared by an inspector and delivered to the superintendent of the mailing department, and placed by the superintendent in a "nixes" basket, not with the intention that it should be taken through the postoffice and delivered to any person, but with the intention that in or about the basket where it was so placed it should be torn open by a suspected person, was not "intended to be conveyed by mail," within the meaning of the statute, and that the defendant could not be convicted. The court said: "I do not hold that what is called in the testimony in this case a 'decoy' or 'test' letter, or the contents thereof, might not, when regularly mailed, be the subject of embezzlement, and punishable under these sections. But I think it should get into the mail in some of the ordinary ways provided by the postal authorities, and become fairly and reasonably part of the 'mail matter' under control of the postal authorities."

It is a question for the jury whether a letter is intended to be conveyed by the mail or by the letter carrier, and in a case where a person has been convicted of embezzling a letter and valuable property in a letter passing through the regular course of the mail and the hands of the letter carrier, the court will not inquire into the motives with which the letter was put into the mails, even though the object was to detect or entrap the party in his criminal practices. *Re Wight* (1890) 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487. See also *United States v. Matthews* (1888) 1 L.R.A. 104, 35 Fed. 890.

In England, a paper put into the postoffice with a fictitious address is

held to be a post letter within the meaning of the postal laws. *Reg. v. Young* (1846) 2 Car. & K. (Eng.) 466, 1 Den. C. C. 194, 2 Cox, C. C. 142, overruling *Reg. v. Gardner* (1845) 1 Car. & K. (Eng.) 628.

But where the decoy letter does not come into the defendant's hands in the regular course of the postoffice business, no conviction can be had. *Reg. v. Rathbone* (1841) Car. & M. (Eng.) 220, 2 Moody, C. C. 242; *Reg. v. Shepherd* (1856) 2 Jur. N. S. (Eng.) 96, Dears. C. C. 606, 25 L. J. Mag. Cas. N. S. 52, 4 Week. Rep. 237.

In the Canadian case of *Rex v. Ryan* (1905) 9 Ont. L. Rep. 137, 4 Ann. Cas. 875, it appeared that the accused was a letter carrier in the city of Toronto, and that the letter in question was a decoy letter, written by an official in the postoffice, and addressed to a person within the district in which it was the duty of the accused to carry and deliver letters. The letter was postmarked, though not with the stamp of the Toronto office. It did not appear by whom this was done, or whether the duty of stamping was confined to a single official. It was handed by the writer to the superintendent of the letter sorters in that office, with instructions to have it placed among other letters intended to be delivered by the prisoner. It was handed by him to a letter sorter, who, in the performance of his usual duties in sorting and distributing letters to be handled by the letter carriers, placed it in the usual place with others which the prisoner was to take up, carry away, and deliver, and the prisoner, in the course of his duty, took it with the rest, but, instead of delivering it, opened it and stole the money which had been placed therein. Affirming a conviction, the court said: "The first point urged by counsel for the prisoner was that the letter in question was not a 'post letter.' In support of this proposition two English cases were cited: *Reg. v. Rathbone* and *Reg. v. Shepherd* (Eng.) *supra*. There can be no doubt that these cases in several

respects closely resemble the present. It is necessary, however, to compare the English Postoffice Act, in force when they were decided, with our own. In the former (1 Vict. chap. 36, § 47) it is enacted that a 'post letter shall mean any letter or packet transmitted by the post under the authority of the Postmaster General, and a letter shall be deemed a post letter from the time of its being delivered to a postoffice to the time of its being delivered to the person to whom it is addressed.' Our act, 1 Edw. VII. chap. 19, § 1, reads: 'The expression "post letter" means any letter transmitted by the post or delivered through the post, or deposited in any postoffice, or in any letter box put up anywhere under the authority of the Postmaster General, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post-office or in any such letter box, or is being carried through the post.' In the *Rathbone* Case the decoy letter was, in the momentary absence of the prisoner, placed by the writer, an assistant inspector, in a heap of letters which the prisoner was about to sort. The report of the judgment on this point is very meager, being contained wholly in the following words of Baron Parke: 'The objection was that it was not a post letter, or a letter put into the post; and the judges are unanimously of opinion that that objection must prevail, the statute only applying to letters put into the post in the ordinary way.' The judgment is explained by Willes, J., at p. 53 of 25 L. J. Mag. Cas. N. S., where he says: '*Reg. v. Rathbone* shows that to make a man liable, the letter must have come into his hands in the ordinary course of the postoffice.' In *Shepherd's Case* the letter was written by one inspector, who gave it to a

second inspector, who gave it to a third, who locked it up over night, and in the morning gave it to a fourth person, who surreptitiously mixed it with letters which the prisoner was about to sort. In neither of these cases did the letter in question come into the hands of the prisoner in the regular way, or from any person authorized to deliver it to him, or to handle it at all. In the Shepherd Case, Dears. C. C. at p. 611, Pollock, C. B., says: "The person who first received the letter was not entitled to receive it, and he handed it to a person who was not entitled to take it; in fact, no one received the letter who was authorized so to do." Willes, J., says on the same page: "The letter in this case was not put into the post in the ordinary way, nor does it appear that any person who received it was justified in receiving it." On the other hand, the letter in question in the present case was received by the accused in the ordinary way at his wicket, where it was placed by Humphries, a sorter, in the regular course of his duties. It is unnecessary for us to decide when it became a post letter. If written by Henderson in his own postoffice building, and delivered there to Stoddard, it may be that it did not become a post letter until deposited in the postoffice proper with Humphries. It is sufficient that it became a post letter, at the latest, when it came into the hands of Humphries, and continued to be such until stolen by the accused. It can scarcely be seriously argued that if the inspector or the postmaster, or any other official in the postoffice building, wishes to post a letter, it is necessary that it should be carried outside and thrust through the aperture provided for the general public in order to make it a post letter within the meaning of the act."

3. Using mails to defraud.

As to the defense of entrapment in a prosecution for obtaining money or goods under false pretenses, generally, see *supra*, II. j.

Where the defendant is suspected

of using the mails to defraud, it is no defense that the crime was committed in response to a decoy letter, sent by an agent of the government for the purpose of ascertaining whether the defendant is so engaged. *Goldman v. United States* (1915) 135 C. C. A. 625, 220 Fed. 57, affirming (1913) 207 Fed. 1002; *Freeman v. United States* (1917) 156 C. C. A. 133; 248 Fed. 353, *Holsman v. United States* (1918) 160 C. C. A. 271, 248 Fed. 193, writ of certiorari denied in (1919) 249 U. S. 600, 63 L. ed. 796, 39 Sup. Ct. Rep. 258.

"It is contended that the writing and mailing of the letters which are set out in the indictment were not criminal, and do not constitute crimes, for the reason that the letters were solicited by the United States post-office inspectors in letters written by them and sent through the mails to Dr. Jordan as decoy letters, that the government officers initiated the crime, and that the case is thereby brought within the principle of the decisions of this court in *Woo Wai v. United States* (1915) 137 C. C. A. 604, 223 Fed. 414, and *Sam Yick v. United States* (1917) 153 C. C. A. 96, 240 Fed. 60. The ruling in each of the cases so referred to was based upon the ground that the government officers had suggested the crime and induced its commission, and that the offense did not have its origin in the mind of the accused. The distinction between those cases and the case at bar is plain. Here the accused was suspected of being engaged in using the mails in a scheme to defraud. It was to ascertain whether such was the case, and not to suggest the commission of a crime which otherwise would not have been committed, that the decoy letters were written. The case comes clearly within the doctrine of *Grimm v. United States* (1895) 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470." *Freeman v. United States* (1917) 156 C. C. A. 133, 248 Fed. 353.

In *Holsman v. United States* (1918) 160 C. C. A. 271, 248 Fed. 193, writ of certiorari denied in (1919) 249 U. S. 600, 63 L. ed. 796, 39 Sup. Ct. Rep. 258,

the court said: "The objection urged by counsel in their brief is to the effect that the letters were admitted without showing that they were received at the office of the defendant Freeman, and that certain replies, purporting on their face to come from his office, were received by the postoffice inspectors who caused the decoy letters to be sent. It was stipulated between the government and the defendants Freeman and Holsman that these letters were received, through the postoffice department, at the office of Freeman, and that the replies were transmitted through the mail from said office, and nothing was left for the determination of the court except the competency thereof as evidence fit to go to the jury. That the letters were competent is beyond question. The inspectors in no way became parties to the alleged conspiracy in sending the decoy letters. Their course was adopted simply for the purpose of ascertaining whether the law was being violated by the defendants, which resulted in obtaining pertinent evidence tending to show such violation of the law."

In *Goldman v. United States* (Fed.) supra, it appeared that a government inspector, in order to detect the defendant, who had been suspected of using the mails to defraud, answered an advertisement by the defendant, and succeeded in getting sufficient evidence to support a prosecution against him. The court sustained the conduct of the inspector, but intimated that, had his conduct been such as to induce rather than to detect a crime already planned, the conduct would not have been justified.

s. Practice of dentistry without license.

On a prosecution for practising dentistry without a license, it is no defense that the prosecuting witness went to the office of the defendant and had him fill a cavity in his tooth, and paid him for the service, with a view to prosecuting him therefor. *State v. Littooy* (1909) 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292.

s. Procuring women for immoral purposes.

In *People v. Moore* (1911) 142 App.

Div. 402, 127 N. Y. Supp. 98, affirmed in (1911) 201 N. Y. 570, 95 N. E. 1136, it was held to be no defense to a prosecution for having committed the statutory crime of knowingly receiving money for and on account of procuring and placing women in the custody of another person, for immoral purposes, that a trap was laid for the defendant, and that the principal witness, in whose custody the women were placed, did not intend to, and did not in fact, make use of them for immoral purposes, the defendant having, in fact, knowingly received the money, having knowingly procured the women, and having intended to deliver, and having delivered, them for immoral purposes.

But in *State v. Mantis* (1920) 32 Idaho, 724, 187 Pac. 268, wherein it appeared that the accused had merely acquiesced in the suggestion of the prosecuting witness, acting at the instance of the district attorney, that the accused cohabit with her illegally, it was held that the criminal design had originated in the mind of the witness, and that the entrapment deprived the act of its criminality. The court said: "Entrapment into the commission of a crime is not a defense in the sense of a justification or excuse for an act which otherwise would be criminal, but it resolves itself into a question of whether the accused committed any crime. If the criminal design originated with him, or if he intentionally committed or carried out his own criminal purpose, whether it originated with him or not, at the suggestion of another person, the fact that someone other than the accused facilitated the execution of the scheme, or that an officer appeared to co-operate with him, will not be a defense. . . . In this case there is no evidence that the appellant originated the criminal design of which he was accused and convicted, or that he wilfully and with criminal intent attempted to carry out the crime of which he was convicted after it was suggested to him. The money was given only after its payment was suggested by the woman, and, after she had stated that she preferred to live with appellant for immoral pur-

poses, the appellant merely acquiescing in her suggestion. The case falls clearly within the rule, and there is no evidence to sustain the verdict."

In *State v. McCornish* (1921) — Utah, —, 201 Pac. 637, reversing a conviction of pandering, the defendant, who was employed as a bell boy in a hotel, having, according to the state's evidence, at the solicitation of a policeman who had procured a room at the hotel, sent a prostitute to his room, the court said: "If the defendant in this case had been engaged in some unlawful business or enterprise, as was the case in *State v. Robinson*, 40 Utah, 448, 125 Pac. 657, and an officer had merely, in the course of defendant's business, asked him to deal with such officer as he dealt with others, the case would be entirely different. The defendant in this case, was, however, not carrying on, either directly or indirectly, an unlawful business or enterprise; but he, as we construe the evidence, was by the officer requested and induced to do an act constituting a crime, which he would not have done but for the inducement of the officer. The officer thus induced the defendant to do what he would not have done but for such inducement."

a. Pure Food and Drug Act violation.

In *United States v. Morgan* (1910) 181 Fed. 587, reversed in (1911) 222 U. S. 274, 56 L. ed. 198, 32 Sup. Ct. Rep. 81, on other grounds, a prosecution for sending a misbranded shipment of water, branded "spring water," in interstate commerce, in violation of the Pure Food and Drug Act, the fact that the defendant was induced to act by a detective intending to prosecute him was declared to be immaterial.

In *United States v. Eman Mfg. Co.* (1920) 271 Fed. 353, it appeared that the prosecuting witness failed to induce the accused to violate the Pure Food and Drug Act by shipping a misbranded medicinal preparation to a druggist, who ordered it at the instance of a government agent, but that the agent later induced the accused to send him the preparation. It was held that the second attempt was a procurement of the commission

of the crime, and that the entrapment was a defense. The court said: "The stipulation does not disclose that the defendant here has ever sent 'Sulfox' in interstate shipment other than the two bottles to Eaton in response to his letter. Eaton's failure to induce the defendant to violate the statute by shipping to the druggist, his letter to the defendant, the absence of facts as a basis from which he could believe or suspect that the defendant had, on other occasions, violated the statute, and the stipulation, cause me to reach the conclusion that he wrote the letter to the defendant, not for the purpose of discovering violations, but with the intention and purpose of inducing the defendant to violate the statute; and that on these facts *Grimm's Case* is not an authority in support of the prosecution, and that, in the interests of a sound public policy, the defendant should be found not guilty, and discharged."

As to the defense of entrapment in a prosecution for a violation of the Interstate Commerce Act, see *supra*, II. m.

v. Receiving stolen property.

As to the defense of entrapment in the prosecution of other crimes where the want of consent of the person affected is an essential element of the crime, see *supra*, II. c, n, and *infra*, II. w and y.

In a prosecution for receiving stolen property it is a defense that the property was offered to the accused, with the consent of the owner, for the purpose of entrapment, for the receipt, to constitute such a crime, must be without the authority of the owner. *United States v. De Bare* (1875) 6 Biss. 358, Fed. Cas. No. 14,935; *People v. Jaffe* (1906) 185 N. Y. 497, 9 L.R.A.(N.S.) 263, 78 N. E. 169, 7 Ann. Cas. 348; *State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283; *Reg. v. Dolan* (1855) 6 Cox, C. C. (Eng.) 449, Dears. C. C. 436, 3 C. L. R. 295, 24 L. J. Mag. Cas. N. S. 59, 1 Jur. N. S. 72, 3 Week. Rep. 177, overruling *Reg. v. Lyons* (1841) Car. & M. (Eng.) 217; *Reg. v. Schmidt* (1866) 10 Cox, C. C. (Eng.) 172, 35 L. J. Mag. Cas. N. S. 94, L. R. 1 C. C.

15, 12 Jur. N. S. 149, 13 L. T. N. S. 679, 14 Week. Rep. 286; Reg. v. Hancock (1878) 14 Cox, C. C. (Eng.) 119, 38 L. T. N. S. 787; Reg. v. Vilensky [1892] 2 Q. B. (Eng.) 597, 61 L. J. Mag. Cas. N. S. 218, 5 Reports, 16, 41 Week. Rep. 160, 56 J. P. 824.

In *People v. Jaffe* (1906) 185 N. Y. 497, 9 L.R.A.(N.S.) 263, 78 N. E. 169, 7 Ann. Cas. 348, the court said: "The proof clearly showed, and the district attorney conceded upon the trial, that the goods which the defendant attempted to purchase on October 6th, 1902, had lost their character as stolen goods at the time when they were offered to the defendant and when he sought to buy them. In fact, the property had been restored to the owners and was wholly within their control, and was offered to the defendant by their authority and through their agency. The question presented by this appeal, therefore, is whether, upon an indictment for receiving goods, knowing them to have been stolen, the defendant may be convicted of an attempt to commit the crime where it appears without dispute that the property which he sought to receive was not in fact stolen property. The conviction was sustained by the appellate division chiefly upon the authority of the numerous cases in which it has been held that one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible. Notably among these are what may be called the pickpocket cases, where, in prosecutions for attempts to commit larceny from the person by pocket picking, it is held not to be necessary to allege or prove that there was anything in the pocket which could be the subject of larceny. . . . In passing upon the question here presented for our determination, it is important to bear in mind precisely what it was that the defendant attempted to do. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase, there-

fore, if it had been completely effected, could not constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a nonexistent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it is a mere truism that there can be no receiving of stolen goods which have not been stolen. 2 Bishop, New Crim. Law, § 1140. It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact. The crucial distinction between the case before us and the pickpocket cases, and others involving the same principle, lies not in the possibility or impossibility of the commission of the crime, but in the fact that, in the present case, the act which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy, and received them into his possession, he would have committed no offense under § 550 of the Penal Code, because the very definition in that section of the offense of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such manner as to constitute larceny. This knowledge being a material ingredient of the offense, it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated."

In *United States v. De Bare* (1875) 6 Biss. 358, Fed. Cas. No. 14,935, wherein it appeared that postage stamps were stolen from the government and deposited by the thief with an express company, directed to the accused, but were recovered by the postmaster from the express company on an order from the thief, and subsequently forwarded by the postmaster, under the direction of the Postoffice Department, to the accused, the court held there could be no con-

viction, saying: "The moral turpitude of a receiver under such circumstances may be as great as in case the property comes directly from the hands of the thief, because the criminal intent on his part exists equally in both cases. But to create the offense which the law punishes, the property, when received, must, in fact, and in a legal sense, be stolen property. If these stamps were received by the defendant, they did not, when received, upon the proof made, bear this character. They had been captured from the thief by the owner, and the act of forwarding them to the alleged receiver was the act of the owner." To the same effect are *Reg. v. Schmidt* (1866) 10 Cox, C. C. (Eng.) 172, 35 L. J. Mag. Cas. N. S. 94, L. R. 1 C. C. 15, 12 Jur. N. S. 149, 13 L. T. N. S. 679, 14 Week. Rep. 286, and *Reg. v. Villensky* [1892] 2 Q. B. (Eng.) 597, 61 L. J. Mag. Cas. N. S. 218, 5 Reports, 16, 41 Week. Rep. 160, 56 J. P. 824.

So, in *State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283, it appeared that a detective, acting for a railroad company, persuaded a third person to convey a box of clothing, which was taken from the railroad company by the detective, and delivered by him to the third person for conveyance, to the accused, who was suspected of receiving stolen goods, for the purpose of entrapping him with a view to a prosecution. It was held that since there had been no felonious intent connected with the original taking, there was no larceny, and consequently the accused could not be guilty of the crime of receiving stolen property, although the third person who delivered the clothing to the accused believed it to be stolen.

In *Reg. v. Dolan* (1855) 6 Cox, C. C. (Eng.) 449, it appeared that the stolen goods were found in the pocket of the thief by the owner thereof. The owner sent for a policeman and the three went together towards the defendant's shop, where the thief had previously sold stolen goods. The policeman then gave the goods to the thief and he was told by the owner to

go to the shop and sell them. The thief did so and turned the proceeds over to the owner. It was held that the purchaser was not guilty of receiving stolen goods. The court said: "I feel strongly that this conviction is wrong. I do not see how it can be supported, unless it could be laid down that, if at any period in the history of a chattel once stolen, though afterwards restored to the possession of the owner, it should be received by anyone with a knowledge that it had been stolen, an offense would be committed within the statute." To the same effect is *Reg. v. Hancock* (1878) 14 Cox, C. C. (Eng.) 119, 38 L. T. N. S. 787, following *Reg. v. Dolan* (Eng.) supra.

w. Robbery.

As to the defense of entrapment in the prosecution of other crimes where the want of consent of the person affected is an essential element of the crime, see supra, II. c, n and v, and infra, II. y.

It is a defense to a prosecution for robbery that the crime was instigated by the person robbed, for the purpose of entrapping the accused, as it is an element of the crime of robbery that it shall be committed without the consent of the victim. So, if the property is parted with, not because of force or intimidation, but solely for the purpose of prosecuting the person taking the property, robbery is not committed. *Rex v. Fuller* (1820) Russ. & R. C. C. (Eng.) 408. See also *State v. West* (1900) 157 Mo. 309, 57 S. W. 1071; *Tones v. State* (1905) 48 Tex. Crim. Rep. 363, 1 L.R.A.(N.S.) 1024, 122 Am. St. Rep. 759, 88 S. W. 217, 13 Ann. Cas. 455.

But a person who knows that a robbery is contemplated against him may remain passive, and take steps to prevent the commission of the crime and apprehend the would-be robbers, without being held to have consented to the offense. *State v. West* (Mo.) and *Tones v. State* (Tex.) supra; *State v. Piscoineri* (1910) 68 W. Va. 76, 69 S. E. 375; *Norden's Case* (1754) Fost. C. L. (Eng.) 129.

Thus, in *State v. West* (Mo.) supra,

wherein it appeared that a division superintendent had been apprised that an attempt would be made to rob a train, and, in pursuance of this information, placed a guard on the train, which captured the accused after they had stopped the train, the court said: "It is . . . well-settled law that where two or more persons conspire to commit an offense, and the person against whom or whose property the offense is premeditated becomes apprised of their intention and arranges to have them apprehended in the act, he does not thereby consent to their conduct, or furnish them any excuse."

Where a person carries marked money so that, if taken from him, the necessary evidence may be secured to convict the offenders, the entrapment is no defense. *Tones v. States* (Tex.) supra, wherein the court said: "We understand appellant's defense to embrace two propositions: First, that prosecutor was willing to be robbed, prepared himself for that purpose, made no resistance; and, conceding that the money was taken from him, under the circumstances, by the officers, that it was with his consent, and so there could be no robbery. Second, that appellant and his companion Finley were police officers of the town of Denison; that they were authorized by ordinance to arrest persons found drunk in any public place in said city; that appellant was found in such condition by them, and they took him into custody, and carried him to jail; that they had a right to search him; that he used no violence in said search; and that, in the absence of any violence used in procuring the money, conceding that they did procure it, this would not constitute robbery. Furthermore, if it be admitted that sufficient violence was shown in taking the money, still no intent was shown to appropriate it, and if subsequently they formed the intent, and did appropriate said money, it would not constitute robbery. On the first proposition, appellant has cited a number of authorities, from which he deduces a principle of law, as follows: Where money is placed upon

a person with the purpose of being taken from him, in order to detect a criminal, the owner of the money and the person from whom the money is taken consenting thereto, robbery is not committed. . . . Of course, if it be conceded that the evidence shows that the prosecutor was consenting to the robbery, then the application of the authorities cited may be granted. However, we gather from the authorities cited by appellant, and others, that as to the offense of burglary, larceny, robbery, and other crimes of like character, if the owner of the burglarized premises or property invites a crime, or induces parties to commit an offense in order that they might be apprehended, that he cannot afterwards be heard to say that he did not consent to what was done. . . . But we do not believe it is held by any well-considered authority that where a person has learned of plans to burglarize his premises, and does not at all enter into the designs of the burglar, but does not try to prevent the burglary,—on the contrary, lays plans to entrap the burglar, and does apprehend him in the act,—there is no [any?] consent to the burglary; and the burglar is amenable to punishment."

So, it is no defense to a prosecution for taking property by force or threats, and against the owner's consent, in pursuance of a conspiracy for that purpose, that the prosecutor, after the defendants had formed their guilty intent, laid a trap, and went voluntarily to their meeting place with money which was marked and furnished him by the prosecuting attorney for the purpose of entrapping the defendants, who were thus captured by officers on the watch. *State v. Piscoineri* (1910) 68 W. Va. 76, 69 S. E. 375.

In *Norden's Case* (1754) *Fost. C. L. (Eng.)* 129, it was held to be no defense to a prosecution for robbery that a person having heard of the practice of a highwayman to rob a certain stage, accompanied it in a post chaise for the purpose of apprehending him, and when he came up and presented a weapon and demanded

money, gave him some, and then captured the robber.

And it is no defense to a prosecution for an attempt to commit the crime of robbery, that the defendant's accomplices were acting under instructions from the district attorney's office for the purpose of apprehending the defendant, where the latter made the first suggestion of the crime, and the person to be robbed had no part in the transaction. *People v. Du Veau* (1905) 105 App. Div. 381, 94 N. Y. Supp. 225.

x. Subornation of perjury.

It may be a defense to a prosecution for attempted subornation of perjury that the offense was induced by another. In *Com. v. Bickings* (1903) 12 Pa. Dist. R. 206, wherein a judgment of conviction was arrested and the defendant discharged, it appeared that the defendant had been engaged in litigation against his brother, Levi Bickings; that, in the course of that litigation, it became necessary to prove certain disputed facts by a witness additional to himself; that one Omensetter, an acquaintance of both of the brothers, threw himself in the defendant's way, and finally lured the latter into giving him a written statement of the facts to be testified to, and the sum of \$10 as part payment of a whole sum of \$25 to be paid to him for testifying. A relation between Omensetter and the defendant's litigant brother was clearly made out, and the whole appeared to have been a trap so to discredit the defendant in the civil proceeding as to compel him to abate all or a part of his demand. The court, discussing the criminality of the defendant, said: "The liability of men to fall into crime by consulting their interests and passions is unfortunately great, without the stimulus of encouragement. No state, therefore, can safely adopt a policy by which crime is to be artificially propagated. This principle it is which leads to the limitations of the doctrine as laid down by Wharton, . . . namely, that the defendant who is trapped must himself have previously intended

the offense into which he is trapped, and, also, that the offense intended is one to be committed by himself, either alone or with others. In the case before us, the design of the offense appears to have originated with Omensetter, and to have been by him transferred into the defendant's mind. Moreover, the crime to be committed, to wit, perjury, was to be committed by the same man, and not by the defendant. This is virtually the case of a detective who, by promising to perpetrate a crime, lures an innocent man into aiding and abetting it, the object being, not the perpetration of the crime, but the luring of the abettor. Such a proceeding is not a reality, but merely a tragical farce, in which the detective, masquerading as a criminal, captivates the unsophisticated defendant, and then, with mock heroics, denounces him."

y. Trading with slave.

In *State v. Anone* (1819) 11 S. C. L. (2 Nott & M'C.) 27, it was held to be no defense to a prosecution for the crime of trading with a slave without a note or ticket in writing, that the master of the slave sent him out with goods for the purpose of entrapping anyone who might trade with the slave. To the same effect, see *State v. Sonnerkalb* (1820) 11 S. C. L. (2 Nott & M'C.) 280. See also *State v. Stroud* (1819) 11 S. C. L. (2 Nott & M'C.) 34, note. The statute under which the foregoing cases arose apparently made the act a crime regardless of the consent of the master.

Where, however, the statute made the want of the owner's consent an essential element of the crime, it was held that a conviction could not be had where the master ordered the slave to make purchases for the sole purpose of prosecuting the seller. *State v. Geze* (1853) 8 La. Ann. 52, wherein it was held that where the owner or person having charge of a slave sent him to obtain liquor from the defendant for the purpose of inducing the latter to commit the statutory offense of selling liquor to a slave,

"by Howard M. Benton, Attorney in Fact."

After the execution of the bond, and while it was in full force and effect, and at a time when the officer was in the discharge of his duties as a member of the fire department of the city, riding his motorcycle, he ran into and against the bicycle of the plaintiff and appellee, Geisler, causing him to be thrown to the ground and badly injured. This suit was brought by the injured boy against the officer and his surety, the Massachusetts Bonding Insurance Company, to recover damages for the alleged negligence of the officer. A verdict for \$500 being returned and judgment entered thereon in favor of the plaintiff, the defendants Manwaring and his surety appeal, urging several grounds for the reversal of the judgment, which may be set out as follows:

(1) There is no liability on the bond of the policeman for a trespass done by him while performing duties as a member of the fire department. (2) Public necessity exonerates a motorcycle policeman from liability for all but gross negligence. (3) The plaintiff, Geisler, was guilty of contributory negligence but for which the injury would not have happened. (4) The trial court grievously erred in instructing the jury on the law of "last clear chance," where only specific charges of negligence, which do not cover the act of which complaint is made, are contained in the petition. (5) The policeman's bond covered only his official acts, and is available to a citizen only when the officer has been guilty of misfeasance, malfeasance, or nonfeasance. (6) The surety on the official bond of a police officer is not liable for ordinary acts of negligence of the officer, for these are done in his individual capacity.

Appellant Manwaring was acting both as a police officer and fireman at the time of the accident to appellee, Geisler, and it is im-

possible to separate his duties one from the other. In such case the surety on the bond of the policeman may be held liable. The injured party will not be required to draw fine distinctions, and determine whether the officer was doing more duty as a policeman than as a fireman, or vice versa, if he was performing any duty as a police officer. Nor is a peace officer exonerated from liability for an injury inflicted on another while in the discharge of official duties, on the ground of public necessity, if the officer failed to exercise reasonable care for the protection of those whom he knew, or by the exercise of reasonable judgment should have expected, to be at the place of the injury, although he may not be criminally liable. For instance, an officer whose duty it is to make an arrest of one charged with felony may use such force and means as will prevent the escape of the prisoner, even to shooting and wounding him; but if, in shooting at a fleeing prisoner, a police officer should wound another on a public street where people are generally congregated and expected to be, the officer would not be exonerated from civil liability because he had a right to shoot to stop the prisoner, for it was his duty to so perform the functions of his office as not to injure another, and in shooting into a crowd, or along a public thoroughfare where people were wont to travel in large numbers, he would be guilty of such failure to exercise reasonable care as would render him civilly liable for the wrong, even though he was justified in firing at the prisoner.

Officer—surety—
liability for acts
in different
capacities.

—liability for
injuries.

Coming now to the consideration of the alleged insufficiency of the pleading of plaintiff to have warranted the trial court in giving an instruction on the law of the last clear chance, it may be said that the recognized rule in this jurisdiction is that a general allegation of neg-

(191 Ky. 532, 230 S. W. 918.)

ligence is sufficient to justify the introduction of evidence of any negligence which was the direct and

Pleading—
negligence—
general
allegations.

proximate cause of the injury to the plaintiff; but if the plaintiff in his peti-

tion set out in specific detail the particular acts of negligence upon which he will rely for recovery, he will be concluded thereby, and cannot introduce evidence of other or different acts of negligence. Even if there be a general allegation of negligence, and this is followed by an explanatory charge of specific acts of negligence, the plaintiff will likewise be confined in evidence to the proof of the specific acts of which he complains, and will not be allowed to enlarge thereon under his general averment of negligence. *Gaines & Co. v. Johnson*, 133 Ky. 507, 105 S. W. 382.

The petition in this case avers that the plaintiff was injured by the defendant, at a time when the defendant police officer was riding his motorcycle along Monmouth street in the city of Newport "at a dangerous and unreasonable rate of speed," without giving any warning, notice, or signal of any kind of the approach, of said motorcycle to the said infant plaintiff, and without having said motorcycle under reasonable control and keeping a lookout ahead of said motorcycle for persons using said street, suddenly and unexpectedly, and with gross and wanton carelessness and negligence, drove said motorcycle upon and against infant plaintiff and his bicycle, throwing infant plaintiff down to and upon said street with great violence, seriously injuring plaintiff and destroying his bicycle. "Plaintiff says that by reason of said negligence and said dangerous and unreasonable rate of speed and said failure of defendant William R. Manwaring, to give warning, notice, or signal of the approach of said motorcycle as aforesaid, and his failure at said time to have said motorcycle under reasonable control and keep a lookout

ahead of his said motorcycle for persons upon said street, infant plaintiff was thereby injured."

It will be observed that the petition charges four specific acts of negligence: (1) Operation of machine at a dangerous rate of speed; (2) failure to give warning; (3) failure to have motorcycle under reasonable control; and (4) failure to keep a lookout for people on street.

No one of the specific acts of negligence charged in the pleading was sustained by the proof. As there was no general averment of negligence, and the specific acts of negligence charged do not cover the facts of this case the court should not have given instruction No. 1, which stated the law controlling persons having the last clear chance to avoid an injury.

—last clear
chance—
sufficiency of
allegation.

The evidence for plaintiff tended to prove that the plaintiff, Geisler, a boy of thirteen years of age, was riding his bicycle along the right side of the public street late in the evening, when the engine of the fire department passed going south. The boy turned his wheel and crossed the street, and started back in the direction the fire engine was going. His wheel was about 3 or 4 feet from the curb, and on the right side of the street. The appellant Manwaring, who was riding a motorcycle and aiding the fire department at the time, came up behind appellee, and when in about 20 feet of appellee saw him, and shouted a warning to him to get out of the way, which appellee says he did not hear or obey. Instantly thereafter the motorcycle struck the wheel of the bicycle on which Geisler was riding, and threw him to the ground with great violence, inflicting the injury of which complaint is made.

It would appear from the evidence of appellee and his witnesses that appellant Manwaring could have avoided the injury to plaintiff, if he had only slightly changed the course of his motorcycle after he saw the

the court said: "The objection urged by counsel in their brief is to the effect that the letters were admitted without showing that they were received at the office of the defendant Freeman, and that certain replies, purporting on their face to come from his office, were received by the postoffice inspectors who caused the decoy letters to be sent. It was stipulated between the government and the defendants Freeman and Holsman that these letters were received, through the postoffice department, at the office of Freeman, and that the replies were transmitted through the mail from said office, and nothing was left for the determination of the court except the competency thereof as evidence fit to go to the jury. That the letters were competent is beyond question. The inspectors in no way became parties to the alleged conspiracy in sending the decoy letters. Their course was adopted simply for the purpose of ascertaining whether the law was being violated by the defendants, which resulted in obtaining pertinent evidence tending to show such violation of the law."

In *Goldman v. United States (Fed.)* supra, it appeared that a government inspector, in order to detect the defendant, who had been suspected of using the mails to defraud, answered an advertisement by the defendant, and succeeded in getting sufficient evidence to support a prosecution against him. The court sustained the conduct of the inspector, but intimated that, had his conduct been such as to induce rather than to detect a crime already planned, the conduct would not have been justified.

s. Practice of dentistry without license.

On a prosecution for practising dentistry without a license, it is no defense that the prosecuting witness went to the office of the defendant and had him fill a cavity in his tooth, and paid him for the service, with a view to prosecuting him therefor. *State v. Littooy (1909) 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292.*

s. Procuring women for immoral purposes.

In *People v. Moore (1911) 142 App.*

Div. 402, 127 N. Y. Supp. 98, affirmed in (1911) 201 N. Y. 570, 95 N. E. 1136, it was held to be no defense to a prosecution for having committed the statutory crime of knowingly receiving money for and on account of procuring and placing women in the custody of another person, for immoral purposes, that a trap was laid for the defendant, and that the principal witness, in whose custody the women were placed, did not intend to, and did not in fact, make use of them for immoral purposes, the defendant having, in fact, knowingly received the money, having knowingly procured the women, and having intended to deliver, and having delivered, them for immoral purposes.

But in *State v. Mantis (1920) 32 Idaho, 724, 187 Pac. 268,* wherein it appeared that the accused had merely acquiesced in the suggestion of the prosecuting witness, acting at the instance of the district attorney, that the accused cohabit with her illegally, it was held that the criminal design had originated in the mind of the witness, and that the entrapment deprived the act of its criminality. The court said: "Entrapment into the commission of a crime is not a defense in the sense of a justification or excuse for an act which otherwise would be criminal, but it resolves itself into a question of whether the accused committed any crime. If the criminal design originated with him, or if he intentionally committed or carried out his own criminal purpose, whether it originated with him or not, at the suggestion of another person, the fact that someone other than the accused facilitated the execution of the scheme, or that an officer appeared to co-operate with him, will not be a defense. . . . In this case there is no evidence that the appellant originated the criminal design of which he was accused and convicted, or that he wilfully and with criminal intent attempted to carry out the crime of which he was convicted after it was suggested to him. The money was given only after its payment was suggested by the woman, and, after she had stated that she preferred to live with appellant for immoral pur-

poses, the appellant merely acquiescing in her suggestion. The case falls clearly within the rule, and there is no evidence to sustain the verdict."

In *State v. McCornish* (1921) — Utah, —, 201 Pac. 637, reversing a conviction of pandering, the defendant, who was employed as a bell boy in a hotel, having, according to the state's evidence, at the solicitation of a policeman who had procured a room at the hotel, sent a prostitute to his room, the court said: "If the defendant in this case had been engaged in some unlawful business or enterprise, as was the case in *State v. Robinson*, 40 Utah, 448, 125 Pac. 657, and an officer had merely, in the course of defendant's business, asked him to deal with such officer as he dealt with others, the case would be entirely different. The defendant in this case, was, however, not carrying on, either directly or indirectly, an unlawful business or enterprise; but he, as we construe the evidence, was by the officer requested and induced to do an act constituting a crime, which he would not have done but for the inducement of the officer. The officer thus induced the defendant to do what he would not have done but for such inducement."

u. Pure Food and Drug Act violation.

In *United States v. Morgan* (1910) 181 Fed. 587, reversed in (1911) 222 U. S. 274, 56 L. ed. 198, 32 Sup. Ct. Rep. 81, on other grounds, a prosecution for sending a misbranded shipment of water, branded "spring water," in interstate commerce, in violation of the Pure Food and Drug Act, the fact that the defendant was induced to act by a detective intending to prosecute him was declared to be immaterial.

In *United States v. Eman Mfg. Co.* (1920) 271 Fed. 353, it appeared that the prosecuting witness failed to induce the accused to violate the Pure Food and Drug Act by shipping a misbranded medicinal preparation to a druggist, who ordered it at the instance of a government agent, but that the agent later induced the accused to send him the preparation. It was held that the second attempt was a procurement of the commission

of the crime, and that the entrapment was a defense. The court said: "The stipulation does not disclose that the defendant here has ever sent 'Sulfox' in interstate shipment other than the two bottles to Eaton in response to his letter. Eaton's failure to induce the defendant to violate the statute by shipping to the druggist, his letter to the defendant, the absence of facts as a basis from which he could believe or suspect that the defendant had, on other occasions, violated the statute, and the stipulation, cause me to reach the conclusion that he wrote the letter to the defendant, not for the purpose of discovering violations, but with the intention and purpose of inducing the defendant to violate the statute; and that on these facts *Grimm's Case* is not an authority in support of the prosecution, and that, in the interests of a sound public policy, the defendant should be found not guilty, and discharged."

As to the defense of entrapment in a prosecution for a violation of the Interstate Commerce Act, see *supra*, II. m.

v. Receiving stolen property.

As to the defense of entrapment in the prosecution of other crimes where the want of consent of the person affected is an essential element of the crime, see *supra*, II. c, n, and *infra*, II. w and y.

In a prosecution for receiving stolen property it is a defense that the property was offered to the accused, with the consent of the owner, for the purpose of entrapment, for the receipt, to constitute such a crime, must be without the authority of the owner. *United States v. De Bare* (1875) 6 Biss. 358, Fed. Cas. No. 14,935; *People v. Jaffe* (1906) 185 N. Y. 497, 9 L.R.A.(N.S.) 263, 78 N. E. 169, 7 Ann. Cas. 348; *State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283; *Reg. v. Dolan* (1855) 6 Cox, C. C. (Eng.) 449, *Dears. C. C.* 436, 3 C. L. R. 295, 24 L. J. Mag. Cas. N. S. 59, 1 Jur. N. S. 72, 3 Week. Rep. 177, overruling *Reg. v. Lyons* (1841) *Car. & M. (Eng.)* 217; *Reg. v. Schmidt* (1866) 10 Cox, C. C. (Eng.) 172, 35 L. J. Mag. Cas. N. S. 94, L. R. 1 C. C.

15, 12 Jur. N. S. 149, 13 L. T. N. S. 679, 14 Week. Rep. 286; Reg. v. Hancock (1878) 14 Cox, C. C. (Eng.) 119, 38 L. T. N. S. 787; Reg. v. Vilensky [1892] 2 Q. B. (Eng.) 597, 61 L. J. Mag. Cas. N. S. 218, 5 Reports, 16, 41 Week. Rep. 160, 56 J. P. 824.

In *People v. Jaffe* (1906) 185 N. Y. 497, 9 L.R.A.(N.S.) 263, 78 N. E. 169, 7 Ann. Cas. 348, the court said: "The proof clearly showed; and the district attorney conceded upon the trial, that the goods which the defendant attempted to purchase on October 6th, 1902, had lost their character as stolen goods at the time when they were offered to the defendant and when he sought to buy them. In fact, the property had been restored to the owners and was wholly within their control, and was offered to the defendant by their authority and through their agency. The question presented by this appeal, therefore, is whether, upon an indictment for receiving goods, knowing them to have been stolen, the defendant may be convicted of an attempt to commit the crime where it appears without dispute that the property which he sought to receive was not in fact stolen property. The conviction was sustained by the appellate division chiefly upon the authority of the numerous cases in which it has been held that one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible. Notably among these are what may be called the pickpocket cases, where, in prosecutions for attempts to commit larceny from the person by pocket picking, it is held not to be necessary to allege or prove that there was anything in the pocket which could be the subject of larceny. . . . In passing upon the question here presented for our determination, it is important to bear in mind precisely what it was that the defendant attempted to do. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase, there-

fore, if it had been completely effected, could not constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a nonexistent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it is a mere truism that there can be no receiving of stolen goods which have not been stolen. 2 Bishop, New Crim. Law, § 1140. It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact. The crucial distinction between the case before us and the pickpocket cases, and others involving the same principle, lies not in the possibility or impossibility of the commission of the crime, but in the fact that, in the present case, the act which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy, and received them into his possession, he would have committed no offense under § 550 of the Penal Code, because the very definition in that section of the offense of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such manner as to constitute larceny. This knowledge being a material ingredient of the offense, it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated."

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viction, saying: "The moral turpitude of a receiver under such circumstances may be as great as in case the property comes directly from the hands of the thief, because the criminal intent on his part exists equally in both cases. But to create the offense which the law punishes, the property, when received, must, in fact, and in a legal sense, be stolen property. If these stamps were received by the defendant, they did not, when received, upon the proof made, bear this character. They had been captured from the thief by the owner, and the act of forwarding them to the alleged receiver was the act of the owner." To the same effect are *Reg. v. Schmidt* (1866) 10 Cox, C. C. (Eng.) 172, 35 L. J. Mag. Cas. N. S. 94, L. R. 1 C. C. 15, 12 Jur. N. S. 149, 13 L. T. N. S. 679, 14 Week. Rep. 286, and *Reg. v. Villensky* [1892] 2 Q. B. (Eng.) 597, 61 L. J. Mag. Cas. N. S. 218, 5 Reports, 16, 41 Week. Rep. 160, 56 J. P. 824.

So, in *State v. Waghalter* (1903) 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283, it appeared that a detective, acting for a railroad company, persuaded a third person to convey a box of clothing, which was taken from the railroad company by the detective, and delivered by him to the third person for conveyance, to the accused, who was suspected of receiving stolen goods, for the purpose of entrapping him with a view to a prosecution. It was held that since there had been no felonious intent connected with the original taking, there was no larceny, and consequently the accused could not be guilty of the crime of receiving stolen property, although the third person who delivered the clothing to the accused believed it to be stolen.

In *Reg. v. Dolan* (1855) 6 Cox, C. C. (Eng.) 449, it appeared that the stolen goods were found in the pocket of the thief by the owner thereof. The owner sent for a policeman and the three went together towards the defendant's shop, where the thief had previously sold stolen goods. The policeman then gave the goods to the thief and he was told by the owner to

go to the shop and sell them. The thief did so and turned the proceeds over to the owner. It was held that the purchaser was not guilty of receiving stolen goods. The court said: "I feel strongly that this conviction is wrong. I do not see how it can be supported, unless it could be laid down that, if at any period in the history of a chattel once stolen, though afterwards restored to the possession of the owner, it should be received by anyone with a knowledge that it had been stolen, an offense would be committed within the statute." To the same effect is *Reg. v. Hancock* (1878) 14 Cox, C. C. (Eng.) 119, 38 L. T. N. S. 787, following *Reg. v. Dolan* (Eng.) supra.

w. Robbery.

As to the defense of entrapment in the prosecution of other crimes where the want of consent of the person affected is an essential element of the crime, see supra, II. c, n and v, and infra, II. y.

It is a defense to a prosecution for robbery that the crime was instigated by the person robbed, for the purpose of entrapping the accused, as it is an element of the crime of robbery that it shall be committed without the consent of the victim. So, if the property is parted with, not because of force or intimidation, but solely for the purpose of prosecuting the person taking the property, robbery is not committed. *Rex v. Fuller* (1820) Russ. & R. C. C. (Eng.) 408. See also *State v. West* (1900) 157 Mo. 309, 57 S. W. 1071; *Tones v. State* (1905) 48 Tex. Crim. Rep. 363, 1 L.R.A.(N.S.) 1024, 122 Am. St. Rep. 759, 88 S. W. 217, 13 Ann. Cas. 455.

But a person who knows that a robbery is contemplated against him may remain passive, and take steps to prevent the commission of the crime and apprehend the would-be robbers, without being held to have consented to the offense. *State v. West* (Mo.) and *Tones v. State* (Tex.) supra; *State v. Piscineri* (1910) 68 W. Va. 76, 69 S. E. 375; *Norden's Case* (1754) Fost. C. L. (Eng.) 129.

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Thus, in *State v. West* (Mo.) *supra*,

acts. No other rule would be safe. Sureties are not needed on a sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to anyone, while acting under color of his office."

In *Martin v. Smith* (1910) 136 Ky. 804, 29 L.R.A.(N.S.) 463, 125 S. W. 249, the sureties on the bond of a town marshal were held to be liable for his wrongful act in shooting a person in the belief that he intended to interfere in an arrest which the officer was attempting to make.

Since a recovery cannot be had for negligent acts not done by virtue of office, in *Jordan v. Neer* (1912) 84 Okla. 400, 125 Pac. 1117, it was held that the sureties on the bond of a sheriff were not liable for the acts of their principal in attempting to stop, without a warrant, a man who was quietly proceeding along the highway, and killing him in an exchange of shots which followed his refusal to stop.

The sureties on the official bond of a constable are not liable for personal injury or wrongful death caused by such officer while professing to act in his official capacity, in making an arrest without a warrant, and without claim that an offense was being committed in his presence based on conduct giving color to such claim, or calling for judgment and opinion as to whether an offense had been so committed. *State v. Mankin* (1911) 68 W. Va. 772, 70 S. E. 764.

A peace officer who shoots a person in attempting to arrest him without a warrant, and without the exercise of the slightest diligence to ascertain whether the person has committed an offense, does not act *colore officii* so as to render his sureties liable. *Chandler v. Rutherford* (1900) 43 C. C. A. 218, 101 Fed. 774, wherein the court said: "To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official ca-

capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond."

Killing or injury in preventing escape.

In *Thomas v. Kinkead* (1892) 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 28, 18 S. W. 854, an action against a constable and the sureties on his official bond, to recover for the wrongful killing of a person by a deputy of the constable, the court held that a peace officer, having arrested a person accused of a misdemeanor, cannot lawfully kill him or inflict a bodily injury to prevent his escape, although no other means of prevention are available, and if he or his deputy inflict a bodily injury on the misdemeanor under such circumstances, though holding a warrant for his arrest, the sureties on the official bond of the officer are liable in damages.

The shooting by a city marshal of one who is fleeing after being arrested for a misdemeanor is wrongful, and is an official act for which his sureties are liable. *Rischer v. Meehan* (1896) 11 Ohio C. C. 408, 5 Ohio C. D. 416.

Similarly, in *Brown v. Weaver* (1898) 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388, a sheriff and his sureties were held to be liable on the officer's bond, conditioned that "he faithfully perform all the duties of said office during his continuance therein," for the wrongful shooting by a deputy sheriff of a prisoner attempting to escape from arrest. The court said: "If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable. If it was not an official but a personal act, it is equally clear that he is not answerable. But an official act does not mean what a deputy might lawfully do in the execution of his office; if so, no action could ever lie against the sheriff for the 'misconduct' of his deputy. It means, therefore, whatever

is done under color or by virtue of his office."

The act of a sheriff in shooting one guilty of a simple misdemeanor to prevent his escape from arrest, although the shot was fired merely to cause the misdemeanor to halt, was held, in State use of Johnson v. Cunningham (1914) 107 Miss. 140, 51 L.R.A.(N.S.) 1179, 65 So. 115, to amount to negligence rendering liable the sureties on his official bond. The court said: "There can be no question that a sheriff and the sureties on his official bond are liable in a civil action for damages arising from the intentional or negligent shooting of a misdemeanor who flees to avoid arrest. The officer owes to the fugitive the duty to exercise care and precaution not to injure him. He must not intentionally shoot a misdemeanor who is a fugitive, nor must he discharge a firearm, while in pursuit, in such a manner as to cause such fugitive injury."

Under a statute allowing action on the bond of a city officer by one injured by the principal's neglect of duty, a surety company, bonding city detectives for the faithful performance of their duties and the payment of any damage that might be adjudged against said detectives for injury by them to any person, was held in Askay v. Maloney (1917) 85 Or. 333, 166 Pac. 29, to be properly joined in an action against the officers for death from their negligent act in shooting at an escaping prisoner, to the fatal injury of a third person; and it was said not to be essential that a judgment should be first obtained against the principals, for the bond, being given pursuant to statute, would be deemed to supply the statutory remedy. On a second appeal in (1919) 92 Or. 566, 179 Pac. 899, it appeared that the bond in question was merely an undertaking to reimburse the city, or any person, "for any loss sustained by reason of any persons named in the schedule hereto attached, or additions thereto, as hereinafter provided, . . . to faithfully discharge all the duties of their respective offices according to the true

intent and meaning of said ordinances, and failure to make payment for any and all damages that may be adjudged against them by any tribunal for the illegal arrest, imprisonment, or injury by him to any person." The court held that under the terms of the bond the responsibility of the surety company for an alleged careless and negligent act of the officers in shooting in the public street at an escaping prisoner, thereby causing the death of a third person, was not concurrent with the responsibility of the officers, but was only secondary, while the liability of the individual defendants was primary.

But in Hendrick v. Walton (1887) 69 Tex. 192, 6 S. W. 749, it was held that, under a statute creating liability when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another, a sheriff and his sureties were not liable for the act of a deputy in shooting one who was endeavoring to escape after being arrested. It was not decided in that case whether the act of the deputy was an official act, within a statute making the sheriff responsible for such acts of his deputy.

Failure to prevent killing by mob.

The act of a United States marshal in wrongfully permitting a prisoner, in charge of a deputy marshal whom he knows to be incompetent and unfit to perform the duties of his office, to be killed by a mob, is sufficient to render the officer liable on his official bond, because of his personal negligence, for the killing of the prisoner, through the deputy's unfitness. Asher v. Cabell (1892) 1 C. C. A. 693, 2 U. S. App. 158, 50 Fed. 818.

Where it appears that a sheriff-carelessly and negligently suffered a prisoner in his lawful custody to be killed by a mob, he and the sureties on his bond, conditioned for the faithful performance of the duties of his office, will be held liable in damages. Indiana ex rel. Tyler v. Gobin (1899) 94 Fed. 48. See to the same effect, Ex parte Jenkins (1900) 25 Ind. App. 582, 81 Am. St. Rep. 114, 58 N. E. 560.

But exactly the contrary doctrine

was held in *State use of Cocking v. Wade* (1898) 87 Md. 529, 40 L.R.A. 628, 40 Atl. 104, wherein it was affirmatively stated that the sureties on a sheriff's bond were not liable for a wrong committed by him in aiding and abetting a mob in lynching a prisoner regularly committed to his custody. The court said: "We will add that, even if it had been charged . . . that the sheriff acted maliciously, the official bond of that officer could not be held liable in a case like this. The liability of the sureties is that of an express contract that the sheriff shall 'well and truly execute the office of sheriff and in all things thereto appertaining, and should well and truly perform all the duties required by law to be by him performed.' This provision, it seems now to be well settled, 'binds the officer affirmatively to the faithful execution of his office. There is no clause to cover an abuse or usurpation of power—no negative words that he will commit no wrong by color of his office, nor do anything not authorized by law.' "

Failure to prevent injury by fellow prisoner.

If a sheriff is found guilty of negligence in not protecting a prisoner from injury by an insane fellow prisoner, the surety on his bond is likewise liable to the extent of the bond, which is conditioned for the faithful performance of the officer's duties. *Kusah v. McCorkle* (1918) 100 Wash. 318, L.R.A.1918C, 1158, 170 Pac. 1023.

Negligent driving of motorcycle.

In the reported case (*MANWARING v. GEISLER*, ante, 192) it is held that the bond of a police officer was liable for an injury caused by his negligent driving of a motorcycle, though he was at the time engaged in performing a duty for the fire department. The decision is, however, based on the terms of the bond, which rendered the sureties liable for any trespass by the officer for which he might be held liable, and there is dictum in the case that the rule would be otherwise with respect to a bond conditioned for the faithful performance of official duty.

L. F. C.

CHARLES WELDON, Plff. in Certiorari,
v.

STATE OF ARKANSAS.

Arkansas Supreme Court — November 7, 1921.

(— Ark. —, 234 S. W. 466.)

Contempt — assault on judge as contempt.

1. An assault upon the judge during an intermission of the court, at a place other than that where the court is held, because of his official conduct with respect to a case on trial before him, is a contempt which the court has inherent power to punish.

[See note on this question beginning on page 212.]

—inherent power of courts.

2. Courts have power to punish for contempt as a necessary incident to the exercise of their express powers,

and statutory authority need not be found to warrant that action.

[See 6 R. C. L. 489; see also note in 8 A.L.R. 1543.]

(McCulloch, Ch. J., and Hart, J., dissent.)

CERTIORARI to the Circuit Court for Garland County (Sorrells, J.) to review a judgment convicting defendant of contempt of court. *Affirmed.* The facts are stated in the opinion of the court.

Messrs. Thomas S. Downey and Harry H. Myers, for plaintiff in certiorari:

The acts complained of were not, and cannot be construed to have been, committed in the presence of the court.

Turk v. State, 123 Ark. 341, 185 S. W. 472; 8 Am. & Eng. Enc. Law, 2d ed. 22; Shoultz v. McPheeters, 79 Ind. 376; Stewart v. Crane, 87 Ga. 330, 13 S. E. 552; Ex parte Gardner, 22 Nev. 280, 39 Pac. 570; Neel v. State, 9 Ark. 258, 50 Am. Dec. 209.

If the petitioner was guilty of contempt the punishment is excessive and unreasonable, and an unwarranted usurpation of power.

Carl Lee v. State, 102 Ark. 130, 143 S. W. 909.

Messrs. J. S. Utley, Attorney General, Elbert Godwin, and W. T. Hammock, Assistant Attorneys General, for the State:

The act of petitioner in assaulting Judge Wood, the regular presiding judge over the Garland circuit court, occasioned by litigation then pending before it, although while the court was not in session, was such contempt that it was authorized, under the law, to punish petitioner for contempt summarily, for assault.

Neel v. State, 9 Ark. 259, 50 Am. Dec. 209; Ex parte McCown, 139 N. C. 95, 2 L.R.A.(N.S.) 603, 51 S. E. 959; Field v. Thornell, 106 Iowa, 7, 68 Am. St. Rep. 281, 75 N. W. 685; United States v. Anonymous, 21 Fed. 772; 6 R. C. L. § 5, p. 492.

Smith, J., delivered the opinion of the court:

This proceeding grew out of the following citation, which issued out of the Garland circuit court: "Whereas, on the 4th day of July, 1921, Charlie Weldon, in the county of Garland and state of Arkansas, made an assault on the person of the Honorable Scott Wood, judge of this court, and whereas said assault was without provocation, and was prompted by malice by the acts of said judge in the performance of his judicial duties in a case pending in this court wherein the state of Arkansas is plaintiff and Charlie Weldon and others are defendants, and said assault was made with the intent to intimidate said judge and

deter him from the performance of his duties in the trial of said case: It is therefore ordered that an attachment of contempt of court be issued for the said Charlie Weldon, and that he be requested to appear at the next regular day of the present term of said court on the 13th day of July, 1921, and show cause, if any he have, why he should not be punished for said contempt."

An agreement of exchange of courts was made between the judge of the Garland circuit court and W. B. Sorrells, judge of the eleventh circuit, and the matter was heard on the return day of the citation, before the last-named officer. The case coming on for hearing, defendant, Weldon, who will hereinafter be referred to as the petitioner, was found guilty as charged, and his punishment fixed at imprisonment in jail for three months and a fine of \$500. Petitioner has by certiorari brought before us the record of the court below for review.

Judge Wood testified that the court over which he presided had taken a recess from the Saturday before the 4th of July to the 13th of that month, and that he spent the 4th at a bathing place called Arboresdale Springs, 8 miles from Hot Springs, the county seat, and that as he came from the water, and was standing outside a dressing booth waiting to get in, he noticed petitioner walking towards him, and as petitioner came up he said to witness, "You are a smart guy," and struck at the judge. The judge said: "What is the matter with you? You are crazy; you are a fool." Petitioner said, "Did you hear what he called me?" The judge denied having called petitioner any name. The judge testified that he said to petitioner, "I know what you are doing this for; you think you can bully somebody;" or, "You are doing it because I did, in my official capacity, have to try you."

The petitioner used vulgar language towards the judge, and called him some names, and asked: "What have you got it in for me for?"

What have I done to you?" but never denied that he was acting for the purpose of which the judge accused him, and made no response to the statement of the judge. The judge and the petitioner struck at each other, then clinched, but were separated without either having inflicted any bodily harm on the other. The judge further testified that he had only seen the petitioner in court, and had never before had any conversation or communication with him. He stated that petitioner had been indicted in his court for manufacturing intoxicating liquors, but an agreement had been made between petitioner and the prosecuting attorney that the charge should not be tried until a similar charge had been disposed of in the Federal court. Petitioner was convicted in the Federal court, but that conviction was reversed in the Federal court of appeals. Whereupon petitioner was put on trial in the Garland circuit court. There was a mistrial, and, in dismissing the jury, Judge Wood, who had presided, made the remark that the case would be set for another day and tried until a verdict was reached.

Petitioner testified that he spoke to the judge civilly, who responded by saying, "Hello, mooner," meaning thereby to call him a "moonshiner," and that this offensive epithet of the judge caused the difficulty which then ensued.

Each of these witnesses was corroborated in several material respects, but, without further reciting the testimony, we announce the conclusion that the finding of the trial court is supported by the testimony. *Ex parte Winn*, 105 Ark. 193, 150 S. W. 399.

It is insisted that the judgment of the court below must be quashed and the proceeding dismissed because the incident herein set out occurred on a day when the court was not in session, and at a place where a session of the court could not be legally held, and further, that, as the conduct complained of did not take place in the actual pres-

ence of the court, the punishment imposed is without authority of law, and is, in any event, in excess of that permitted by the law.

It is true that the incident complained of did not occur on a day when the Garland circuit court was in session (*Light v. Self*, 138 Ark. 221, 211 S. W. 369, 214 S. W. 746), although it did occur before the adjournment of the court for the term. It is also true that the incident occurred at a place where court could not be legally held. *Mell v. State*, 133 Ark. 197, L.R.A.1918D, 480, 202 S. W. 33. But are these facts conclusive of the question presented on this appeal?

Section 1484, Crawford & M. Dig., provides that every court of record "shall have power to punish as for criminal contempt persons guilty of the following acts;" and there follows, in five paragraphs, an enumeration of acts declared to constitute contempt of court. This section is taken from § 37, chap. 43, of the Revised Statutes of Arkansas; and no change appears to have been made in it except that, as approved (February 28, 1838), it read, "Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others;" and thereafter follow the five paragraphs as they now appear in § 1484, Crawford & M. Dig.

The words "and no others" have been eliminated from the statute. This was done by Josiah Gould in chapter 36 of the digest of the statutes prepared by him in 1858, and in a note to the section where this omission first occurs the digester has the following explanation: "The words 'and no others' are stricken out as not binding on the courts. See *State v. Morrill*, 16 Ark. 384, and cases there cited."

The facts in the case of *State v. Morrill*, *supra*, were that Morrill had published an article in a newspaper, reflecting upon a decision of the supreme court and apparently attributing the decision to extraneous influence. In response to the

summons which there issued, the defendant filed a plea to the jurisdiction, submitting that the publication was not embraced within the statute regulating the punishment of contempts. Speaking for the court, Chief Justice English conceded that the act charged against the defendant was not embraced within any clause of the statute. The insistence was made by counsel for the defendant that the court must look to the statute for its power to punish contempts, and not to any supposed inherent power of its own springing from its constitutional organization, and that the courts were controlled by this statute, and could not go beyond its provisions. The chief justice proceeded to answer, and to refute this insistence, in an opinion evincing great research and learning. He quoted from the opinion of this court in the case of Neel v. State, 9 Ark. 259, 50 Am. Dec. 209, as follows: "By the common law, a court may punish for contemptuous conduct toward the tribunal, its process, the presiding judge, or for indignities to the judge while engaged in the performance of judicial duties in vacation, or for insults offered him in consequence of judicial acts; but indignities offered to the person of the judge in vacation, when not engaged in judicial business, and without reference to his official conduct, are not punishable as contempts."

The opinion in the Neel Case is one of equal erudition, and the two together so thoroughly discuss the common-law doctrine of contempt that this writer is unequal to the task of adding anything to the discussion; and the two opinions together make it clear that courts

Contempt—
inherent power
of courts.

have power to punish for contempt as a necessary incident to the exercise of their express powers, and that in doing so statutory authority need not be sought or found to warrant that action.

It is insisted, however, that our present Constitution has deprived the courts of this power, and that

since its adoption the courts must look to the statute for authority to punish for contempts, except those committed in the immediate presence or hearing of the court, or in direct disobedience to its process. The provision of the Constitution referred to in § 26 of article 7, and reads as follows: "The general assembly shall have power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience of process." Crawford & M. Dig. § 1483.

A similar contention was made in the case of Turk v. State, 123 Ark. 341, 185 S. W. 472. There Turk and Wallen were never shown to have been at any time in the actual presence of the court. On the contrary, it affirmatively appears that the conduct complained of, to wit, the intimidation of a litigant from appearing in court and prosecuting his suit there pending, was committed "before reaching the courthouse." It was there insisted that as the offense with which Turk and Wallen were charged "was not committed in the presence or hearing of the court, and was not in disobedience of any process of the court, that its power to punish was exceeded in the fine and imprisonment assessed," inasmuch as § 1485, Crawford & M. Dig. (§ 721, Kirby's Dig.), provides that punishment for contempts not so committed "shall in no case exceed the sum of \$50, nor the imprisonment ten days."

Answering this insistence, Mr. Justice Kirby, for the court, said:

"It is universally held that intimidating a witness and preventing his appearance at court, or procuring him to absent himself from the trial, is a contempt of court. Preventing the appearance of a litigant in court, for the prosecution of a suit brought to enforce a right, by intimidation and threats, is such an obstruction of judicial procedure as renders absolutely worthless all process of the court, which is instituted for the enforcement and protection of the rights, and the redress

and prevention of wrongs, of the litigants. It destroys the dignity and power of the court and brings the administration of justice into disrepute.

"Here a citizen appealed to the court for the redress of an alleged wrong, only to find himself confronted by the wrongdoer and his associate on the day set for the trial, at the door of the court, and so intimidated with threats that he found it necessary to absent himself from the court of justice to which he had appealed, and abandon the prosecution of his cause of action through fear.

"The conduct of appellants was a flagrant offense against the dignity and power of the court, whose arm is long enough and strong enough to keep open and unobstructed the way to its door to all who must invoke its authority, which is not limited in the right to punish offenses of this kind except by the infliction of such punishment as is commensurate with the enormity of the offense and calculated to preserve and uphold the dignity and honor of the court and its respect in the confidence of the people. *Ford v. State*, 69 Ark. 550, 64 S. W. 879. The court had jurisdiction to hear the proceeding, and did not exceed its authority in the assessment of the punishment."

If full faith and credit are given to that opinion, we think it must necessarily follow that petitioner is as guilty of contempt as were Turk and Wallen.

If intimidating a witness and preventing his appearance at court is a contempt, if preventing the appearance of a litigant in court is such an obstruction of judicial procedure as constitutes contempt, why is it not contempt to be guilty of

—assault on
judge as
contempt.

improper conduct designed and intended to influence and control the action of the court itself? The reasoning of Mr. Justice Scott in the case of *Neel v. State*, *supra*, is applicable here. He said: "When, therefore, the com-

mon law deemed it so necessary, for this great purpose, to protect the juror, the witness, the informer, the party, the jailer, the attorney, and other persons, many of whom might never again be called into a court of justice, it was not to be expected that it would fail to cover with its complete armor the presiding minister of the law's majesty, who would be so often exposed to similar trials. Not that any higher personal privileges were arrogated for him than for the humblest of these, but because it was obvious that the principle which suggested the protection of these would, at least to the same extent, protect him, if it did not rise with the grade of the officer, and the majesty of the law be more degraded in the person of a higher than a lower officer, intrusted with its administration."

In offering actual physical violence to the person of the judge, petitioner was in the constructive presence of the court, for he sought thus to influence, intimidate, and control the action of the judge in the matter of resetting his case for trial when the judge had again resumed the bench.

In the case of *Stuart v. People*, 4 Ill. 395, the supreme court of Illinois said that in the class of constructive contempts would necessarily be included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice, and that such acts would be considered as done in the presence of the court. See also *People v. Wilson*, 64 Ill. 196, 16 Am. Rep. 528, 1 Am. Crim. Rep. 107; *Ex parte McCown*, 139 N. C. 95, 2 L.R.A. (N.S.) 603, 51 S. E. 957; *McCarthy v. Hugo*, 82 Conn. 262, 135 Am. St. Rep. 270, 73 Atl. 778, 17 Ann. Cas. 219, and the notes thereto, in which cases supporting and opposing the view that acts impeding the administration of justice will be held to be within the constructive presence of the court will be found.

It follows, therefore, that the judgment of the Circuit Court must be affirmed; and it is so ordered.

Hart, J., dissenting (November 14, 1921):

My dissent is based on the ground that Weldon did not commit contempt in the presence of the court, and therefore, under our Constitution, his punishment is fixed by statute at a fine not exceeding the sum of \$50 and imprisonment not exceeding ten days in jail.

State v. Morrill, 16 Ark. 384, sustains the inherent common-law right of constitutional courts to punish for contempt, committed either in or out of the presence of the court.

The Constitution of 1874 did not attempt to restrict the power of constitutional courts to punish for contempt, whether committed in or out of the presence of the court. Article 7, § 26, provides that the general assembly shall have the power to regulate by law the punishment of contempts not committed in the presence or hearing of the courts, or in disobedience of process. This section recognizes the inherent power of constitutional courts to punish for contempt, but gives the legislature power to prescribe the punishment where the contempt is not committed in the presence of the court.

The court either was or was not in session when the contempt was committed. If it was not in session, I cannot see how there could be any contempt committed in the presence of the court, either actual or constructive. If court was in session, the case would call for the application of the doctrine in Turk v. State, 123 Ark. 341, 185 S. W. 472. In that case the court was in session, and the contempt consisted in the defendant, by threats, preventing the plaintiff from appearing in the circuit court to prosecute his case. At the time the contempt was committed by the defendant, the plaintiff was in the town where the court was in session, for the purpose of attending the trial of his case on that day. The law does not take account of different parts of days. Central Coal & Coke Co. v. Graham,

129 Ark. 550, 196 S. W. 940. Hence the court said that he was constructively in the presence of the court when the contempt was committed.

The doctrine of constructive presence proceeds upon the theory that the misbehavior is committed where it takes effect. Where one puts in force an agency for the purpose of interfering with the administration of justice, he, in legal contemplation, accompanies the same to a point where it becomes effective. So, in the present case, if court had been in session, it would be said that the contempt was committed in the constructive presence of the court, although not at the courthouse. I cannot perceive how contempt could be committed, either in the actual or constructive presence of the court, when the court was not in session.

Light v. Self, 138 Ark. 221, 211 S. W. 369, 214 S. W. 746, is authority for holding that the court was not in session when Weldon committed the contempt. In that case the county court entered an order "Court adjourned until called by the judge," and at a later day attempted to amend the order of adjournment so as to make it read, "The court will suspend until to-morrow, and remain open until the business of the term is completed." This court held that this could not be done, because the court could not be kept in session by such an order.

The effect of the holding in that case is that any order made by a court not in session is void, and I cannot conceive how contempt could be committed in the presence of the court, which was not a court, because not in session.

All courts, unless restrained by statute, may adjourn their sittings to a distant day. Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54, and McVay v. State, 104 Ark. 629, 150 S. W. 125. In State ex rel. Hall v. Canal Constr. Co. 134 Ark. 447, 203 S. W. 704, the court said that we have departed from the common-law rule that a term of court should

be considered as one day, and that a court of record may adjourn from one day to a distant day. It was further stated that during the interim the court had no power to transact business.

Even under the dissenting opinion in the case of *Light v. Self*, *supra*, the contempt in the present case cannot be said to have been committed in the presence of the court. The dissenting opinion in that case proceeds upon the theory that the court was not adjourned by the order made. The dissenting opinion, however, recognized the power of the court to adjourn from one day to a distant day. When it has adjourned from one day to a distant day, I cannot perceive how it could be said to be in session for any purpose during the intervening

days. If so, if a court should adjourn to a distant day for the purpose of holding a regular term of the court in another county in his district, it would follow, under the majority opinion, that contempt could be committed in the presence of the court—not only of the court which was actually being held, but also of the court which was adjourned.

The Chief Justice concurs.

NOTE.

Assault as contempt of court is the subject of the annotation following *RE FOUNTAIN*, post, 212; specifically, as to assault on judge, see subd. II. of that annotation.

RE L. E. FOUNTAIN, Appt.

North Carolina Supreme Court—September 21, 1921.

(— N. C. —, 108 S. E. 342.)

Contempt — abusing juror.

1. Abusing a juror for the verdict he has rendered, and making threatening gestures towards him after the case is ended, but before the end of the term of court, tends to impede and hinder the proceedings of the court, and to impair respect and authority for the court's proceedings, within the meaning of a statute making one guilty of an offense whose conduct has such tendency.

[See note on this question beginning on page 212.]

Appeal — contempt proceeding — review of facts.

2. The findings of fact in a proceeding to punish for contempt are not reviewable upon appeal from a judgment of the superior court.

Contempt — denying intent — effect.

3. One does not purge himself of contempt for abusing a juror, by denying intention to show contempt for the court.

[See 6 R. C. L. 534, 535.]

Courts — respect for proceedings.

4. The action of tribunals established by law for the purpose of investigating matters at issue between litigants is to be respected and obeyed, and is subject to review only in the method provided by law.

Appeal — right of one adjudged guilty of contempt.

5. One adjudged guilty of contempt for abusing a juror for the verdict which he rendered is entitled to an appeal.

[See 6 R. C. L. 538, 539.]

APPEAL by defendant from a judgment of the Superior Court for Edgecombe County (Calvert, J.) convicting him of indirect contempt not in the presence of the court. *No error.*

Statement by Clark, Ch. J.:

The judge finds as facts that at November term, 1921, of said county, the case of "L. E. Fountain against Calvin Jones" was called for trial on Thursday of the first week (it being a two-week term), and the verdict was rendered on the following day; that Raeford Liles was a talis juror, and after the verdict had been returned he was discharged from further service as a juror; that about an hour or two after the return of the verdict in said cause, and after said talis juror had been discharged from further service, he was met on the street by the plaintiff in the action, L. E. Fountain, "who accosted him, using abusive and insulting language toward him and the other jurors in the case, because of the verdict they had rendered, and committed an assault upon the said Liles." The matter was brought to the attention of the court during that term, who thereupon issued a rule against the said Fountain, which was not served, because of his absence from town, until after the said court had adjourned for the term and was continued by reason of such failure; the March term was a criminal term, and this matter was not reached, but at the April term it was called up, and a new rule to show cause was issued by the judge holding that term, requiring the respondent to appear to answer the rule, which he did in person and by counsel, and "upon the hearing then had the court makes these further findings of the fact: About an hour or two after the court adjourned for the day on which a verdict was rendered the respondent (L. E. Fountain) accosted the said Raeford Liles, using abusive and insulting language towards him, and of and concerning him and the other jurors in the case, and committed an assault upon him, the said Liles, and that this talis juror Liles that same afternoon informed one Daniel Harris, who was then a regular juror, and served as such the following day, that the acts and conduct of the said respondent, L. E. Fountain, did tend to impede and impair the re-

spect and authority for the proceedings of the court; and the court finds that the respondent has been guilty of contempt of the court, and so adjudges L. E. Fountain, respondent, to be in contempt of court, and adjudges that he pay a fine of \$100 and the costs of this proceeding. Thomas H. Calvert, Judge Presiding."

The respondent excepted to the foregoing findings of fact and the judgment of the court.

Messrs. G. M. T. Fountain & Son, for appellant:

The allegations in the affidavit, taken as true, constitute, in law, constructive contempt.

13 C. J. 5, §§ 2 & 3; *Ex parte McCown*, 139 N. C. 95, 2 L.R.A.(N.S.) 603, 51 S. E. 957; *Re Oldham*, 89 N. C. 23, 45 Am. Rep. 673; *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709.

Since the civil action had been disposed of by a verdict of the jury, and the jury itself discharged from further service in connection with said civil action, defendant would not be guilty of contempt.

13 C. J. 22, § 27; *Re Glenn*, 103 S. C. 501, L.R.A.1916D, 1191, 88 S. E. 294; *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; *Ex parte Green*, 46 Tex. Crim. Rep. 576, 66 L.R.A. 727, 108 Am. St. Rep. 1035, 81 S. W. 723; *State v. Dunham*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *State ex rel. Atty. Gen. v. Circuit Ct.* 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193; *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *State Law Examiners v. Hart*, 104 Minn. 88, 17 L.R.A.(N.S.) 585, 116 N. W. 212, 15 Ann. Cas. 197; *State v. Kaiser*, 20 Or. 50, 8 L.R.A. 584, 23 Pac. 964; *Re Shannon*, 11 Mont. 67, 27 Pac. 352; *State v. Root*, 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590; *People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 290, 41 N. E. 700; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199, 11 N. E. 426; *People ex rel. Brewer v. Platzek*, 133 App. Div. 25, 117 N. Y. Supp. 852; *State ex rel. Dorrion v. Hazeltine*, 82 Wash. 81, 143 Pac. 436; *State v. Bee Pub. Co.* 60 Neb. 282, 50 L.R.A. 195, 83 Am. St. Rep. 531, 83 N. W. 204; *Ex parte McLeod*, 120 Fed. 130; *Post v. State*, 14 Ohio C. C. 111.

When a reasonable doubt, in fact or in law, exists as to the guilt of anyone charged with constructive contempt for interfering with the due administration of justice, the doubt must be resolved in his favor and he must be acquitted.

Oscar Barnett Foundary Co. v. Crowe, 80 N. J. Eq. 109, 74 Atl. 964; State ex rel. Dorrien v. Hazeltine, 82 Wash. 81, 143 Pac. 436; Saal v. South Brooklyn R. Co. 122 App. Div. 364, 106 N. Y. Supp. 996; People v. Hille, 192 Ill. App. 139; State v. Davis, 50 W. Va. 100, 40 S. E. 331, 14 Am. Crim. Rep. 282; Re Gonzales, 88 N. J. L. 536, 97 Atl. 953.

In a proceeding at law for criminal contempt the respondent may purge himself by his answer.

Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 42 L.R.A. (N.S.) 796, note; People v. Seymour, 272 Ill. 295, 111 N. E. 1008; 13 C. J. 74, § 109; Re Moore, 63 N. C. 397; Ex parte Biggs, 64 N. C. 202; Re Robinson, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453; Re Gorham, 129 N. C. 481, 40 S. E. 311; Re Parker, 177 N. C. 463, 99 S. E. 342; O'Flinn v. State, 9 L.R.A. (N.S.) 1119, note.

Messrs. James S. Manning, Attorney General, and Frank Nash, Assistant Attorney General, for the State: Defendant was guilty of contempt.

Ex parte McCown, 139 N. C. 95, 2 L.R.A. (N.S.) 603, 51 S. E. 957; State v. Little, 175 N. C. 743, 94 S. E. 680; Poindexter v. State, 109 Ark. 179, 46 L.R.A. (N.S.) 517, 159 S. W. 197.

Clark, Ch. J., delivered the opinion of the court:

This is a proceeding for indirect contempt, under Consol. Stat. § 984, by conduct impeding and impairing the respect due to, and the authority of, the court, by abusing and assaulting a juror. Such conduct occurred during the term of the court, but not in the immediate presence of the court.

The court held in Re Gorham, 129 N. C. 485, 40 S. E. 311, that in a proceeding as for contempt in attempting to influence a juror, the findings of fact by the trial judge, if there is any evidence, cannot be reviewed on appeal, and that the respondent can purge himself only where the intention is the gravamen of the offense. Baker v. Cordon, 86 N. C. 116, 41 Am. Rep. 448.

Here there is evidence, and the offense was in the act, and not in the intention.

In this case, moreover, there was slight divergence between the evidence for the state and the respondent, and there was ample evidence to justify the findings of fact by the court. While the respondent denies attempting to strike the juror Liles, he does not deny the abusive and threatening language as to him and the other jurors on account of the verdict they rendered against him. Said juror testified that, when the respondent, upon the recess of the court, met him and began cursing and abusing him and the rest of the jury who had sat on the case, using profane and vile expressions, he started to walk away from said Fountain, but the latter continued to walk beside him, cursing and abusing him and all the members of the jury, and repeatedly raised his hand and shook it in his face, continuing to threaten and abuse both affiant and all other members of the jury, talking in an angry and vehement manner and threatening him so that the affiant had to walk away from him, being an old man seventy years of age, to avoid a battery upon him, and walked into the lot of an adjacent stable to avoid personal encounter and fisticuff, as he thought the said Fountain was going to strike him, and he was actually put in fear, and that this was before the court had adjourned for the term, and about two hours after the affiant had been discharged as a juror.

There was also an affidavit by the deputy sheriff that he was unable at that term of the court to serve the rule upon said Fountain, though his residence and place of business were in Tarboro, he absented himself from the county for the purpose of avoiding said officer, or keeping himself concealed to prevent service of said rule upon him. On an appeal in such proceedings from an inferior court, the findings of fact are reviewable, but it is other-

Appeal—contempt proceeding—review of facts.

wise when the appeal is from the superior court. *Re Deaton*, 105 N. C. 62, 11 S. E. 244.

The respondent does not deny the use of abusive language as stated by the juror as above, and says that he might have used gestures and raised his hand, but that he did not intend to assault him or put him in fear, and asserts he left town upon business.

In *State v. Hampton*, 63 N. C. 13, where the defendant, in striking distance of the prosecutor, his arm being bent, but not drawn back, said to the prosecutor, "I have a good mind to hit you," whereupon the prosecutor walked away, it was held that the defendant was guilty of an assault.

But it was not necessary, indeed, that there should have been a battery upon the juror. This is not an indictment for such battery. It is sufficient if the juror was called in question in the manner above stated, for the discharge of his official duty

in rendering his verdict, for the court properly held that such conduct tended "to impede and hinder the proceedings of the court, and to impair the respect and authority for the proceedings of the court," and adjudged that the respondent had been guilty of contempt of the court. *Consol. Stat.* § 984.

The defendant contends that he has purged himself of contempt by denying his intention to show contempt for the court. The question is not whether the respondent intended to show his contempt of the court, but whether he intentionally did the acts which were a contempt of the court. *Re Parker*, 177 N. C. 467, 99 S. E. 342.

The adjustment of differences between parties, or the investigation of conduct forbidden by law, by legal tribunals, instead of by personal strength, marks the line between civilized government and barbarism. When the tribunals established for that purpose have investigated the matter at issue, or are investigating

it, their action is to be respected and obeyed, and is subject to review only in the method provided by law.

In *Ex parte McCown*, 139 N. C. 95, 2 L.R.A. (N.S.) 603, 51 S. E. 957, there was a personal attack upon a judge during the recess of the court, and before it had actually adjourned, though the case on account of which the judge was attacked had been finally disposed of, and the court held that McCowan was in contempt; that the right of the court to be protected in the discharge of its duty is an inherent power of which it could not be deprived, for *Const. art. 4, § 12*, provides: "The general assembly shall have no power to deprive the judicial department of any power or jurisdiction which **Courts—respect for proceedings.** rightfully pertains to it as a co-ordinate department of the government."

It is a most essential power, rightfully pertaining to the judicial department, that those administering it, whether judges or jurors, shall not be assaulted or intimidated by violent and threatening conduct from the untrammelled discharge of their duties; and this is as essential in regard to jurors who are a part of the court as it is to the judges.

There would be small assurance of the impartial and fearless administration of justice if the judges only are to be protected from such misconduct as is here shown, but the jurors, who are much more liable to be thus called in question, should be left to defend themselves by physical strength, or by indictment or prosecution of the offenders.

In *Re Brown*, 168 N. C. 417, 84 S. E. 690, the court held that a newspaper criticism after the court had judge, and not a matter of contempt, adjourned was personal to the That case was rested upon the ground that the court had adjourned.

In the *McCown Case*, 139 N. C. at page 110, 2 L.R.A. (N.S.) 603 51 S. E. 962, Judge Walker said: "As courts can exercise judicial functions only through their judicial officers, an assault upon such

Contempt—abusing juror.

—denying intent —effect.

an officer because he has discharged a required duty is necessarily an attack upon the court for what it has done in the administration of justice."

That case holds that such conduct is direct contempt, and is constructively done in the presence of the court, and falls within subsection Consol. Stat. § 978 (1). Besides the able and full discussion of the whole matter in that case, see also *State v. Little*, 175 N. C. 743, 94 S. E. 680, in which it is held (Hoke, J.), that the power of the court to attach for contempt includes in its protection all officers of the court, jurors, attorneys, and others, who in the line of their official duties are assisting the court in the despatch of its duties, and all witnesses who are in attendance under subpoena. In that case the defendant in a criminal action had assaulted the state's witness before the trial, for

the purpose of hindering or delaying the administration of justice, and he was held to be in direct contempt, and that the respondent had no right of appeal, or to demand trial by jury, or to demand that his hearing be removed before another judge. Nothing could be added to the very full and careful discussion of the subject-matter in *State v. Little*.

The respondent was entitled to an appeal (Re Parker, *supra*), ^{Appeal—right of one adjudged guilty of contempt.} but, if he were not, —if his sentence were excessive or the jurisdiction was doubtful,—his remedy was by habeas corpus proceedings and a certiorari, if necessary, from this court. *Re Holley*, 154 N. C. 163, 69 S. E. 872.

Disregarding, however, this phase of the case, we find in the judgment of the court in this case no error.

ANNOTATION.

Assault as contempt of court.

- I. In general, 212.
- II. Assault on judge, 213.
- III. Assault on juror, 214.
- IV. Assault on attorney, 215.
- V. Assault on witness, 217.
- VI. Assault on officers or agents of court, 217.
- VII. Miscellaneous, 218.

I. In general.

Assaults committed in the presence of the court, or so near thereto as to disturb the administration of justice, or assaults committed upon a judge, juror, attorney, witness, or officer of the court because of the performance of their duty in connection with court proceedings, or to deter them from such performance in the future, have, in numerous cases, been punished as contempts of court.

United States. — *United States v. Emerson* (1831) 4 Cranch, C. C. 188, Fed. Cas. No. 15,050; *United States v. Patterson* (1886) 26 Fed. 509; *Re Terry* (1888) 13 Sawy. 440, 36 Fed.

419, writ of habeas corpus denied in (1888) 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; *Ex parte McLeod* (1903) 120 Fed. 130; *Ex parte O'Neal* (1903) 125 Fed. 967; *United States v. Barrett* (1911) 187 Fed. 378. See also *O'Neal v. United States* (1903) 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776, 14 Am. Crim. Rep. 303; *United States v. Anonymous* (1884) 21 Fed. 761; *Sharon v. Hill* (1885) 24 Fed. 726.

Arkansas.—*WELDON v. STATE* (reported herewith) ante, 202.

Hawaii.—*Re Mills* (1908) 19 Haw. 88, Ann. Cas. 1912A, 577.

Kentucky.—*Brannon v. Com.* (1915) 162 Ky. 350, L.R.A.1915D, 569, 172 S. W. 703.

Louisiana.—*State v. Garland* (1873) 25 La. Ann. 532.

North Carolina.—*RE FOUNTAIN* (reported herewith) ante, 208; *State v. Woodfin* (1844) 27 N. C. (5 Ired. L.) 199, 42 Am. Dec. 161; *Ex parte McCown* (1905) 139 N. C. 95, 2 L.R.A.

(N.S.) 603, 51 S. E. 957; *State v. Little* (1918) 175 N. C. 743, 94 S. E. 680.

Ohio. — *Steube v. State* (1888) 3 Ohio C. C. 383.

Washington. — *State v. Buddress* (1911) 63 Wash. 26, 114 Pac. 879.

England. — *Davis's Case* (1461) 2 Dyer, 188b, 73 Eng. Reprint, 415; *Waller's Case* (1634) Cro. Car. 373, 79 Eng. Reprint, 926; *Williams v. Johns* (1773) 2 Dick. 477, 21 Eng. Reprint, 355; *Rex v. Wigley* (1835) 7 Car. & P. 6.

In the early days in England fighting in court received severe punishment. Thus, in *Davis's Case* (Eng.) supra, the memorandum of the case is that a certain person struck another in the face with his right fist in the great hall of Westminster, all of the King's courts sitting there, and threatened to hang him if he would give evidence against a felon then to be arraigned; and for this act the offender was indicted, confessed the indictment, and judgment was rendered and executed for perpetual imprisonment during life, with forfeiture of all his property, and the cutting off of his right hand.

And in *Waller's Case* (1634) Cro. Car. 373, 79 Eng. Reprint, 926, where one was indicted because, in Westminster palace, near the great hall where the justices were in session, he made an assault upon another person, in disturbance of the law and contempt of the King, and was found guilty, it was held that, because he did not commit the offense in the presence of the justices or the King, the judgment of the cutting off of the hand should not be given, but he was punished by imprisonment and fine of £1,000.

Fighting in court during the progress of a trial has been regarded as not of a merely negative character, or, *prima facie*, innocent or colorless conduct, but as of a positive nature, which requires justification; and, therefore, one under custody for direct contempt for fighting in court, who attempts to show that the conduct for which he was held in contempt was a justifiable defense of his person, is attempting to contradict

the record by showing facts to remove culpability, and is not merely attempting to supplement the record by showing such additional facts, not contradicting it, as would exonerate him. *Re Mills* (Haw.) supra.

It was held in *Re Mills* (1908) 19 Haw. 88, Ann. Cas. 1912A, 577, supra, that a mittimus sufficiently complied with a statutory provision that, "whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in such judgment and in the order or warrant of commitment," where it set out that the party to be taken into custody had been adjudged guilty of a direct contempt in taking part in a fight in the court room, in open court, when the court was in session and actually engaged in the trial of a case. The contention was overruled that the mittimus was insufficient because it failed to show that the accused was not acting in self-defense or under other justifiable circumstances.

II. Assault on judge.

In *WELDON v. STATE* (reported herewith) ante, 202, it was held that an assault upon the judge during an intermission of the court at a place other than that where the court was held, because of his official conduct with respect to a case on trial before him was a contempt which the court had inherent power to punish.

Also, in *State v. Garland* (1873) 25 La. Ann. 532, it was held that contempt of court was committed by an assault by an attorney on a judge during a recess of the court, because of a controversy between the two while the court was in session. There had been no adjournment, and it appears that the assault occurred in the court room as the judge was leaving.

And it was held in *Ex parte McCown* (1905) 139 N. C. 95, 2 L.R.A. (N.S.) 603, 51 S. E. 957, that a contempt of court at common law was committed by abusing and assaulting the judge after he had retired from the court room to his boarding house,

upon adjournment subject to notice from the judge, because of his disposition of the case immediately prior thereto.

It was held also in *Ex parte McCown* (N. C.) *supra*, that abusing and assaulting a judge after he has retired from the court room during a recess of the court, because of his action in the case pending before him, is a direct contempt, within the meaning of a statute defining such a contempt as disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

But in *Ex parte Ballew* (1921) — *Okla. Crim. Rep.* —, 201 *Pac.* 525, assuming that the assault on a district judge, which occurred on the street in the evening, was in consequence of the judge's action in injunction proceedings on the previous day, the court held that the assault did not constitute a direct contempt of court, within the meaning of a statute defining direct contempts as "disorderly or insolent behavior committed during the session of the court, and in its immediate view and presence," or "any breach of the peace, noise, or disturbance so near to it as to interrupt its proceedings." And it was held that the assault did not come within any of the statutory definitions of contempt, either direct or indirect, and that the punishment for the act must be found in the provisions of the Penal Code.

And where the judge, having adjourned court for the day, was stopping at a tavern at which certain persons, with knowledge that the judge was there, committed a great riot, with quarreling and striking at each other, and could not be induced to depart until a late hour of the night, it was held that the rioters were not guilty of contempt of court. *Com. v. Stuart* (1822) 2 *Va. Cas.* 320.

As to what acts or language toward a judge not occurring while the court is in session may constitute a contempt of court, see, as illustrative of

cases not involving assaults, *Snyder v. State* (1898) 151 *Ind.* 553, 52 *N. E.* 152; *Field v. Thornell* (1898) 106 *Iowa*, 7, 68 *Am. St. Rep.* 281, 75 *N. W.* 685; *State v. Root* (1896) 5 *N. D.* 487, 57 *Am. St. Rep.* 568, 67 *N. W.* 590.

III. Assault on juror.

Where, about two hours after the return of a verdict and the discharge of a juror from further service, he was met on the street by the plaintiff in the case, who accosted him, using abusive and insulting language on account of the verdict, and conducted himself in such a threatening manner as to cause the other party to retreat, to avoid, as he thought, a personal encounter, it was held in the reported case (*RE FOUNTAIN*, *ante*, 208) that a contempt of court had been committed, since a battery upon the juror was unnecessary, and it was sufficient if the juror was called in question in the manner indicated for the discharge of his official duty in rendering a verdict, this conduct being properly held to impede and hinder the proceedings of the court and to impair the respect and authority for its proceedings.

It was held in *Re Glenn* (1916) 103 *S. C.* 501, *L.R.A.* 1916D, 1190, 88 *S. E.* 294, that a witness is not guilty of contempt in assaulting a juror for a statement made by the latter, after the termination of the trial, as to the veracity of the witness. In this case the juror, on the day after the rendering of the verdict and while off duty as a juror, coming from his home to his place of business, made a statement with reference to the case, reflecting on the character and veracity of a witness. The latter, to whom the conversation was reported, sought an interview with the juror, during which the alleged assault occurred. The court said there was no pretense that the witness was guilty of any direct contempt; that there was no resistance or defiance of the court's power or authority, and no disobedience of any of its orders; that after a case is ended, nothing which is done, unless it is in disobedience of an order of the court, can be adjudged a contempt

of court; and that no words spoken in reference either to judge or jury after a case is ended, can be construed as being a contempt of court.

Although perhaps not strictly in point as a case of assault, attention is called to *Reg. v. Martin* (1848) 5 Cox, C. C. (Eng.) 356, where, immediately after a conviction, a brother of the prisoner went to the home of the foreman of the jury and challenged him to mortal combat for having bullied the jury in his brother's case; and it was held that he should be committed for contempt of court.

IV. Assault on attorney.

See also *Sharon v. Hill* and *United States v. Anonymous* (Fed.) under VI. *infra*.

The power of the court to punish for contempt consisting of an assault upon the prosecuting attorney in a pending case, which produces injuries incapacitating the attorney from attending court and hence delays the trial, is sustained in *Steube v. State* (1888) 3 Ohio C. C. 383, although the assault was committed about half a mile from the courthouse and two hours after the adjournment of court for the day. It was contended that the attack arose out of a personal difficulty wholly unconnected with the case, and that there was no intent to obstruct the administration of justice. The court held that such an intent was unnecessary, and that the evidence disproved the contention that the altercation was a merely personal one disconnected with the trial.

It was held, also, in *Steube v. State* (Ohio) *supra*, that in contemplation of law the assault was committed in the presence of the court, within the meaning of a statute relating to contempts so committed.

Allegations in the answer in the contempt proceeding that the assault was the result of a personal difficulty wholly unconnected with the trial in question, that it occurred two thirds of a mile from the courthouse after the court had adjourned, and that the defendant had no intention of obstructing the administration of justice or of committing a contempt

of court, were held insufficient in *Steube v. State* (Ohio) *supra*, to purge the defendant of contempt on the theory that, in the absence of a reply, the allegation must be taken as true; the court saying that the case was not one in which pleadings were necessary or to which the rules of pleading were applicable, and that, in view of the evidence showing the falsity of the answer, the latter could only be regarded as aggravating the contempt.

It was held in *United States v. Patterson* (1886) 26 Fed. 509, that a contempt of court was committed by an assault made on counsel for one of the parties in a pending case, in the court room, during an intermission or recess, just after the presiding judge had left the bench, but before he or all of the jurors and witnesses in attendance had left the court room, although the cause of the encounter had no connection with the court or any of the proceedings, and the assailant had no intention or thought of any incivility to the court or judge. It was said: "The mistake of the respondent was in assuming that when the judge left the bench he might, so far as the court was concerned, proceed to accomplish his purpose of making the assault, supposing that it was only when the judge was upon the bench that any question of contempt could arise. But it must be apparent to everyone that this is a misconception, and far too restricted to admit of approval anywhere. A court would deserve the contempt of public opinion if it permitted so narrow a view of its prerogatives to prevail, and could not complain if, during its recess, the court room should be used for a cockpit or a convenient place to erect a prize ring. That is the logic of the false assumption that was made in this case. But, wholly aside from this consideration, there is a principle of protection to all who are engaged in and about the proceedings of a court that requires preservation against misbehavior of this kind. The defendant in court whose attorney was attacked is entitled to the protection of the court

against any personal violence towards its attorney while he is in attendance on the court. Otherwise, attorneys might be driven from the court, or deterred from coming to it, or be held in bodily fear while in attendance, and thereby the administration of justice be obstructed. This principle might be pressed beyond reasonable limits, to be sure, but it certainly is not going beyond the true confines of the doctrine to apply it here. It protects parties, jurors, witnesses, the officers of the court, and all engaged in and about the business of the court, even from the service of civil process while in attendance, and certainly should protect an attorney at the bar from the approach and attack of those who would do him a personal violence."

The circumstance, however, that the assailant intended no disrespect for the court, and was under a misapprehension that he was not committing a contempt because the occurrence took place at a recess, was considered in *United States v. Patterson* (Fed.) *supra*, as sufficient to mitigate the punishment from imprisonment to a fine, the court expressly stating, however, that the case should not be considered a precedent in this regard.

And it was held a contempt of court, in *United States v. Barrett* (1911) 187 Fed. 378, for one interested in a pending suit to assault the attorney for the opposing party, because of his connection with and conduct of the case, in the street, in open view of the jury, which was then deliberating on the verdict, or to aid and abet in the assault through keeping off bystanders who might attempt to separate the combatants.

While, perhaps, not strictly a case of assault, attention is called to *Re Johnson* (1887) L. R. 20 Q. B. Div. (Eng.) 68, holding that a solicitor was promptly committed for contempt of court where, in proceedings before a judge at chambers, it appeared that he had misconducted himself, and continued his misconduct by way of abuse and threats against the solicitor of his opponent with reference to the proceedings, while he and such solic-

itor were going along the passages on their way from the building. It was said by Lord Esher, M. R.: "I pass by altogether the question where and in what part of the building the appellant's misconduct took place; it is obvious that it took place immediately after proceedings before a judge in chambers, and in consequence of what had taken place upon these proceedings, and that the appellant intended in what he did to cast contumely and insult on such proceedings. It seems to me to be immaterial whether the judge sitting at chambers is to be considered as sitting in a court or not. I am not prepared to say he is not, but it is not necessary to consider the point. The judge was acting for the court judicially and in the administration of justice, and what the appellant did was an insult to the administration of justice. That being so, he was liable to be called to account for it, as he was, not before the judge sitting at chambers, but before the court. I do not say that a judge at chambers could, for an act of contempt perpetrated before him at chambers, himself commit for contempt. I do not decide whether he could or not, though I am inclined to think that he could not. It seems to me quite clear that a person behaving in such a manner as the appellant did, either before the judge or immediately after leaving his chambers, with the intention of casting contempt on the administration of justice, is guilty of a contempt of the court which is being represented by the judge, and can be attached for contempt by such court."

See also *Ex parte Snodgrass* (1901) 43 Tex. Crim. Rep. 359, 65 S. W. 1061, 15 Am. Crim. Rep. 400, where the language and conduct of an attorney, in discussing the testimony of witnesses, was such that one of the witnesses committed an assault on the attorney in the presence of the court, and the attorney was adjudged guilty of contempt for language and conduct provoking the assault. This was held erroneous, the case turning on the question of the propriety of the argu-

ment by the attorney leading to the assault.

V. Assault on witness.

It was held in *Brannon v. Com.* (1915) 162 Ky. 350, L.R.A.1915D, 569, 172 S. W. 703, that a criminal contempt was committed by an assault, before the jury had returned its verdict of guilty, upon a witness in the public street a few minutes after he had left the court room, where he had testified against the accused, for the purpose of punishing him for testimony he had already given, or of intimidating for the future in a similar case against the assailant, which was still to be tried. The court said: "For one to commit, as was done by the appellant in this case, an assault and battery upon the witness as a punishment for giving testimony against him in an action or criminal prosecution then pending, though in part disposed of, or as a means to intimidate him and influence his testimony expecting to be given in the future trial of an action or criminal prosecution then pending, is a criminal contempt, because such conduct is as much an interference with the authority and dignity of the court, and an obstruction of justice, as would be the intimidation or bribery of a witness, or any contempt committed in the presence of the court. The evidence clearly proves appellant's guilt of such a contempt; and, this being true, it was within the power and jurisdiction of the court to proceed against him by rule and summarily try him, as was done in this case."

And where one under indictment, during the term and before trial, at a café near the courthouse and the hotel in which the judge was staying, assaulted a party who was to be one of the principal witnesses against him, it being found that the purpose of his acts was to prejudice and delay the rights and remedies of the state in the indictments, and that they had this effect, and tended to cause delay in the transaction of the business of the court, and to impair respect and authority for its proceedings, it was

held in *State v. Little* (1918) 175 N. C. 743, 94 S. E. 680, that the court correctly adjudged the offending party guilty of direct contempt and administered summary punishment for the offense, and that no appeal would lie from the sentence imposed.

VI. Assault on officers or agents of court.

An assault upon a United States commissioner because of past discharge of duty was held in *Ex parte McLeod* (1903) 120 Fed. 130, to be a contempt of the authority of the court, whose officer the commissioner was in the administration of criminal laws, although no proceeding against the offender was then pending, and the commissioner was not at the time in the performance of any duty. It is said in the syllabus by the court that as courts can exercise judicial functions only through their judicial officers, an assault upon a judicial officer because he has discharged a judicial duty is necessarily an attack upon the court; that it is vital to the welfare of society that courts which pass upon the life, liberty, and property of the citizen be free to exercise their reason and conscience unawed by fear or violence; and that the highest consideration of the public good demands that courts protect their officers against revenges induced in consequence of the performance of their duties, as well as violence while engaged in the actual discharge of duty.

It was held in *Ex parte McLeod* (Fed.) supra, that the Federal court was not deprived of the power to punish summarily, as for a contempt, an assault upon a court officer, while yet in office, induced by his performance of duty in a past case, by the statutory provision that Federal courts should have power to punish by fine or imprisonment contempts of their authority, provided such power to punish contempts should not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.

Where an attorney, who was also

a party in a suit, resisted and assaulted the marshal who had been ordered by the court to remove the attorney's wife from the court room because of grossly insulting language used by her to the judge while he was reading his opinion in the case, it was held in *Re Terry* (1888) 13 Sawy. 440, 36 Fed. 419, that he was properly committed for contempt of court, and could not secure a release by denial of wrongful or criminal intent. An application to the United States Supreme Court for a writ of habeas corpus for release from imprisonment for contempt in this case was denied in (1888) 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77.

In *Ex parte O'Neal* (1903) 125 Fed. 967, where one who had been convicted in the Federal district court of contempt in committing an assault upon and resisting an officer of the court, a trustee in bankruptcy, in the execution of its orders, sought release on habeas corpus, contending that the alleged assault occurred in a store at some distance from the court room, that the court was not in session and had not been in session for months before that date, and that the judge was not in the state at the time, the court, in refusing a release, said: "In my opinion, the additional facts offered to supplement the record do not materially change the status of the case, nor do they in any wise extend the jurisdiction of this court upon this writ. The charge of contempt against the relator is based upon the fact that he unlawfully assaulted and resisted an officer of the district court in the execution of orders of the court, and in the performance of the duties of his office under such orders; and in that respect it would seem to be immaterial whether at the time of the resistance the court was actually in session, with a judge present in the district, or whether the place of resistance was 40 or 400 feet from the actual place where the court was usually held, so long as it was not in the actual presence of the court, nor so near thereto as to embarrass the administration of justice." A writ of error to review the judgment of

the district court in the contempt proceedings for the assault in this case was dismissed for want of jurisdiction in *O'Neal v. United States* (1903) 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776, 14 Am. Crim. Rep. 303.

In *Williams v. Johns* (1773) 2 Dick. 477, 21 Eng. Reprint, 355, on an application to commit the defendant for contempt in making the person who served him with a subpoena to appear and answer eat the same, and otherwise illtreating him, the court ordered the defendant to stand committed unless cause was shown.

Attention was called also to *United States v. Anonymous* (1884) 21 Fed. 761, where the taking of testimony before an examiner was interrupted by one who was attending as a party to the case and as an attorney, by his insulting and threatening language and conduct to the examiner and other counsel, and he was adjudged guilty of contempt.

And see *Sharon v. Hill* (1885) 24 Fed. 726, where the contempt consisted in the interruption of proceedings before an examiner in chancery in a Federal court, threatening the life of counsel, and drawing a pistol while examination of a witness was in progress, it being said that the examiner was an adjunct of the court, and that the act was undoubtedly as distinctly and clearly a contempt of court as though committed in the presence of the judge, in the court room, while in the act of trying a case.

VII. Miscellaneous.

Where the prosecuting witness after leaving the court, while in the lobby, struck the defendant, it was held in *Rex v. Wigley* (1835) 7 Car. & P. (Eng.) 6, that he should be committed for contempt of court.

And it was held in *United States v. Emerson* (1831) 4 Cranch, C. C. 188, Fed. Cas. No. 15,050, that the assault was committed "in the presence of the court, or so near thereto as to obstruct the administration of justice," within the meaning of the Federal statute declaratory of the law

concerning contempts of court, where a party in suit, while the court was sitting, assaulted a person with whom he had a verbal altercation, in the entrance hall of the court room, separated therefrom only by a cloth-covered door without panels.

But in *Ex parte O'Brien* (1895) 127 Mo. 477, 30 S. W. 158, it was held that the evidence showed that the arrest and other acts constituting the alleged contempt occurred at a point beyond the range of the personal knowledge or vision of anyone in the court room, and that there had been no contempt committed in the "immediate view and presence" of the court so as to give it jurisdiction to award a punishment against the offender in his absence for such an offense. The case was one where a police officer was charged with assault in connection with the arrest, for another offense, of one who had just been discharged, and had gone outside the court room, which was separated from the scene of the disturbance by closed doors and a concourse of persons.

While the court did not use the word "view" in its order adjudging certain parties guilty of contempt, it was held not a valid objection that the order failed to show disorderly or contemptuous behavior in the immediate view and presence of the court, within a statute conferring power to punish summarily for contempt in such cases, where the order recited that an action was pending

in court; that one of the parties was applying to have an order of dismissal signed by the court; that, in the presence of the judge at chambers in the courthouse, such party used boisterous and angry language and gestures; and that in the clerk's office, "in the immediate presence" of the court, he engaged in a fight with his codefendant. *State v. Buddress* (1911) 63 Wash. 26, 114 Pac. 879.

It was held, also, in *State v. Buddress* (Wash.) *supra*, that the order for summary punishment for contempt was not defective as failing to disclose that the court was in session, since it showed a breach of the peace or disturbance directly tending to interrupt the proceedings of the court, which was made contempt of court by statute, and it also affirmatively appeared that the court was transacting business when the exchange of words began, and, if it temporarily suspended business during the fight, those who brought about the suspension could not complain.

Without attempting to cover the question presented, attention is called also to *State v. Woodsin* (1844) 27 N. C. (5 Ired. L.) 199, where, the defendant having been fined by the county court for contempt of court "by fighting in the yard of the courthouse, before the courthouse door, and in the presence of the court," it was held on appeal to the superior court that the record was conclusive that the encounter occurred in the presence of the court. R. E. H.

BERNARD COFMAN, Appt.,

v.

J. J. OUSTERHOUS, State Dairy Commissioner, et al., Respts.

North Dakota Supreme Court — August 12, 1918.

(40 N. D. 390, 168 N. W. 826.)

Constitutional law — license of dairy.

1. Chapter 284, Comp. Laws 1913, which requires the owners or operators of cream stations within the state of North Dakota to take out a

Headnotes by BRUCE, Ch. J.

license, and provides that the dairy commissioner may at any time revoke such license on evidence that the licensee has violated any of the existing dairy statutes of the state, is constitutional, and does not deprive such licensees of liberty or property without due process of law.

[See note on this question beginning on page 235.]

Food — dairy business — public interest.

2. The creamery business in North Dakota is a business which is affected with a public interest.

License — purpose.

3. Licenses may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless and that they may really subserve the public good.

[See 17 R. C. L. 502.]

— business affecting public welfare.

4. Licenses may be exacted for the purpose of regulation, so that a business which intimately affects the public welfare may be brought within the supervision of the authorities, and the regulations which are made concerning it may be more easily and certainly enforced.

[See 17 R. C. L. 548.]

Office — dairy commissioner — authority.

5. The dairy commissioner of the state of North Dakota, whose office is created by §§ 2835, 2836, Comp. Laws 1913, is an independent officer, and, as far as his duties as dairy commissioner are concerned, is not subordinate to the commissioner of agriculture and labor.

Estoppel — choice of forum — effect.

6. Where one chooses his forum in which his rights shall be determined or adjudicated, he cannot complain of lack of jurisdiction.

[See 10 R. C. L. 699.]

Constitutional law — scope of police power.

7. The police power of the state is not limited to regulations necessary for the preservation of good order or the public health or safety. The prevention of fraud and deceit, cheating

and imposition, and unfair competition are equally within its province.

[See 6 R. C. L. 208.]

— revocation of license.

8. Chapter 105 of the Laws of 1917, which provides for the revocation of the licenses of the owners of cream stations by the dairy commissioner, on evidence that statutes of the state have been violated, is not unconstitutional, and does not deprive the owners of due process of law for the reason that no appeal from the order of the dairy commissioner is provided for by the statute; it being clear that mandamus will lie to redress any wrong which is suffered through any arbitrary, tyrannical, or unreasonable action on the part of the officer, or which is based on false information.

[See 17 R. C. L. 556, 557.]

Certiorari — when available.

9. The writ of certiorari is not a writ of right, but will be granted or denied in the discretion of the court, and according to the circumstances of each particular case, as justice may require.

[See 5 R. C. L. 254.]

— review of merits.

10. The writ of certiorari, which is provided for in § 8445 of the Compiled Laws of 1913, can only be used "when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy." It cannot be used for the purpose of reviewing the merits of a case and of weighing evidence.

[See 5 R. C. L. 251.]

License — procuring — effect.

11. A person who obtains a license under a law, and seeks for a time to enjoy the benefits thereof, cannot afterwards, and when the license is sought to be revoked, question the constitutionality of the act.

(Christianson and Robinson, JJ., dissent.)

APPEAL by relator from an order of the District Court for Burleigh County (Nuessle, J.) denying a petition for a writ of certiorari to review

the action of respondent dairy commissioner in revoking relator's license to conduct a cream station, and the action of the other respondent in sustaining the revocation. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. F. E. McCurdy, for appellant:
Regulations and licenses under the police power can only be exercised where they have a real substantial relation to the protection of public health, public safety, or public morals, and should not impose any unnecessary and unreasonable restriction upon the use of private property.

17 R. C. L. 530; People v. Ringe, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474.

The dairy commissioner had no authority to revoke the license.

Tiedeman, Pol. Power, 273; Peginis v. Atlanta, 132 Ga. 302, 35 L.R.A.(N.S.) 717, 63 S. E. 857.

Messrs. William Langer, Attorney General, and Edward B. Cox, Assistant Attorney General, for respondents:

Relator is not in a position to urge the constitutionality of the law upon the ground that the act does not provide for notice and hearing before revocation of license, in view of the fact that he herein demanded and received a hearing, and that at such hearing he was present in person and represented by counsel, and was permitted to introduce oral and documentary evidence.

Quinn v. State, 82 Miss. 75, 83 So. 839; Cram v. Chicago, B. & Q. R. Co. 19 Ann. Cas. 181, note; Tennessee Fertilizer Co. v. McFall, 128 Tenn. 645, 163 S. W. 806; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Security Trust & S. V. Co. v. Lexington, 203 U. S. 325, 51 L. ed. 204, 27 Sup. Ct. Rep. 87.

Relator, having applied for and received a license under the statute, and been protected by and received the benefits of its provisions, is not now in a position where he can urge that the law is unconstitutional.

Minneapolis, St. P. & S. Ste. M. R. Co. v. Nester, 3 N. D. 480, 57 N. W. 510; State v. Seebold, 192 Mo. 720, 91 S. W. 491; Cram v. Chicago, B. & Q. R. Co. 19 Ann. Cas. 183, note.

The sole purpose of the act in question is to provide for regulation by the state of the occupations enumerated in it.

6 R. C. L. 217; 17 R. C. L. 501.

To the extent that property or business is devoted to the public use, or is affected with a public interest, it is subject to regulation under the police power.

12 C. J. 922; 25 Cyc. 599.

Occupations enumerated in the act, including that of operating a cream station, are such as come within the power of the state to regulate.

17 R. C. L. 541; 6 R. C. L. 210; Of-field v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91.

The police power extends to the protection of the lives, health, comfort, welfare, safety, and quiet of all persons, and to the protection of all property.

17 R. C. L. 542; State v. Robinson, 42 Minn. 107, 6 L.R.A. 339, 43 N. W. 833; State v. Armour & Co. 27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149; Runge v. Glerum, 37 N. D. 618, 164 N. W. 284.

No property rights are acquired under a license from the state to conduct a certain business or carry on a particular occupation, when such a license is required as a means of regulation only.

Christ Church v. Philadelphia County, 24 How. 300, 16 L. ed. 602; Tomlinson v. Jessup, 15 Wall. 454, 24 L. ed. 204; Humphrey v. Pegues, 16 Wall. 244, 21 L. ed. 326; Doyle v. Continental Ins. Co. 94 U. S. 544, 24 L. ed. 152; Gray v. Connecticut, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; Com. v. Kinsley, 133 Mass. 578; 17 R. C. L. 554; 25 Cyc. 625.

Bruce, Ch. J., delivered the opinion of the court:

This is an appeal from an order of the district court of the sixth judicial district, denying the petition of the appellant for a writ of certiorari to review the action of the dairy commissioner, J. J. Ousterhous, in revoking a license of the appellant to conduct a cream station at Hazen, North Dakota, and to review the action of the commissioner

of agriculture and labor, J. N. Hagan, in sustaining the said revocation.

The statutes under which the action sought to be reviewed was taken are as follows:

Section 2835, Comp. Laws 1913: "There is hereby created a bureau of the department of agriculture and labor to be known as the dairy department, which is hereby created for the purpose of promoting, improving, and regulating the dairy products of the state and to establish and enforce proper rules and regulations pertaining thereto."

Section 2836, Comp. Laws 1913: "The commissioner of agriculture and labor is hereby authorized and directed to appoint a deputy in his department who shall be known as the dairy commissioner, and shall be the official head of the dairy department," etc.

Chapter 103, Laws 1917:

"Section 1. It shall be unlawful for any person to sample or test milk, cream, or any other dairy product excepting merchants dealing in manufactured butter for the purpose of determining the commercial value of such product when bought or sold, without first having secured a license from the state dairy department, and such license shall be conspicuously displayed in his place of business. Provided that in case of sickness or necessary absence, said person may appoint a substitute for six days and for a longer period subject to approval of the dairy commissioner, but said person shall be responsible for the acts of said substitute. This license shall be granted to those who shall have completed a course in milk and cream testing in any recognized college or dairy school, or to those who shall pass an examination under the direction of the state dairy department and satisfactorily demonstrate that they are properly qualified and competent to use such test.

"The dairy commissioner shall have the authority to revoke any license issued under the provisions of

this act if the holder is convicted of a failure to comply with the state dairy laws. Said license shall be granted for a period of one year by the dairy department upon payment of a fee of two dollars (\$2), payable prior to examinations, one dollar (\$1) of which shall be returned in case of failure to pass said examination. In the case of a renewal of a license, a fee of one dollar (\$1) shall be paid.

"The fees collected under the provisions of this act shall be paid into the state treasury, monthly, by the dairy commissioner to be credited to the dairy department and to be used for conducting said examinations."

Section 2854, Comp. Laws 1913: "It shall be unlawful for the owner, manager, agent or employee of any creamery or cheese factory to manipulate, underread or overread the Babcock test, or any other contrivance used for determining the quality or value of milk."

Chapter 105, Laws of 1917:

"Section 2844 of the Compiled Laws of 1913 is hereby amended and re-enacted so as to read as follows:

"Every person, firm or corporation owning or operating a creamery, cheese factory, renovating or process butter factory, or cream station in this state, shall be required before beginning business, or within thirty days thereafter, to obtain from the dairy commissioner a license for each and every creamery, cheese factory, renovating or process butter factory or cream station owned or operated by said person, firm or corporation, which shall be good for one year. The fee for such license shall be ten dollars, and no license shall be transferable. Each license shall record the name of the person, firm or corporation owning or operating the creamery, cheese factory, renovating or process butter factory, or cream station license, its place of business, the location thereof, the name of the manager thereof and the number of the same. Each license so issued

shall constitute a license to the manager or agent of the place of business named therein.

"It shall be the duty of every person, partnership, firm or corporation, or association holding a license to operate in any plant in which dairy products are handled commercially, to post in a conspicuous place such license under which they are operating, together with a summary of the dairy laws which shall be prepared and sent out from the office of the dairy commissioner.

"The dairy commissioner may withhold a license from any applicant who has previously violated or refused to comply with any of the existing dairy laws or lawful requests issued by said dairy commissioner, or his authorized assistants. The dairy commissioner may, at any time, revoke a license on evidence that licensee has violated any of the existing dairy statutes, or has refused to comply with all lawful requests of the dairy commissioner or his authorized agents."

The first order canceling the license was in the form of a letter, and was as follows:

"Bismarck, N. D., August 3d, 1917.

"Mr. B. Cofman,

"Hazen, North Dakota.

"Dear sir:—

"Some time ago one of our deputy inspectors spent several days in your community with the intention of determining the truth of some of the reports that have been coming into this office. After making quite thorough examination from the evidence which our inspector obtained, we find that it becomes the duty of this department to revoke your license. Our inspector weighed, sampled, and tested several cans of cream which were delivered to you at your station, and we hold the check which you issued in payment of same, as evidence that you overread the test on one can of cream as much as 4 per cent, and that on another can you credited the producer with 21 lbs. less than he had delivered.

"You have been long enough in this business to know how to test the cream correctly, and no doubt you are also aware that to overread and underread the Babcock test is a violation of our state dairy laws.

"You will also note that the last legislative session made it the duty of this department to revoke the license of parties who violate our dairy laws and who do not comply with the requirements of this department.

"You will kindly give proper attention to this notice and make all the necessary arrangements to have your cream station closed by August 15th, 1917. We are sorry that such an action as this has been necessary. We are also convinced that a firm stand must be taken in enforcing the dairy laws.

"Very truly yours,

"(Signed) J. J. Osterhous,
"Dairy Commissioner."

Although it is clear from the provisions of §§ 2835 and 2836 of the Compiled Laws of 1913 that no appeal to the commissioner of agriculture and labor is provided for, and the dairy commissioner is an independent officer, the appellant and relator, Bernard Cofman, after the sending of the order in question, made an application to the commissioner of agriculture and labor for a hearing, and in response to this application the dairy commissioner, J. J. Ousterhous, to whom the application must have been referred, telegraphed said Cofman: "Your license will be extended for a period of ten days for arranging a hearing within that time. Will see your attorney to-morrow."

Thereafter and on the 21st day of August, 1917, with the consent of all parties, a hearing was had before the said commissioner of agriculture and labor, John T. Hagan, the relator personally appearing and offering testimony, and the dairy commissioner being represented by Assistant Attorney General Edward B. Cox. After this hearing the following order was issued by the said

commissioner of agriculture and labor:

"State of North Dakota.

"Before Commissioner of Agriculture and Labor, in the Matter of the License of Bernard Cofman to Buy Cream at Hazen, North Dak.

"Order Sustaining Revocation of License.

"The above-entitled matter coming on to be heard on the 21st day of August, 1917, on petition of Bernard Cofman, of Hazen, North Dakota, the petitioner herein being present in person and by his attorney, F. E. McCurdy, and the state dairy commissioner, J. J. Ousterhous, being present in person and represented by Edward B. Cox, assistant attorney general. The commissioner having heard the testimony, the argument of counsel, and being fully advised in the premises, it is ordered and decreed by the commissioner that the order of the dairy commissioner revoking the license of Bernard Cofman, petitioner herein, to conduct a creamery station at Hazen, North Dakota, be in all things sustained and upheld.

"Dated this 15th day of Sept., 1917.

"J. N. Hagan,

"Commissioner of Agriculture and Labor."

Although the petition does not allege that this order was recognized and reaffirmed by the dairy commissioner, it seems to proceed on the assumption that this was done, and the certiorari is asked on the grounds that:

"The evidence in this case shows that, on the particular cream which the dairy commissioner charges was overread in the test for butter fat, it appears that three tests were made: One by the Hazen creamery, which test was 39 per cent; one by the public health laboratory at Bismarck, North Dakota, which tested 41 per cent; and the one by the relator, at 43 per cent. It further ap-

pears from the evidence that the Hazen creamery is in direct business competition with the relator, and that the inspector worked with the Hazen creamery in attempting to catch Mr. Cofman, and that at that time he made no effort to catch the Hazen creamery; that the evidence shows that the cream had been hauled over rough country roads, and that it is possible for a partial churning to have taken place, and small particles of the butter fat to have become joined together in small lumps, and that the amount of cream selected for making this test is a very small amount, 18 grams, and that should one of these small particles of butter fat have been found in the 18 grams that the test would be greater, and there might be a variation in the test, after being subject to such process. Furthermore, it appears it would be possible for high variation of the reading of the test because of the fact that cream is placed in a tube of a small diameter for test reading, and that, due to the capillary attraction, the cream has a tendency to be uneven, leaving a depression in the center, and that the test would be difficult to read without using what is known to the trade as a red reader.

"Referring to the weight proposition, there appears from the evidence that, instead of there being one can of cream, there were two cans of cream in the single test, and the two cans were weighed back and considered as one can of cream. These cans of cream were weighed at the same old Hazen creamery, and taken to Cofman's cream station and sold to him, and the empty cans taken back to the general merchandise store and weighed. The evidence doesn't show whether the scales were tested or not, and there is no evidence that the Hazen creamery scales had been tested, and it is correct: That since the hearing a test has been made of the scales of the general merchandise store, and it has been found defective. That the plaintiff and the

merchant, one named Jake Krause, weighed this particular can on the same scale, and also on another scale, and found the scale of the general merchandise store defective. This was done since the hearings, as the matter only developed in evidence at the hearing, because no information whatever had been furnished to the plaintiff as to what cans of cream were tested or any particulars concerning the matter. That the state dairy commissioner having made a ruling as stated in the letter dated August 3, 1917, and set out in this petition, it appears that this was not a regular cream can, from the evidence submitted, and that it had been covered with a cloth tied over the top, and when weighed back the cloth was weighed with it, but it appears from the evidence that the cloth was not weighed back with it at the time it was weighed in the store. That a transcript of the evidence taken at the hearing is hereto annexed and referred to, and made a part of this application. That no opportunity was given the plaintiff to offer rebuttal testimony on this particular question, and for that reason these statements are incorporated in this petition.

"There is no competent evidence in the record to show that any false reading was made. In other words, there must be a false reading or manipulation of the Babcock test to be a violation of the law. There is absolutely no evidence of any false reading or manipulation. In other words, as far as the evidence shows, this may have been an exact record of the test which this man read. It may have been an exact reading of the Babcock test, also it may have been an exact reading of a correctly balanced scale which this man read, and in canceling this license the dairy commissioner presumed, and the commissioner of agriculture and labor presumed, things not in evidence, and arbitrarily, without jurisdiction, canceled this man's license.

"Further, that the dairy commis-

sioner and the commissioner of agriculture and labor had no jurisdiction to revoke the license of this man for the reason that that portion of the amendment above set out is unconstitutional and void, in violation of § 13 of the Constitution of the state of North Dakota, which provision provides that no man shall be deprived of his property without due process of law, and also article 5 of the Amendments of the Constitution of the United States reads to the same effect.

"There being no provision in the Constitution for any hearing or for any trial by any tribunal, and no opportunity for a day in court by which the licensee may protect his right to pursue a lawful business, if this license is revoked it will have the effect of depriving him of his means of livelihood, absolutely ruining his business, and rendering a considerable investment in property valueless, destroy the good will of the business he has worked up in that community, and inflict upon him irreparable financial loss. That the relator has no other adequate means at law or otherwise, and that the said state dairy commissioner and the commissioner of agriculture and labor had exceeded their jurisdiction in canceling the license."

There is no merit in these contentions. The creamery business is essentially a business which is affected with a public interest, and as such is generally subject to governmental regulation. The police power of the state is not limited to regulations necessary "for the preservation of good order or the public health and safety. The prevention of fraud and deceit, cheating and imposition, is equally within the power, and a state may prescribe all such regulations as in its judgment will secure, or tend to secure, the people against the consequences of fraud." 6 R. C. L. 208; State v. Armour & Co.

Constitutional
law—license of
dairy.

Food—dairy
business—public
interest.

Constitutional
law—scope of
police power.

27 N. D. 177, L.R.A.1916E, 380, 145 N. W. 1033, Ann. Cas. 1916B, 1149, id. 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924; Munn v. Illinois, 94 U. S. 124, 24 L. ed. 77.

The purpose of the statute, indeed, is well known, and is to build and to develop the dairying and stock-raising industries of the state. It is to prevent the unfair competition by which the financially stronger foreign creameries, and butter and cheese and ice cream factories, may destroy those of this state by overgrading or overmeasuring until the local creameries are driven to bankruptcy, and then control the grades and the prices. It is in line with the general laws of the state against unfair competition. Though the state may not interfere with interstate commerce, it may prevent fraud of this kind.

It is not historically true, as contended by counsel for appellant, that a person has a natural right to engage in any useful and lawful business, free from legislative interference and control, and that such a business cannot be the subject of a legislative license. A business may be useful, yet the method of conducting it may, unless regulated, be conducive of harm; and in the same way there may be inducements to and avenues of fraud in a perfectly legitimate business, or cases in which danger of fraud should be minimized, even though the business may be useful and harmless; and even a useful business may be so affected with a public interest that it may be properly regulated.

Licenses, indeed, may be imposed not merely for the purpose of acting as temporary permissions to engage in harmful occupations, but in order to so control those that are useful that their operation may be harmless, and that they may really subserve the public good, which, after all, is the basis of all property rights.

License—
purpose.

It has never been the law that the state may not exact a license for the purpose of regulation, so that a business which intimately affects the public welfare may be brought within the supervision of the authorities, and that the regulations which are made concerning it may be more easily and certainly enforced. Parker & W. Public Health & Safety, § 276; People ex rel. Lodes v. Health Dept. 189 N. Y. 187, 13 L.R.A.(N.S.) 894, 82 N. E. 187; 17 R. C. L. 556.

—business
affecting public
welfare.

Nor does the fact that chapter 105 of the Laws of 1917, which authorize the dairy commissioner to revoke the licenses in question, does not in terms provide for a hearing or for an appeal, render the statute invalid or the action of the dairy commissioner nugatory. Even if a hearing was necessary,—and on this we express no opinion,—such a hearing was accorded to the petitioner, and even if not before the dairy commissioner,—who, as we view the statute, is an independent officer, and not subordinate in such cases to the secretary of agriculture and labor,—yet before the very person (the secretary of agriculture and labor) whom the petitioner designated, and before whom he desired it to be had.

Office—dairy
commissioner—
authority.

Estoppel—
choice of forum
—effect.

Even where a hearing is required by the Constitution to be had before an administrative officer is authorized to cancel licenses, or is looked upon as due process of law, it is not always necessary that it shall be provided for by the statute, but is merely a constitutional guaranty to which the authority conferred by the statute is subject.

Nor does the fact that no appeal to the courts is provided for nullify the act; for, without any such provision, it is clear that mandamus will lie in such a case to redress any wrong which is suffered through any arbitrary,

Constitutional
law—revocation
of license.

tyrannical, or unreasonable action on the part of the officer, or which is based upon false information. *People ex rel. Lodes v. Health Dept. supra.*

We are satisfied, indeed, that the trial court did not err in denying the writ of certiorari in the case which is before us.

Certiorari—
when available. The writ is not a

writ of right, but will be granted or denied in the discretion of the court, and according to the circumstances of each particular case, as justice may require.

4 Enc. Pl. & Pr. 32. In North Dakota it can only be used "when in-

—review of
merits. ferior courts, officers, boards, or tribunals have ex-

ceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy." See § 8445, Compiled Laws 1913.

It is clear that we cannot go into the merits of the case, and cannot determine whether the relator was in fact guilty of fraud in the conduct of his business, in reading of the weights, or in the tests which he applied. These matters are matters of defense at bar, and do not go into the jurisdiction. *St. Paul, M. & M. R. Co. v. Blakemore*, 17 N. D. 67, 114 N. W. 730; *State ex rel. Noggle v. Crawford*, 24 N. D. 8, 138 N. W. 2; 40 Am. St. Rep. 34, note. The remedy, if any, was by mandamus. 17 R. C. L. 557; *People ex rel. Lodes v. Health Dept. supra.*

Nor, in any event, can the relator question the right of the dairy commissioner to cancel the license on the ground of the unconstitutionality of the act, and that his business was such that could not be constitutionally licensed. It is clear, indeed, that a person who obtains a

license—pro-
curing—effect. license under a law, and seeks for a

time to enjoy the benefits thereof, cannot afterwards question the constitutionality of the act when the license is sought to be revoked. *Minneapolis, St. P. & S.*

Ste. M. R. Co. v. Nester, 3 N. D. 480, 57 N. W. 510; *Hart v. Folsom*, 70 N. H. 213, 47 Atl. 603; *State v. Seebold*, 192 Mo. 720, 91 S. W. 491; note in 19 Ann. Cas. 183.

Nor, indeed, do we believe that there is any merit in the contention that the license, when once issued, can only be revoked after conviction in a criminal prosecution. It is true that chapter 103 of the Laws of 1917, in conferring the authority to revoke licenses issued to persons who are authorized to *sample or test* milk, uses the term "convicted."

It is also true that, although the word "convicted" has not always and in the case of licenses been held to imply a conviction before a court of law (see 1 Words & Phrases, 2d series, 1045; *Sawicki v. Keron*, 79 N. J. L. 382, 75 Atl. 478), it seems to be generally so construed by the law dictionaries. The revocation in the case at bar, however, is not sought to be had under the provisions of chapter 103, but under those of chapter 105 of the Laws of 1917, which relate, not to those who sample or test milk, but to "every person, firm, or corporation, owning or operating a creamery, cheese factory, . . . butter factory or cream station in this state," and which act was approved on the day after the approval of chapter 103, and contains the clause: "The dairy commissioner may withhold a license from any applicant who has previously violated or refused to comply with any of the existing dairy laws or lawful requests issued by said dairy commissioner, or his authorized assistant. The dairy commissioner may, at any time, revoke a license *on evidence* that licensee has violated any of the existing dairy statutes, or has refused to comply with all lawful requests of the dairy commissioner or his authorized agents."

The judgment of the District Court is affirmed.

Christianson, J., dissenting:

I am unable to agree with the reasoning or the conclusion reached by my associates in this case, and,

in view of the importance of the questions involved, I deem it my duty to indicate the reasons for my dissent. It should be noted at the outset that the object of the license statute involved in this action is regulation, and not revenue. The power to tax is exercised to raise revenue; the police power is exercised to promote the order, safety, health, morals, and general welfare of society. While the police power is not susceptible of exact definition or limitation, the real object of such power, "and that . . . which in its broad sense includes every instance of its exercise, is the securing of the general welfare, comfort, and convenience of the people" (12 C. J. 920); and to that end it may be exercised to meet the changing conditions of society, and "put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare" (Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; 9 Enc. U. S. Sup. Ct. Rep. 523). Where a subject is within the police power, it is for the legislature, within constitutional limits, to determine what the remedy shall be. The police power, however, is not above the Constitution, but "is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state Constitution." 12 C. J. 929. The object of a police measure must be the public good; and the business sought to be regulated must, in some measure, be affected with public interest. For "no general power resides in the legislature to regulate private business, or prescribe the conditions under which it shall be conducted, . . . so long as the business is not affected with public interest. The merchant, manufacturer, artisan, and laborer, under our system of government, are left to pursue and provide for their own interest in

their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty." 9 Enc. U. S. Sup. Ct. Rep. 521, 522. And "the legislature may not, under guise of protecting the public interest, deny to any person the equal protection of the laws, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." 9 Enc. U. S. Sup. Ct. Rep. 523. See also 6 R. C. L. pp. 226-228. But, "to justify the state in interposing its authority in behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference." 9 Enc. U. S. Sup. Ct. Rep. 523.

While the legislature, in the exercise of the police power, may regulate all professions, trades, occupations, and business enterprises that are of a quasi public nature, by providing such rules or restrictions as to safeguard the general welfare of the public, such legislative power has its limits, and "is subject to the qualification that the measures adopted for the purpose of regulating the exercise of the rights of liberty and the use and enjoyment of property must be designed to effect some public object which government may legally accomplish, that they must be reasonable, and have some direct, real, and substantial relation to the public object sought to be accomplished, and that the governmental power is not to be arbitrarily or colorably exercised or used as a subterfuge for oppressing some individual or class of individuals. In short, the exercise of the police power is subject to judicial review, and personal and property rights cannot be wrongfully destroyed by arbitrary enactment. If the means employed have no real or substantial relation to the public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary

will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action." 5 Enc. U. S. Sup. Ct. Rep. pp. 556, 557.

"The police power of the state extends only to such measures as are reasonable, and the general rule is that all police regulations must be reasonable under all circumstances. In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. A statute, to be within this power, must be reasonable in its operation upon the persons whom it affects, and not unduly oppressive. The validity of a police regulation, therefore, primarily depends on whether, under all the existing circumstances, the regulation is reasonable . . . and whether it is really designed to accomplish a purpose properly falling within the scope of the police power." 6 R. C. L. p. 236.

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public. . . . Regulation which impairs or destroys, rather than preserves, . . . is within the condemnation of constitutional guaranties." 6 R. C. L. p. 239. See also 12 C. J. 934.

While it is true a license is generally held to be neither a contract nor property, within the technical definitions of those terms, it is nevertheless a personal right or franchise, which in many instances has great value. In the case at bar, for instance, the revocation of plaintiff's license (if sustained) deprives him of the right to pursue the vocation whereby he earns his livelihood, destroys an established business, and casts upon him the odium of having committed illegal acts, and being unworthy of permission to continue in his business. Manifestly, few determinations can in a greater degree affect the rights to acquire, possess, and protect prop-

erty and reputation, and to pursue and obtain happiness (which are guaranteed to all men by § 1 of the state Constitution), than the determination of the dairy commissioner to revoke petitioner's license.

While the legislature may doubtless confer discretionary powers upon administrative boards or officers to grant, or withhold, or revoke licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of police regulation (although it has been held in some of the state courts "to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual," see *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State v. Fiske*, 9 R. I. 94; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156, the regulations must be reasonable, and the power conferred exercised in a lawful and constitutional manner. (17 R. C. L. pp. 538-542). "In such cases the doctrine is, in the absence of anything upon the face of the law to the contrary, that the discretion vested in such tribunal, board, or official is a judicial or legal discretion, and it will not be presumed, in the absence of proof to the contrary, that it has been, or is being, used in an unreasonable, arbitrary, or oppressive manner." But when the law vests absolute and arbitrary discretion in a board or official, without right of appeal therefrom, to grant, or refuse, or revoke a license for conducting a legitimate business, or when the power granted to such administrative board or officer is shown to have been arbitrarily exercised under sanction of state authority, the party thus unlawfully oppressed may secure redress in the courts. 4 Enc. U. S. Sup. Ct. Rep. pp. 368, 369, 372. See also 17 R. C. L. p. 539, note 20.

And even in cases involving revocation of licenses in the exercise

of official discretion, the courts have not refrained from inquiring into the facts far enough to ascertain whether the facts presented a case for the exercise of reasonable discretion, or whether the power of revocation had been, or was attempted to be, exercised capriciously, arbitrarily, or oppressively. *William Fox Amusement Co. v. McClellan*, 62 Misc. 100, 114 N. Y. Supp. 594; *Edelstein v. Bell*, 91 Misc. 620, 155 N. Y. Supp. 590; *Bainbridge v. Minneapolis*, 131 Minn. 195, L.R.A. 1916C, 224, 154 N. W. 964.

It should be remembered that the business sought to be regulated by the statutes under consideration is one inherently lawful and beneficial to society. In dealing with licenses for the conduct of business of this nature, the courts have not hesitated to set aside measures vesting arbitrary powers in boards (or especially in a single individual) to issue or revoke licenses, or to set aside the arbitrary acts of such board or individual when acting under a law fair on its face. In *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the Supreme Court of the United States held an ordinance of the city and county of San Francisco providing that it should be unlawful for any person to engage in the laundry business within the corporate limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," to be violative of the 14th Amendment to the Federal Constitution.

In determining the reasonableness of a license statute, the nature of the business sought to be regulated must be considered; for it is self-evident that there is a vast distinction between a license granted for the conduct of a business which is inherently lawful and harmless and relating to a subject which is useful to the community, and one granted for the conduct of a business which is inherently dangerous, or "which min-

isters to and feeds upon human weakness and passions." Manifestly, conditions and restrictions placed upon licenses of the latter kind, and entirely reasonable as applied to such licenses, might be entirely unreasonable as applied to licenses of the former kind. This distinction was expressly recognized and pointed out by the Supreme Court of the United States in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13. That case involved a retail liquor dealer's license. The validity of the ordinance and the action of the police commissioners in refusing to issue a license were assailed. It was asserted that the ordinance was invalid under the principle announced in *Yick Wo v. Hopkins*, supra, as a delegation of arbitrary discretion to the police commissioners. In distinguishing the two cases, the Supreme Court of the United States said: "It will thus be seen that that case [*Yick Wo v. Hopkins*] was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors *with reference to a business harmless in-itself and useful to the community, and the discretion appearing to have been exercised for the express purpose or depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.*" 137 U. S. 94, 95.

One of the most effective safeguards against the arbitrary acts of public officials is an opportunity to be heard. And the weight of judicial authority seems to support the doctrine that a person engaged in a business inherently lawful and useful to society may not be deprived of the license to conduct it without opportunity to defend his right to maintain it. The right to a full and fair hearing by an applicant

for a license was recognized and upheld in *Hart v. Folsom*, 70 N. H. 213, 47 Atl. 603 (cited in the majority opinion). And it has been said that the theory that a person may be deprived of a license without an opportunity to be heard in his own defense "is so opposed to the principles of common law that any fact affecting the rights of an individual shall be investigated and determined ex parte, and without opportunity being afforded to the party to be affected thereby to be heard," that a law ought not to be construed as contemplating such procedure unless that purpose is expressed in the plainest terms. *State ex rel. Powell v. State Medical Examining Bd.* 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238.

In considering the question of revocation of a license to practise law, the Supreme Court of the United States said: "Before a judgment disbaring an attorney is rendered, *he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practise his profession as when they are taken to reach his real or personal property.* . . . The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged." *Ex parte Robinson*, 19 Wall. 512, 22 L. ed. 208. See also *People use of State Board of Health v. McCoy*, 125 Ill. 289, 17 N. E. 786; *State v. Schultz*, 11 Mont. 429, 28 Pac. 643.

Leaving constitutional consideration on one side, the idea that an individual appointive, administrative official may revoke a license for the conduct of a lawful business, without affording the licensee a full opportunity to be heard, is so contrary to the spirit of our institutions that it ought not be presumed

that the legislature intended to confer such power or prescribe such procedure unless it has said so in express terms.

The power to issue and revoke licenses is vested in the dairy commissioner, and no provision is made for an appeal from his decision. The dairy commissioner is appointed by the commissioner of agriculture and labor. Comp. Laws 1913, § 2836. Chapter 103, Laws 1917, empowers the dairy commissioner "to revoke any license issued under the provision of this act *if the holder is convicted of a failure to comply with the state dairy laws.*" And chap. 105, Laws 1917, authorizes the dairy commissioner to "revoke a license, *on evidence that licensee has violated any of the existing dairy statutes, or has refused to comply with all lawful requests of the dairy commissioner or his authorized agents.*" There are many statutory provisions relating to the business of operating creameries and cream stations. The test for milk and cream is carefully and minutely prescribed by the statute (Comp. Laws 1913), § 2853; and it is made a misdemeanor "to use any other means of determining the amount of butter fat in milk or cream than the Babcock test, or to use any other size of milk measure, weight, test tubes, or bottles" than those described in the statute, or "to manipulate, underread, or overread the Babcock test." Comp. Laws 1913, §§ 2853, 2854, 2861.

The words "convicted" and "evidence" have well-settled legal meanings. Manifestly, under our laws no one can be "convicted" without being afforded an opportunity to be heard in his defense, and mere rumors and hearsay statements, not made matters of record, but whispered in secret to a public officer, do not constitute evidence which may form the basis for an official act requiring the exercise of judgment and discretion. Yet in the case at bar the dairy commissioner attempted to revoke a valuable franchise, held by the petitioner, for the

avowed reason that the petitioner had committed criminal acts, and this adjudication was made solely upon rumors or hearsay statements, and without the petitioner being afforded an opportunity to be heard.

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men;' for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, supra.

The majority members hold that, inasmuch as the petitioner requested and obtained a hearing before the commissioner of agriculture and labor, he is bound by the decision rendered by such official. I believe this conclusion to be erroneous. The commissioner of agriculture and labor is an administrative officer. He has such powers only as are conferred upon him by law. N. D. Const. § 83. It is conceded by the majority members that the commissioner of agriculture and labor has no authority under our statutes to review the actions of the dairy commissioner with respect to the revocation of licenses issued

under the dairy statutes. This being so, how can a hearing before him be of any consequence? If such hearing constitutes due process, and the parties become bound by the determination, then by similar process of reasoning it should be held that parties who go before a justice of peace and litigate title to realty, or some other question outside of the justice's jurisdiction, become bound by, and estopped to question the validity of, the decision, or that parties, by submitting a controversy to a person selected by them, clothe the person selected with authority to render a binding decision upon the questions submitted.

It is also suggested in the majority opinion that a party who accepts a license under the provisions of a statute is precluded from assailing the validity of any of the conditions imposed by the statute. Under the view I have taken of the case, the question is not necessarily involved, as, in my opinion, the statutes contemplate that the licensee shall have notice, and full opportunity to be heard, before his license is canceled, and that whatever discretion the dairy commissioner has with respect to the issuance or revocation of licenses must be exercised fairly and impartially, in harmony with the fundamental principles of American institutions.

In this connection, however, I deem it proper to observe that while it is true that a person may, under certain circumstances, waive the right to question the constitutionality of a statute, and may (with certain exceptions) even waive constitutional provisions intended for his benefit, it does not follow that a person who accepts a license will be deemed to have assented to conditions or restrictions sought to be imposed in violation of his constitutional rights.

In considering this question the Supreme Court of the United States said: "The defendant, however, insists that some of the provisions

of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' Section 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute, or with any regulations prescribed by the state railroad and warehouse commission, that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the *valid* laws of the state and the *valid* rules and regulations prescribed by the commission. If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings." *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

See also *San Francisco v. Liverpool & L. & G. Ins. Co.* 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380; *Hibbard v. State*, 65 Ohio St. 574, 58 L.R.A. 654, 64 N. E. 109.

The majority members, also, hold that petitioner has mistaken his remedy. It is stated that his remedy, if any, is mandamus, and not certiorari. Under our statute "the writ of mandamus may be issued . . . to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is un-

lawfully precluded by such inferior tribunal, corporation, board or person." Comp. Laws 1913, § 8457.

And "a writ of certiorari may be granted . . . when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy." Comp. Laws 1913, § 8445.

Mandamus lies to compel action to be taken by the inferior body or officer. Certiorari lies to review action which has been taken by an inferior body or officer. 11 C. J. 90; 26 Cyc. 142. While mandamus may be invoked to compel the exercise of official discretion, it cannot compel such discretion to be exercised in a particular way. 26 Cyc. 159. Nor can such discretion be controlled or reviewed by mandamus when it has once been exercised. *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 164; *Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141.

The rule generally prevailing is that only acts judicial or quasi judicial in their nature are reviewable by certiorari. But, under the laws of this state, the writ is not confined to a review of judicial or quasi judicial proceedings, but extends to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error, appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy. *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715. See also 11 C. J. 121. And "it is a general rule of the common law that when a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary way or in a course not according to the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari will lie." 4 Enc. Pl. & Pr. 73.

In *State ex rel. Johnson v. Clark*, supra, this court reviewed the action of the city council of the city of Minot in annexing certain territory

to such city, and held that the claim "on the part of the petitioner that the city council did not have jurisdiction to act, by reason of the failure to post and print notices" of the annexation proceeding, constituted such attack upon the jurisdiction of the city council as to make it a proper question for review by certiorari. And it seems that the authorities generally hold that action taken without legal notice constitutes an "excess" of jurisdiction, and is reviewable by certiorari. 11 C. J. 105; 4 Enc. Pl. & Pr. 93.

It seems to me that under the rule laid down in *State ex rel. Johnson v. Clark*, supra, the question raised by the petitioner, that the dairy commissioner exceeded his jurisdiction in revoking the license without giving the petitioner notice and an opportunity to be heard, is one properly reviewable by certiorari. There is no question of fact presented. The questions presented are purely questions of law with respect to the powers and jurisdiction of the dairy commissioner. It is conceded that he revoked petitioner's license without notice, and without affording him an opportunity to be heard; and that the dairy commissioner based his action upon rumors or hearsay statements submitted to him in the absence, and without the knowledge, of the petitioner. In my opinion such action was wholly unwarranted under the statutes, and contrary to the principles of natural justice.

The view I have taken of the statutes involved in this proceeding renders it unnecessary to determine to what extent the legislature may regulate the business of purchasing milk and cream, and I therefore express no opinion as to whether the license regulations contained in chapters 103 and 105, Laws 1917, are reasonable or unreasonable.

Robinson, J., dissenting:

In this case it appears that in August, 1917, at Hazen, North Dakota, Cofman, the appellant, was conducting a cream station under a license from the dairy commission-

er, issued in May, 1917. On August 3d the commissioner wrote a letter to Cofman, purporting to revoke his license, and directed him to close his cream station by August 15th. This revoking letter was written without any prior notice to Cofman, and without giving him any hearing or any opportunity to refute the charges made against him. That charge, as stated in the letter, was that he had "overread the cream tester on one can of cream as much as 4 per cent, and that on two cans the weight was 2 pounds short."

Cofman appealed to the commissioner of agriculture and labor, and though the statute does not provide for any such appeal, yet, as a matter of courtesy, Cofman was given a chance to prove his innocence. He claimed that until specific charges were made against him, and until proven guilty by competent testimony, his innocence should be presumed, but the commissioners held that the license was not a property right, and that it was merely a gratuitous permission, which might be revoked without a hearing and without cause. However, without making any formal charge against Cofman and without any findings of fact, the commissioner of agriculture heard evidence and made a grandiloquent order and decree affirming the order of the dairy commissioner. From an order of the district court denying a review by certiorari, Cofman appeals to this court. The whole procedure is based on a gross misconception of the law. A license may, or it may not, involve any property right, but a license to conduct a cream station or a creamery, to practise law or medicine, or to follow any business vocation, is a property right of which a person may not be deprived in an arbitrary manner and without due process of law. By due process of law is meant the law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

On May 15, 1917, Cofman was issued a license to conduct a cream

station at Hazen. It was issued under chapter 103, Laws 1917. The license is granted to a qualified person for one year upon payment of a fee of \$2, and renewed on payment of \$1. And the dairy commissioner is given authority to revoke any license if the holder is "convicted of a failure to comply with the state dairy laws." To convict is to prove and find guilty of an offense, crime, or wrong. The statute gives no authority to revoke a license until the holder has been tried and convicted of a failure to comply with the dairy laws. In law there can be no conviction of a wrong without formal written accusation and a fair opportunity for a trial; and until the accused is proven guilty he is presumed to be innocent. He may not be called upon to prove his innocence. He must be confronted with the witnesses against him, and have a reasonable opportunity to cross-question them and to disprove their testimony.

Cofman had none of these opportunities and guaranties. The commission acted as if they had an absolute right to revoke the license without any written accusation or any conviction of wrong.

As the whole record is before this court, there is no reason for a writ directing the dairy commissioner or the secretary to duplicate and certify the same; and in regard to the merits of the case there is no question of doubt. There is no charge or evidence that Cofman did wilfully overread his cream tester or underread the weight of his two cans of cream, and there is no claim that on such reading any person can be always perfect and accurate, or that the cream tester is always perfect and accurate; and the same is true of the different scales used in weighing cream cans; and from the record now before the court it does appear that the revocation of the license and the whole procedure were absolutely void.

ANNOTATION.

Constitutionality of regulations as to milk.

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- II. General rule, 236.
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- IV. Inspection of cattle and dairies:
 - a. In general, 238.
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 - d. Certification or Pasteurization, 246.
 - e. Arbitrary declaration of adulteration or unwholesomeness, 246.

I. Scope.

This annotation will consider only such regulations with respect to the production and sale of milk as have been questioned as violations of such constitutional provisions as relate to liberty, property rights, and equal protection of the laws, etc. There are

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- f. Compulsory evidence, 248.
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VII. Receptacles:

- a. Capacity, 251.
- b. Identification, 252.
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VIII. License:

- a. In general, 253.
- b. Blood test, 254.
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- d. Revocation, 255.

IX. Provisions for transportation, 255.

X. Discriminatory provisions, 255.

a few cases in which a statute has been attacked because the title was not adequate to cover the subject-matter, which, of course, raises no question different from the mass of cases dealing with the accuracy of titles, and, therefore, makes no contribution to the solution of the prob-

lems now under consideration. There are also cases dealing with the question whether or not a regulation of a board of health was within the authority conferred upon the board by the legislature, which are omitted from this discussion because they do not involve the constitutionality of the regulation. Cases where the constitutional question was raised, but not passed upon, are also omitted, such as *Kansas City v. Cook* (1889) 38 Mo. App. 660, where the defendant raised the question of the constitutionality of the ordinance, but waived it in order not to defeat the jurisdiction of the court to which he appealed.

While *Owensboro v. Evans* (1916) 172 Ky. 831, 189 S. W. 1153, contains much discussion of the reasonableness of an ordinance imposing rather drastic requirements upon applicants for licenses to sell milk, the only constitutional provisions involved are the ones with respect to the titles of statutes, and with respect to the fixing by municipal corporations of different penalties than those imposed by the legislature for the same acts, neither of which have any important bearing upon the general question under discussion in this annotation.

II. General rule.

Milk is a food in more general use than perhaps any other one article. It is a sensitive food, very easily contaminated, and therefore all the regulations which, under the police power, may be made to preserve the purity of food, are properly utilized in the case of milk. But there is something about the possibilities of harmfulness in milk as a food which seems to appeal to the imagination in a way in which other foods do not, and therefore regulations have been made and sustained by the courts which to ordinary common sense seem to be little less than absurd. Very few of the human race have not, at some time in their lives, been more or less dependent on milk for their sustenance, and if all that has been said about its harmfulness were true, very few persons would survive the ordeal of a milk diet. But the fact is they do

survive, and this neutralizes, to some extent at least, the extravagant claims that are made with regard to the class of regulations necessary to make milk a fit food. But the fact is that there is scarcely an exception to the rule that the courts will sustain, as a police measure, practically every regulation which is said by the health board to be necessary to the protection of milk as food. Therefore, the decisions uphold not only the regulations for the licensing of dealers, the inspection of cattle, the surroundings in which they are kept, the cleansing of utensils, and provisions against adulteration, but they sustain also the tuberculin test for cattle, and a blood test for peddlers, and have even sustained a regulation requiring dealers to give bond to pay for milk purchased. The uniformity of the rule upholding regulations regarding the production and sale of milk is shown by the following decisions:

United States.—*Hebe Co. v. Calvert* (1917) 246 Fed. 711; *New York ex rel. Lieberman v. Van De Carr* (1905) 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144, affirming (1903) 175 N. Y. 440, 108 Am. St. Rep. 781, 67 N. E. 913; *St. John v. New York* (1906) 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909.

Alabama.—*Birmingham v. Goldstein* (1907) 151 Ala. 473, 12 L.R.A.(N.S.) 568, 125 Am. St. Rep. 33, 44 So. 113.

California.—*Johnson v. Simonton* (1872) 43 Cal. 242.

Connecticut.—*State v. Stokes* (1916) 91 Conn. 67, 98 Atl. 294.

Illinois.—*Chicago v. Bowman Dairy Co.* (1908) 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; *Koy v. Chicago* (1914) 263 Ill. 122, 104 N. E. 1104, Ann. Cas. 1915C, 67.

Indiana.—*Isenhour v. State* (1901) 157 Ind. 519, 87 Am. St. Rep. 228, 62 N. E. 40.

Iowa.—*State v. Schlenker* (1900) 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698.

Kentucky.—*Sanders v. Com.* (1903) 117 Ky. 1, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219, 77 S. W. 358.

Louisiana.—*State v. Dupaquier*

(1894) 46 La. Ann. 577, 26 L.R.A. 162, 49 Am. St. Rep. 334, 15 So. 502; *New Orleans v. Charouleau* (1908) 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46.

Maryland.—*Deems v. Baltimore* (1894) 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *State v. Broadbelt* (1899) 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771.

Massachusetts.—*Com. v. Waite* (1865) 11 Allen, 264, 87 Am. Dec. 711; *Com. v. Evans* (1882) 132 Mass. 11; *Com. v. Carter* (1882) 132 Mass. 13; *Com. v. Wheeler* (1910) 205 Mass. 384, 137 Am. St. Rep. 456, 91 N. E. 415, 18 Ann. Cas. 319.

Minnesota.—*State v. Crescent Creamery Co.* (1901) 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107; *Nelson v. Minneapolis* (1910) 112 Minn. 16, 29 L.R.A.(N.S.) 260, 127 N. W. 445.

Mississippi.—*Hawkins v. Hoyer* (1914) 108 Miss. 282, 66 So. 741.

Missouri.—*St. Louis v. Liessing* (1905) 190 Mo. 464, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112; *St. Louis v. Schuler* (1905) 190 Mo. 524, 1 L.R.A.(N.S.) 928, 89 S. W. 621; *St. Louis v. Grafeman Dairy Co.* (1905) 190 Mo. 492, 1 L.R.A.(N.S.) 936, 89 S. W. 617; *St. Louis v. Polinsky* (1905) 190 Mo. 516, 89 S. W. 625; *St. Louis v. Scheer* (1911) 235 Mo. 721, 139 S. W. 434.

New Hampshire.—*State v. Campbell* (1887) 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585.

New Jersey.—*State, Shivers, Prosecutor, v. Newton* (1883) 45 N. J. L. 469.

New York.—*Blazier v. Miller* (1877) 10 Hun, 435; *People v. Cipperly* (1886) 101 N. Y. 634, 4 N. E. 107; *People ex rel. Schulz v. Hamilton* (1916) 97 Misc. 437, 161 N. Y. Supp. 425; *Mannix v. Frost* (1917) 100 Misc. 36, 164 N. Y. Supp. 1050, affirmed in 181 App. Div. 961, 168 N. Y. Supp. 1118; *People v. Bowen* (1905) 182 N. Y. 1, 74 N. E. 489, reversing (1904) 97 App. Div. 642, 90 N. Y. Supp. 1108; *People v. Hills* (1901) 64 App. Div. 584, 72 N. Y. Supp. 340; *People v. Koster* (1907) 121 App. Div. 852, 106 N. Y. Supp. 793; *Polinsky v. People* (1878) 73 N. Y. 65; *People v.*

West (1887) 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *People v. Kibler* (1887) 106 N. Y. 323, 12 N. E. 795; *People ex rel. Lodes v. Health Dept.* (1907) 189 N. Y. 187, 13 L.R.A.(N.S.) 894, 82 N. E. 187; *People v. Frudenberg* (1913) 209 N. Y. 218, 103 N. E. 166.

Ohio.—*Walton v. Toledo* (1902) 23 Ohio C. C. 547; *Jury v. State* (1912) 35 Ohio C. C. 514; *Kaiser v. Walsh* (1906) 4 Ohio N. P. N. S. 507, 17 Ohio S. & C. P. Dec. 324.

Rhode Island.—*State v. Smyth* (1883) 14 R. I. 100, 51 Am. Rep. 344.

Tennessee.—*State ex rel. Lowry v. Davis* (1911) 1 Tenn. C. C. A. 550.

Virginia.—*Norfolk v. Flynn* (1903) 101 Va. 473, 62 L.R.A. 771, 99 Am. St. Rep. 918, 44 S. E. 717.

Wisconsin.—*Adams v. Milwaukee* (1911) 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518, affirmed in (1913) 228 U. S. 572, 57 L. ed. 971, 33 Sup. Ct. Rep. 610; *Pfeffer v. Milwaukee* (1920) 171 Wis. 514, 10 A.L.R. 128, 177 N. W. 850.

III. *Delegation of legislative power to boards of health.*

The granting to a board of health of power to issue or withhold permits to sell milk within the city limits, in the honest exercise of a reasonable discretion, does not deprive one seeking to carry on such business, and who is refused a permit, of his property without due process of law. *New York ex rel. Lieberman v. Van De Carr* (1905) 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144, affirming (1903) 175 N. Y. 440, 108 Am. St. Rep. 781, 67 N. E. 913. The court says it will not interfere, because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people. In the lower court (175 N. Y. 440) it was said: "In great cities, where, in certain sections, life exists under crowded conditions that cannot be fully comprehended unless seen, and

where many articles for table consumption by all classes of the community are liable to pass through processes and conditions little short of appalling unless regulated by law, the full and vigorous exercise of the police power in the interests of the public health and general welfare is absolutely essential. It is quite impossible that every offender against the provisions of the Sanitary Code should be accorded due process of law as embracing jury trial and the slow results of the ordinary procedure in the courts. The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menace great centers of population. . . . The requirement of § 66 of the Sanitary Code that the relator should not sell milk without a permit is reasonable, and violates neither the Federal nor state Constitution—is in accordance with law and long-established precedent."

The legislature may confer upon a municipal board of health power to adopt a regulation for the preservation of the purity of the milk to be sold in the municipality. *People ex rel. Cox v. Special Sessions Justices* (1876) 7 Hun (N. Y.) 214. The court says the power to enact and enforce ordinances has always formed an essential feature in the creation of municipal corporations, and the Constitution contains nothing restricting its exercise to any particular part of the municipal body. The ordinance was merely the exercise of municipal authority through the intervention of the board instead of the common council.

The legislature may constitutionally confer on boards of health power to enact sanitary ordinances, such as ordinances to prevent the sale of adulterated milk, which shall have the force of law within the districts over which their jurisdiction extends. *Polinsky v. People* (1878) 73 N. Y. 65.

IV. *Inspection of cattle and dairies.*

a. *In general.*

In *Hill v. Fetherolf* (1912) 236 Pa.

70, 84 Atl. 677, without naming any specific constitutional provision alleged to have been infringed, the court held that it was within the police power of a city to provide for the inspection of dairies from which milk was to be shipped to the city for sale.

An ordinance is not unconstitutional which requires, as a prerequisite to the issuance of a license for the sale of milk, the examination and testing of milk sold, the examination and inspection of the place where it is produced and of the cattle, the nonuse of milk from diseased cows, and the care of the cows by persons free from disease. *Walton v. Toledo* (1902) 23 Ohio C. C. 547.

In *Creaghan v. Baltimore* (1918) 132 Md. 442, 104 Atl. 180, the court, relying largely on prior cases from the state, upheld the constitutionality of a municipal ordinance providing for the inspection and cleanliness of dairies from which milk was brought to the city, and the refusing of permits when proper standards were not maintained.

b. *Tuberculin test.*

One of the fiercest controversies in scientific circles in recent years has revolved about the possibility of transmission of bovine tuberculosis to human beings, and the safety and conclusiveness of the tuberculin test as applied to cattle. It has been positively stated that Koch, the discoverer of tuberculin, has taken the position that bovine tuberculosis cannot be transmitted to the human race, and he has quite a respectable following among the medical profession. There are also investigators who have claimed that the tuberculin test for cattle is unreliable as a test, and that it is positively dangerous to the cattle themselves. The health boards, however, have quite generally resolved the doubt in favor of the possibility of transmitting the disease and of the reliability and safety of the tuberculin test, and, where they have required the use of the test, the courts have held the regulation to be constitutional.

In *Nelson v. Minneapolis* (1910) 112 Minn. 16, 29 L.R.A.(N.S.) 260, 127 N. W. 445, the court, in passing upon

the constitutionality of an ordinance requiring a tuberculin test as a condition to the sale of milk within the city, said that all questions respecting the validity of the ordinance were disposed of in *State v. Nelson* (1896) 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066, which expressly affirmed that a city had power to impose the test as a police regulation. But the question of the constitutionality of the ordinance is not discussed in that case, the questions there discussed being the reasonableness of the ordinance, and whether or not it was authorized by statute. But the court says: "The question of the public health is one of first importance in the regulation and control of human affairs, and all laws or ordinances enacted for that purpose, when not so arbitrary as to be unnecessarily destructive of individual property rights, are uniformly upheld by the courts. Milk constitutes one of the principal articles of our food supply, and the purity thereof, and its freedom from disease germs, are of serious concern to consumers. The methods, regulations, and restrictions to be imposed, to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The courts have no power to determine the merits of conflicting theories, nor to declare that a particular method of advancing and protecting the public is superior or likely to insure greater safety or better protection than others. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen. In the case at bar the city council, duly authorized thereto by legislative grant, determined that the tuberculin test of cows was the most feasible and practicable method of insuring a pure milk supply. This involved a matter of legislative judgment and discretion, and necessarily a comparison with other methods designed to secure the same result, including the theory of pasteurization. The courts cannot make this comparison, weigh the feasibility and the practicability of each, and substitute

their judgment and discretion for that of the legislative body whose determination of the question they are called upon to review."

In *Adams v. Milwaukee* (1911) 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518, the constitutionality of an ordinance requiring the tuberculin test for cattle, the milk from which was to be sold in the municipality, was attacked, and the court, after stating that there was considerable difference in opinion as to the efficacy of the test, and also as to whether or not bovine tuberculosis could be transmitted to human beings, said that there was evidence that milk from tubercular cows was harmful to health, and that there was a sufficient basis for a police regulation of its sale and distribution in the city. The court says the evidence, findings, and authorities cited go to show a widespread recognition of the danger of infection from bovine tuberculosis, and of the efficacy of the tuberculin test. When there are conflicting scientific beliefs or theories in such matters, it is for the city council to determine upon which theory it will pass its police regulations.

In *New Orleans v. Charouleau* (1908) 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46, the ordinance provided for the tuberculin test of all cows whose milk was to be sold within the city, and summary destruction of those found to be infected with tuberculosis. The constitutionality of the ordinance was questioned, but the court held: "It being shown that tuberculosis in a cow may be ascertained by a practically infallible test, and it being further shown that the presence of a cow so affected in a dairy in a city is a serious menace to the public health, the public authorities have the same right to require the destruction of such cow without compensation to the owner, and without judicial inquiry, as they have to require the destruction of decayed fish, meats, and vegetables."

In *Hawkins v. Hoyer* (1914) 108 Miss. 282, 66 So. 741, a statute permitting the board of health to require the rejection of milk from all cows which

reacted to a tuberculin test was held to be constitutional. The principal objections raised were that the statute permitted condemnation of the property by one man, without trial or hearing, and that it took private property without compensation. But the court said: "The legislature, by virtue of the police power of the state, may enact all needful laws for the purpose of preserving the health, preventing the spread of disease, and protecting the lives of the citizens. Under this power the legislature may create boards of health and bestow upon them necessary powers to promote the general health of the people by providing for them healthful conditions. . . . The regulation is within the police power of the state. It is in aid of good health, and consequently tends to the welfare and safety of the people. Tuberculosis is a disease dangerous and destructive to human life. It is recognized that tuberculosis may be communicated to human beings by the use of milk from cows infected with the disease. Therefore, it was proper for the board of health, the body empowered and enjoined by the statute to supervise the health interest of the people and to prevent the spread of epidemic diseases, to make this regulation. . . . There is no purpose therein to deprive a person of property or restrict or interfere with his liberty of action. It is only an inspection provision ordained by the board in its work of supervising and promoting the health interest of the people."

V. Feeding of cattle.

The police power of the state extends to the prohibition of the sale of milk from cows fed on still slop, although there is nothing to show that such milk is not a pure and wholesome article of food. *Sanders v. Com.* (1903) 117 Ky. 1, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219, 77 S. W. 358. The court says: "The development in the science of bacteriology in recent years has conclusively proved that the microbe is a most potent agent in the propagation of contagious diseases, and that there is no more favorable

element for their absorption, growth, and development than milk, and that milk contaminated by their presence communicates diphtheria, typhoid fever, tuberculosis, and other kindred contagious diseases, to human beings, especially to the young. And it is a matter of common knowledge that the conditions usually prevailing around places where 'still slop' is produced are also highly favorable to the development of many forms of bacilli. The heat, dampness, and fermentation—all essential elements in the production of still slop—are favorable to germ growth. So that we may fairly assume that the general assembly, in the enactment of this statute, had sufficient information to justify the belief that milk from cows fed on still slop had ample opportunity to become impregnated with elements dangerous to the public health. Nearly every police regulation affects to some extent property rights; and, whilst this power cannot be made the excuse for oppressive and unjust legislation, the courts are not permitted to say that the legislature may not enact laws apparently necessary for the public health."

In *Johnson v. Simonton* (1872) 43 Cal. 242, which was an action for libel in charging the feeding of cows whose milk was used for human consumption, on still slops, contrary to municipal ordinance, the court, without much discussion of the constitutional question, says that the statute was one within the constitutional power of the legislature to enact. That if it indeed be a fact that the milk of cows fed in whole, or in part, on still slops, is unwholesome for human food, there can be no doubt of the authority of the city to enact the ordinance.

VI. Fixing standard of milk.

a. In general.

The state may fix the standard of milk to be placed on the market. *State, Shivers, Prosecutor, v. Newton* (1883) 45 N. J. L. 469; *People v. Bowen* (1905) 182 N. Y. 1, 74 N. E. 489, reversing (1904) 97 App. Div. 642, 90 N. Y. Supp. 1108; *People v. Koster* (1907) 121 App. Div. 852, 106

N. Y. Supp. 793; *People v. Abramson* (1910) 137 App. Div. 549, 122 N. Y. Supp. 115.

And also of cream. *People v. Hills* (1901) 64 App. Div. 584, 72 N. Y. Supp. 340; *People v. Laesser* (1903) 79 App. Div. 384, 79 N. Y. Supp. 470.

An ordinance is not unconstitutional because it prescribes a quality standard and forbids the sale of milk which does not comply with it, although the milk sold may be wholesome. *St. Louis v. Scheer* (1911) 235 Mo. 721, 139 S. W. 434.

The ordinance involved in *St. Louis v. Liessing* (1905) 190 Mo. 464, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112, provided that no milk should be offered for sale unless it showed on analysis not less than 3 per cent by weight of butter fat, $8\frac{1}{2}$ per cent solids not fat, and $\frac{1}{4}$ of 1 per cent ash, provided that, in contested analysis, butter fat should be estimated gravimetrically by the Adams paper coil process, total solids by evaporation and nonfatty solids by difference between total solids and butter fat, and ash by weighing the residue after incineration of total solids at a dull red heat until all the organic matter is destroyed. The constitutionality of the ordinance was attacked on the ground that the production, sale, and distribution of milk are a legitimate and lawful occupation, conducted as a matter of right and not as a privilege, and that unusual and arbitrary restrictions cannot be lawfully imposed upon it by ordinance, nor can harsh, expensive, and burdensome provisions be enacted against persons engaged in an innocent and useful business, so as to deprive them of the right to devote their property thereto, and destroy their freedom and liberty. The court replied that the ordinance was obviously a police regulation, to guard against the sale or dissemination of an unwholesome and injurious quality of milk and cream, and to protect the public against imposition, fraud, and deception as to an article of food almost universally used by the people. The court said the provisions of the Federal Constitution invoked by defend-

ant were not designed to interfere with the exercise of the police power by the states, and they have not shorn the states of their police power to regulate trades and occupations so as to guard against injury to the public, nor to regulate the use of property so as to prohibit that which is injurious and dangerous to the community. "Perhaps on no one subject has this police power been affirmed as often as the right to inspect and regulate the sale of milk and cream. Numerous decisions of courts of last resort sustain the right of cities in safeguarding the health of their citizens, and in the prevention of deception upon them, by fixing a reasonable standard of purity, to be scientifically ascertained, of milk and cream sold within their limits, and prohibiting the sale of milk of the quality inferior to that required by such municipal standard. When the courts have come to deal with such municipal regulation, they have announced the rule that, if the article is universally conceded to be so wholesome and innocuous that the court may take judicial notice of it, the legislature under the Constitution has no right to absolutely prohibit it; but, if there is a dispute as to the fact of its unwholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves, upon the fundamental principles of our Constitution, that the act of the legislature or municipal assembly is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. . . . It will scarcely be asserted that all milk is so wholesome and nutritious that there can be no doubt in the mind of the court of its wholesomeness. To do so would be to deny our common experience, and to condemn legislation on this subject in almost every state in the Union. . . . The specific provision, the validity of which is in question in this case, is that part of § 18 prohibiting the sale of milk showing an analysis of less than $\frac{1}{4}$ of 1

per cent of ash. This, in effect, is the same as fixing the amount of milk fats, or solid matter, that the milk must contain, which is one of the nutritious ingredients in milk, and the diminution of which deteriorates the quality of milk in a corresponding degree. Authorities above cited are all in harmony on the proposition that it is perfectly competent, in the interest of the health of a community, to fix the standard of quality, and that there is nothing unreasonable or oppressive in the ordinance in that respect."

And that case was followed in *St. Louis v. Grafeman Dairy Co.* (1905) 190 Mo. 507, 1 L.R.A.(N.S.) 926, 89 S. W. 627, *St. Louis v. Bippen* (1907) 201 Mo. 528, 100 S. W. 1048, and *St. Louis v. Schottell* (1907) — Mo. —, 100 S. W. 1049.

In *St. Louis v. Reuter* (1905) 190 Mo. 514, 89 S. W. 628, the court applied the rule of the *Liessing Case* to a requirement that cream should contain not less than 12 per cent of butter fat.

A statute making the sale, or possession for sale, of milk containing less than 12.15 per cent of solids, and 3.35 per cent fat, punishable is constitutional. *Com. v. Wheeler* (1910) 205 Mass. 384, 137 Am. St. Rep. 456, 91 N. E. 415, 18 Ann. Cas. 319. The court says: "Milk is a very important article of food, which enters largely into the sustenance and development of children. It is the natural food of infants for a considerable time after their birth, and the milk of the cow is often used to supply the deficiency of milk from the mother. Probably there is no other article of diet the purity and good quality of which are so important to the life and health of the people, and especially to the life and health of young children, as are the purity and good quality of milk. It is also very easy to adulterate it, and it may be adulterated, especially by the addition of water, in such a way that nothing but a chemical analysis will detect the adulteration. The legislature, in the interest of the public health, has enacted laws intended to enable the people to obtain milk of good quality that is free from

adulteration. No one can question the propriety of legislation upon this subject. If statutes are directed to this end, the methods adopted for accomplishing the object desired, so long as they have some manifest relation to the object, must be left to legislative determination."

In *State v. Crescent Creamery Co.* (1901) 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107, which involved the validity of an ordinance making unlawful the sale of cream containing less than 20 per cent of fat, the court says: "The defendant claims that this statute, in so far as it prohibits the sale of cream solely because it contains less than 20 per centum of fat, is unconstitutional, because it is unreasonable and not a proper exercise of the police power, is based upon an arbitrary classification, and is special legislation, and is an unlawful restraint of trade, and illegally restricts the citizen's right to contract and to pursue a lawful calling, and deprives him of his liberty and property without due process of law. . . . We . . . hold that the statute in question forbids, and only forbids, the sale of cream, as such, which is below the prescribed standard. So construed, the statute is a proper exercise of the police power of the state, and is valid. Its constitutionality rests upon the same principles as does the validity of statutes prohibiting the sale of milk unless it contains a prescribed percentage of fat and solids, and other similar statutes."

And that case was followed in *State v. Tetu* (1906) 98 Minn. 351, 107 N. W. 953, 108 N. W. 470.

In *State v. Campbell* (1887) 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585, the court said of a statute fixing the solids which milk must contain to be salable that it clearly applies to the class of police regulations designed to prevent frauds and to protect the health of the people. The court further said the fixing of an arbitrary standard does not render the statute unconstitutional. "The statute tends to discourage the breeding of a certain class of cattle for the supply of the

milk market. The difficulty of guarding against the adulteration of milk may have influenced the legislature in fixing a standard of richness. Practically it makes no difference whether milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution regarded by the legislature as excessive arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk to unsuspecting consumers for a price in excess of its value is a fraud which the statute was designed to suppress. It is a valid exercise by the legislature of the police power, for the prevention of fraud and the protection of the public health, and as such is constitutional."

The legislature may make the sale of milk below the standard criminal, regardless of the intent. *People v. Kibler* (1887) 106 N. Y. 323, 12 N. E. 795. The court says: "It is notorious that the adulteration of food products has grown to proportions so enormous as to menace the health and safety of the people. Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils. To redress such evils is a plain duty, but a difficult task. Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose. Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells, and compels him to know and to be certain."

A statute forbidding the sale of adulterated food products is not unconstitutional when applied to prevent the sale of a condensed combination of skimmed milk and cocoanut oil, plainly labeled so as not to deceive the public. *Hebe Co. v. Calvert* (1917) 246 Fed. 711. The court says that since the product is sold as condensed milk there is a possibility of the public being deceived, and that the Constitu-

tion of the United States does not secure to anyone the privilege of manufacturing and selling an article offered in such manner as to induce purchasers to believe they are buying something which is in fact different from that which is offered for sale.

That case was affirmed in (1919) 248 U. S. 297, 63 L. ed. 255, 39 Sup. Ct. Rep. 125, where the court said: "The power of the legislature 'is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.' . . . If the character or effect of the article, as intended to be used, 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.'"

A nonproducing vender of milk is not denied due process of law because he is not permitted to show that milk below the required standard is just as it came from the cow, when that privilege is accorded to a producer of milk. *St. John v. New York* (1906) 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909. The court says: "If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated; but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that

it comes from the herd. . . . As the standard established can be proved in the hands of a producing vender, he is exempt from the penalty; as it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt. In the one case the source of milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances. We cannot see that any particular hardship results."

An ordinance which fixes the standard of milk to be sold is not invalid because it provides that the analysis shall be made by the city chemist. *St. Louis v. Liessing* (1905) 190 Mo. 464, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112.

b. Forbidding adulteration.

The legislature may forbid the sale of unhealthful, adulterated, or unwholesome milk as a police regulation to protect the public health. *People v. Cipperly* (1885) 37 Hun (N. Y.) 324, reversed on other grounds in (1886) 101 N. Y. 634, 4 N. E. 107.

Forbidding the sale to any butter or cheese factory of milk adulterated with water violates no constitutional right. *People v. West* (1887) 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610.

Com. v. Waite (1865) 11 Allen (Mass.) 264, 87 Am. Dec. 711, was a prosecution for selling adulterated milk, and the evidence showed that water had been added to the milk. The court said: The defendant argued that "it is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; therefore the legislature has no power to make the sale of milk and water, when mixed, a penal offense unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practised with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require

that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business; and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency."

In *Butler v. Chambers* (1886) 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308, which involved the provisions of the statute relating to the sale of imitation butter, the court referred to the provisions of the statute relating to the sale of impure milk, the care and feeding of the cows, and the sale of adulterated milk, and stated that these provisions of the statute are all unquestionably within the legislative authority.

In *St. Louis v. Schuler* (1905) 190 Mo. 524, 1 L.R.A.(N.S.) 928, 89 S. W. 621, an ordinance forbidding the use of any preservative in milk to be sold within the city was upheld as a valid exercise of the police power, as against a contention that it unconstitutionally deprived the owner of his natural rights and liberty, and the natural gains of his own industry, and of his property and liberty without due process of law. The court says that under our system of laws the legislature is empowered to enact all laws necessary to the protection of public health. In this case the legislature was exercising its police power in regard to a subject affecting the public health. The subject-matter, then, was clearly within the powers of the city council. The court continues: "We think the ground upon which this prohibition against the use of preservatives in milk rests is the right of the legislature to pass all needful and proper ordinances to secure the purity of milk, and to prevent any tampering with milk by absolutely prohibiting the use of artificial preservatives therein. . . . It is a matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and the young; that through the agency of impure milk the germs of many diseases are dissemi-

nated, and, even where there is an absence of any deleterious impurity or the germs of specific diseases, adulterated or diluted milk is not wholesome and nutritious. . . . It cannot be said that the effect of formaldehyde in milk is so well known not to be deleterious that the courts must take judicial cognizance of that fact. That its action is such that it changes the chemical properties of the milk so that it will not sour was established and conceded on the trial, and it was for this reason that it was insisted that, as it preserved the milk from souring, it was claimed to be highly beneficial. We cannot accept this conclusion. It must be recognized that it was a legislative function, in the passage of this ordinance for the preservation of health, to insist that milk should have neither adulterants nor preservatives placed in it, and to inquire as to the effect thereof. . . . The municipal assembly in no manner destroyed or affected the defendant's right of property. He had the right to sell pure and unadulterated milk of the standard prescribed by the ordinance, and the purchaser and the consumer of milk had the right to purchase from him pure milk unmixed with any foreign matter added to it, and this was what the ordinance required, no more and no less, and in so doing it infringed no provision of the organic law of this state or any article of the Federal Constitution.

State v. Schlenker (1900) 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698, was a prosecution for mixing boracic acid with milk as a preservative. There was evidence that the acid, in the quantity used, was a harmless preservative, and it was contended that the legislature had no power to forbid the sale, without deceit or fraud, of a harmless and wholesome article of food. The court said this may be true as a general proposition, but it is also true that, in virtue of the police power, it may pass such laws as are or may reasonably appear to be necessary for the health, comfort, and safety of the people. The court says the statute does not deprive the defendant of his

property, but it does impose upon him the duty of so using it that no injury will result to others most likely to be affected by a disregard on his part of the reasonable health regulations that it enacts. The court says, with respect to the 14th Amendment to the Federal Constitution, that it is fundamental that it does not impose any restraints on the exercise of the police power of the state for the protection of the safety, health, or morals of the community.

Isenhour v. State (1901) 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40, was a prosecution under a statute forbidding having in possession adulterated food which consisted of milk containing formaldehyde. The statute was attacked on the ground that it violated the constitutional provision that no man's property shall be taken by law without just compensation. This was answered by the statement that it did not appear that any property had been taken, and, therefore, that accused was not in a position to raise that question. The court, however, says this class of legislation emanates from an exercise of the police power for the protection of the public health. The power of the legislature, and its right to determine for itself when an emergency for such legislation exists, and the means and instrumentalities necessary to accomplish the end in view, are no longer a doubtful question.

c. Coloring matter.

In *St. Louis v. Polinsky* (1905) 190 Mo. 516, 89 S. W. 625, the court, in considering the constitutionality of an ordinance forbidding the adding of coloring matter to milk or cream, so far as it related to the use of annatto which was added to cream to improve its color, and was admitted to be harmless, said: "By adding annatto to the white milk or cream given by winter-fed or poorly fed cows, a deception is practised upon the milk-consuming public by making this milk of inferior quality assume the rich and golden appearance of superior milk. Such conduct is a fraud and deception upon the public, and an unfair advantage

over honest competitors who refuse to resort to such deception, against which the ordinance is leveled."

d. Certification or Pasteurization.

In *Pfeffer v. Milwaukee* (1920) 171 Wis. 514, 10 A.L.R. 128, 177 N. W. 850, an ordinance requiring either certification of milk, which implied its passing the tuberculin test, or Pasteurization by either the holding or flash method, was attacked, but the court, after describing the benefits of Pasteurization, says: "In the light of these known facts and practices regarding the Pasteurization treatment of milk to destroy pathogenic germs, and the systems of inspection and certification to make it a healthful food and preserve it in that state in the process of distribution among the people of the city, it cannot be said that the common council of the city has provided unreasonable and oppressive regulations for the promotion of the public health of the people, nor that the powers conferred on the health officer for the enforcement of the ordinance are unreasonable, or prejudicial to the private rights and property interests of the plaintiffs and others similarly situated."

In *Koy v. Chicago* (1914) 263 Ill. 122, 104 N. E. 1104, Ann. Cas. 1915C, 67, which involved the validity of an ordinance requiring the installation of registering apparatus on Pasteurizing plants, no specific clause of the Constitution is referred to as being infringed; but the court says legislators and city councils, in the exercise of the police power, may prohibit all things hurtful to the health and safety of society, even though the prohibition invade the right of liberty or property of the individual. The court says: "Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome, and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness, and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to

be conducted and managed according to prescribed regulations, and, together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations and to contain certain required information; the milk to be prepared in the manner, at the times, and by the means directed, and at all times to be subject to inspection. These may be drastic restrictions upon a private business, but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restriction to the preservation of the public health."

e. Arbitrary declaration of adulteration or unwholesomeness.

A provision that milk below a certain specified standard shall be deemed to be adulterated is not unconstitutional. *State v. Smyth* (1883) 14 R. I. 100, 51 Am. Rep. 344. The court says: "Defendant contends that the section is unconstitutional, because, as he alleges, it establishes a rule of evidence and makes it conclusive of the guilt of the accused. We do not take this view of the section. It does not establish a rule of evidence, but creates, or rather defines, an offense. It was the purpose of the statute to prohibit, not only the dealing in milk which had been adulterated, but also in milk of such inferior quality as to fall below the standard named in § 3. It is equally a fraud on the buyer, whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in its natural state it is so poor that it contains the same proportion of water as that which has been adulterated. . . . If a cow habitually gives milk of a quality so poor as to come within the statute, or, as the defendant puts it in his brief, so poor that as a commercial commodity it is valuable only for the purposes of irrigation, she is of no value as a milk producer, and can have none as such to her owner, unless he can sell her milk to his unsuspecting neighbors

for a price greatly in excess of its value—a species of fraud which ought not to be tolerated. The section is but a slight extension of the provision which prohibits the sale of adulterated milk, and, like that, was designed to protect the public against imposition. We think it is a valid exercise by the legislature of the police power incident to the state.” And that case was followed in *State v. Groves* (1885) 15 R. I. 208, 2 Atl. 384.

In *People v. Cipperly* (1886) 101 N. Y. 634, 4 N. E. 107, it was held on the opinion of Learned, P. J., in the general term of the supreme court (1885) 37 Hun, 319, that a provision that milk containing less than a certain percentage of solids shall be declared to be adulterated did not deprive the owner of his property without due process of law. The judge said: “The defendant takes the broader ground that the legislature cannot, under the Constitution, prohibit the sale of milk drawn from healthy cows, which, in its natural state, falls below the standard fixed by the act, unless such milk, or the articles made from it, are in fact unwholesome or dangerous to public health. How is that question of fact to be determined? The court cannot take judicial notice whether milk below the standard is or is not unwholesome or dangerous to public health. Is that to be a question for the jury? If so, the court must charge a jury, in each case, that, if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or rather unsettled, in that way. The constitutionality would vary with the varying judgments of juries. Either, then, the legislature can, under the Constitution, forbid the sale of milk below a certain standard, whether such milk be in fact wholesome or not, or else they cannot do this, whether that milk be in fact wholesome or not. If they may fix a standard, they must judge whether or not milk below that standard is whole-

some. . . . An examination of the present law clearly shows that it relates to, and is appropriate to promote, the public health. Whether its details are wise we do not know. But its object is evident and is good. . . . The present law only says that a sale of milk below a certain standard is a sale of adulterated milk within the meaning of the law; that a sale of milk from cows fed on distillery waste, or from cows within a certain time of parturition, is a sale of unwholesome milk within the meaning of the law. This is not a rule of evidence, but an explanation of the meaning of the words used in the statute. . . . If the legislature, knowing the difficulty of guarding against the watering or other adulteration of milk, deem it best to fix a standard of richness, I think this is within their power, and that, too, irrespective of the question whether the milk is diluted after it is taken from the cow, or whether it is made watery in the animal itself, by giving such food as will produce a great flow of what might well be called milk and water.”

The majority of the general term held that the provision requiring the milk to be declared unwholesome if it contained less than the required percentage of solids was unconstitutional. It says due process of law gave to the defendant the right to contest the allegation that the milk was adulterated or impure, or unwholesome. There can be no trial if the statute requires judgment to be pronounced against the defendant upon proof by the state of some fact not in issue. The legislature cannot make certain facts conclusive evidence, which in their nature are not so. The court says: “If the legislature can compel the courts to render judgment contrary to their convictions of the truth, produced by the evidence, then the legislative power can coerce the judicial power; a proposition destructive of the co-ordinate departments of the government. . . . The . . . section of the act which requires that, upon a trial for selling adulterated milk, the milk shall be declared adulterated if it do not contain the percentage of

ingredients specified in the statute, is beyond the legislative power, because it deprives the defendant of his liberty and property without due process of law, in that it deprives him of the right, upon the trial of the charge against him, to have the issue determined according to the evidence of the fact, and compels him to submit to the statutory declaration thereof, without having the truth ascertained."

The ruling of the court of appeals in that case was followed in *People v. Beaman* (1905) 102 App. Div. 152, 92 N. Y. Supp. 295, and *People v. Eddy* (1891) 35 N. Y. S. R. 146, 12 N. Y. Supp. 628.

A statute is not unconstitutional for providing that milk, shown by the analysis of the public officer to contain a deficiency in solids, shall be deemed to be adulterated. *State, Shivers, Prosecutor, v. Newton* (1883) 45 N. J. L. 469. The court says: "In interpreting the significance of this clause, I think it is obvious that its design is to include within the kind of prohibited milk such as shall not possess a certain standard of excellence. I think the standard so fixed was not intended to mark the absolute line between pure and diluted milk. The placing of the standard was to set up a mark to indicate where, in the judgment of the legislature, the salubrity or fair commercial value of milk ceased to exist. The section does not mean that the result of the analysis shall be conclusive evidence that the milk, has in fact, been adulterated, but it does mean that milk below a certain standard shall not be sold; therefore, when analysis discloses that condition, it shall be, for the purposes of the act, considered adulterated, so that by force of the other sections it thereby becomes prohibited."

In *Com. v. Evans* (1882) 132 Mass. 11, a statutory provision that milk shall be deemed to be adulterated if it contain less than 13 per cent of solids is constitutional. The court says this belongs to the class of police regulations designed to prevent frauds and to protect the health of the people, which it is within the constitutional power of the legislature to enact.

1. *Compulsory evidence.*

An ordinance for regulation of sale of milk is not invalid as requiring one to give evidence against himself, or as depriving him of his property without due process of law, because it requires him to furnish a small quantity of milk free for analysis by the city chemist. *St. Louis v. Liessing* (1905) 190 Mo. 464, 1 L.R.A. (N.S.) 918, 109 Am. St. Rep. 774, 89 S. W. 611, 4 Ann. Cas. 112.

Requiring dairymen to furnish, without compensation, samples of the milk sold by them for analysis, does not violate constitutional provisions against being required to furnish evidence against oneself, or against taking property without compensation or due process of law, or depriving the owner of the equal protection of the laws, or guaranteeing against unreasonable searches and seizures. *State v. Dupaquier* (1894) 46 La. Ann. 577, 26 L.R.A. 162, 49 Am. St. Rep. 334, 15 So. 502. The court says: "Defendant has selected as a business one which, improperly conducted in the hands of unscrupulous men, would seriously affect the health of the public. It is no longer a debatable question whether callings of that character can be legally brought under reasonable restraints and regulations through the exercise of the police power. The object of the ordinance in question is to protect the general public against dishonest venders of milk; its effect will be not only not to injure appellant, but to protect him as a member of the public from that class of persons, and incidentally to save him as an honest vender in that business from injurious competition through fraudulent devices and ill practices. Honest venders could certainly see nothing to flow from the ordinance but proper and beneficial results; they certainly should raise no complaint at having their own actions brought to a test, when in so doing they purge the business of disreputable characters."

A provision authorizing inspectors to enter a carriage used in the conveyance of milk, and take specimens of milk found therein for analysis, is constitutional. *Com. v. Carter* (1882)

132 Mass. 12. The court says: "It is contended that this provision is unconstitutional, because it authorizes the taking of property without consent or compensation; warrants unreasonable searches and seizures, compels one to furnish evidence against himself, and is not within the police power of the commonwealth. An analysis of a specimen of milk offered for sale is an appropriate means of carrying into effect the various provisions of the statutes regulating the sale of milk in this commonwealth. . . . The power granted is not in violation of the provision . . . of the Declaration of Rights that no subject shall be compelled to accuse, or furnish evidence against, himself. If the seizure is such as is authorized by the Constitution and a law passed in pursuance thereof, the fact that the thing seized may be used in evidence, in a criminal charge against the person from whose possession it is taken, does not render the seizure itself a violation of the Declaration of Rights. . . . If the statute had required that all milk offered for sale should first be inspected, it would hardly be contended that the trifling injury to property occasioned by taking samples for inspection would be such a taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights, for the common benefit; and, in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. . . . Such a seizure of milk for the purposes of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision under the laws, by a public officer, of a trade which concerns the public health, and is within the police power of the commonwealth."

One who voluntarily furnishes samples of milk for analysis cannot attack the validity of the ordinance on the

ground that it unconstitutionally compels him to furnish evidence against himself. *State v. Stone* (1894) 46 La. Ann. 147, 15 So. 11.

g. Summary destruction.

Providing for destruction of all milk taken from cows not subjected to the tuberculin test, as soon as it is brought into the city, is not unconstitutional. *Nelson v. Minneapolis* (1910) 112 Minn. 16, 29 L.R.A. (N.S.) 260, 127 N. W. 445. The court says: "Whether the ordinance, in so far as it authorizes the seizure and destruction of milk taken from uninspected cows and brought within the city for sale in violation of the ordinance, so violates the constitutional rights of plaintiffs, and constitutes a taking of their property without due process of law, is the important question in the case. It is urged that before destroying the milk the authorities should be required to ascertain whether it is in fact unwholesome and unfit for food, and that to permit them to destroy the same without regard to whether it is, or is not, free from disease germs, authorizes a taking of property for public use without compensation, and is not that due process of law guaranteed by the Constitution. It is further claimed, with respect to the enforcement of police regulations, that power in the municipal officers, if constitutional rights be respected, must be limited to those methods that will work the least injury to private rights. Counsel's argument in support of their theory of the law is plausible and forceful, but we are unable to concur therein. The council determined that the tuberculin test was a reasonable, and the most practicable, method of insuring purity in the milk brought into the city. To enforce the regulation the council had the power to impose such penalties as would render the regulation effective, and serve the purpose intended. It provided, in addition to fine and imprisonment, a destruction of the condemned milk. The authorities sustain regulations of this character. It is, in fact, the only feasible method of preventing contaminated or unwholesome milk from

reaching the citizens, and to enforce or compel a compliance with the ordinance. A mere fine or imprisonment of the offender would not prevent the milk reaching the consumers; but its destruction, when brought into the city, is effective for all purposes. This authority must be sustained, unless it is to be held as a matter of law that the city should either determine that the milk is in fact impure, or, in the interests of the dairymen, establish and maintain a Pasteurization plant, in which all milk brought into the city may be purified and rendered wholesome."

In *Deems v. Baltimore* (1894) 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648, the court, in considering the constitutionality of an ordinance which provided for summary destruction of milk which did not meet certain tests of a lactometer and litmus paper, said: "To justify such interference with private rights, its exercise must have for its immediate object the promotion of the public good, and, so far as may be practicable, every effort should be made to adjust the conflicting rights of the public and the private rights of individuals. At the same time, the emergency may be so great, and the danger to be averted so imminent, that private rights must yield to the paramount safety of the public; and to await, in such cases, the delay necessarily incident to ordinary judicial inquiry in the determination of private rights would defeat altogether the object and purposes for which the exercise of this salutary power was invoked. Whatever injury or inconvenience one may suffer in such cases, he is, in the eye of the law, compensated by sharing the common benefit resulting from the summary exercise of this power, and which, under the circumstances, was absolutely necessary for the protection of the public. The use of milk as an article of food enters largely, as we all know, into the daily consumption of every household, and there is no more fruitful source of disease than the use of adulterated and unwholesome milk. And if the appellant's contention be right that the question, whether or not milk,

which is daily offered for sale in every part of a large and populous city, comes up to the standard prescribed by the ordinance, must be determined by the ordinary process of judicial investigation, or by chemical analysis, it would be impossible to prevent the danger to the public health necessarily resulting from impure and unwholesome milk. And it is absolutely necessary, therefore, that the appellee should have the power to provide for its inspection by proper means and instruments, and if, upon such inspection, it shall be found not to come up to the standard prescribed by the ordinance, to direct that the offending thing shall be destroyed."

A provision for destruction of milk, or its return to the consignor, if found below the required standard, is not unconstitutional. *State, Shivers, Prosecutor, v. Newton* (1883) 45 N. J. L. 469. The court says: "That the title to all private property is held subject to the paramount consideration of the health and safety of the entire public is too well settled for discussion. It is equally well established that the authority inherent in the state, under the title of police power, enables the legislature to fix upon certain kinds of property, or upon the manner in which property is used, the brand of noxiousness to public safety or health. And when the character of a nuisance has been so affixed to property or its use, it is a frequent exercise of legislative power, in addition to the visitation of a penalty to be recovered by action, or imprisonment upon conviction under indictment, to also provide for the abatement of the nuisance itself by means of a seizure and destruction of the property itself."

An ordinance authorizing the seizure and destruction of milk held for sale, when below the required standard of wholesomeness, does not violate the constitutional provision against depriving one of property without due process of law. *Blazier v. Miller* (1877) 10 Hun (N. Y.) 435. The court says its justification rests upon the immediate and imminent danger to life and health, which it is designed to avert.

Milk kept for sale at a temperature

of more than 50 degrees may be declared to be a nuisance, and summarily destroyed, without depriving the owner of his property without due process of law. *Kaiser v. Walsh* (1906) 4 Ohio N. P. N. S. 507, 17 Ohio Dec. 324.

The confiscation and destruction of milk intended to be sold within a city, which has been drawn from cows which have not been subjected to the tuberculin test as required by municipal ordinance, does not unconstitutionally deprive the owner of his property without due process of law. *Adams v. Milwaukee* (1911) 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518, affirmed in (1913) 228 U. S. 572, 57 L. ed. 971, 38 Sup. Ct. Rep. 610. The evidence tended to show that the milk which plaintiff attempted to sell was from healthy cows, and produced under sanitary surroundings, but the court said ordinances may be enacted for the abatement of public nuisances and the preservation of public health. "When the nuisance is abated by destruction of property, there must exist a necessity for resorting to this drastic and unusual method of enforcement. A case must be presented in which the usual sanction of fine or imprisonment, or the abatement by suit in court, or, indeed, any milder or slower mode of dealing with the offender than destruction of his property, would be inadequate to preserve the public health or safety. 'Salus populi est suprema lex.' And, in all ordinary cases of destruction of property under such authority, the property owner may resort to the courts and recover his damages by proving that the property which was destroyed as a nuisance, or as dangerous to the public health or safety, was not such in fact. . . . In this way the law attempts to harmonize the clash of legal rules, and vindicate at once the right of property, including the right of the owner thereof to due process of law, and also the public right to preservation of its health and safety. The situation here disclosed, with about 3,500 8-gallon cans of milk arriving daily in the city; the fact that the milk will sour and become practically worthless as a beverage in

twenty-four hours or less of summer weather; the impossibility of imposing or enforcing fines provided in a city ordinance upon shippers residing and remaining out of the city; the fact that imprisonment of the offender would not prevent the milk reaching the consumer; the futility of proceeding by fine and imprisonment against the carrier or consignee; the impossibility of allowing this enormous quantity of milk to remain at the delivery depots, reeking and rotting, a breeding place for pathogenic bacteria and insects, during the period necessary for notice to the owner and resort to judicial proceedings; together with the necessity for effectually preventing any of such milk from being used—all establish a situation in which it may be said that the common council had the right to decide that the destruction of the milk is the only available or efficient penalty for the enforcement of the ordinance, and that such destruction was necessary."

VII. *Receptacles.*

a. *Capacity.*

An ordinance requiring the capacity of milk containers to be indelibly stamped on them, and making it an offense to have in possession, with intent to use it, any container of less capacity than is indicated upon it, is a valid exercise of the police power, and violates no constitutional right. *Chicago v. Bowman Dairy Co.* (1908) 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700. The court says: "Milk and cream are articles of general consumption. They are usually sold by the pint or quart, and, while each transaction involves but a few cents, the number of such transactions in a large city like Chicago daily reaches a large sum. The opportunities for fraud in their sale are great, and the ordinary legal remedy afforded the individual consumer to protect himself against fraud or deceit is wholly inadequate. Clearly, therefore, an ordinance like the one under consideration is valid, and is not obnoxious to any of the provisions of the state or national Constitution."

b. Identification.

Forbidding the use for milk or cream of receptacles marked with the names of other dealers is not unconstitutional. *Jury v. State* (1912) 35 Ohio C. C. 514.

c. Sealed containers.

No constitutional right is infringed by forbidding a milk dealer to deliver dipped milk, but requiring it all to be put up in sealed containers. *Mannix v. Frost* (1917) 100 Misc. 36, 164 N. Y. Supp. 1050, affirmed in (1917) 181 App. Div. 961, 168 N. Y. Supp. 1118.

In *State v. Stokes* (1916) 91 Conn. 67, 98 Atl. 294, the court held that an ordinance requiring milk sold in stores, bakeries, and butcher shops to be kept in sealed bottles, while not requiring it to be so kept when sold by dairymen or farmers, having for its purpose the preservation of the public health, and being adapted to that end, was within the police power, and not a violation of the Constitution. The court says: "The ordinance applies to a class of dealers who keep milk for sale under circumstances making it peculiarly liable to contamination from bacteria, from the fact that it is liable to be kept for a considerable period under conditions exposing it to such contamination. The language used shows that the ordinance was intended to apply to milk kept for sale in these establishments, and not to sales by farmers or dairymen who may supply such establishments and others with milk. It does not attempt to prevent the sale of milk, whether the same be standard, adulterated, or impure. It is a mere regulation of the manner in which the milk shall be contained before and at the time of the sale, for the purpose of supplying a safeguard to the public. It applies to a class of dealers whose methods of handling the commodity seemed, in the judgment of the board of commissioners, to require regulation in the interest of the public health. Applied to such a class, the regulation is not unjustly discriminating."

d. Cleansing.

In *People v. Frudenberg* (1913) 209 N. Y. 213, 103 N. E. 166, a provision,

"nor shall any person receive or have in his possession any such receptacle [i. e., one used in the transportation and delivery of milk and cream] which has not been washed after holding milk or cream, or which is unclean in any way," was held to mean, not that it could not be reclaimed by the dealer unless it was washed, but that it should be washed by him without delay, and, as so interpreted, the act was held to be constitutional. The facts of the case were that accused, a driver in charge of the delivery wagon, in making his rounds, gathered up the empty bottles and took them to the railroad station where they were to be shipped to the dairy for washing and refilling, instead of taking them to the nearest sterilizing plant in the city for the performance of that service, and the court held him liable for failure to comply with the law. The dissenting judge says: "This enactment forbids the purveyor of milk from resuming possession of the bottles in which the milk has been furnished to the customer unless such bottles have been cleaned before they are taken back. The vender is not given a reasonable time within which to clean them; he is not given any time at all. If he has such receptacles in his possession which have not been washed after holding milk, he is liable to fine and imprisonment, no matter how short may be the duration of his possession, and although he proceeds to cleanse the bottles with the utmost celerity. He may not receive them if they are unwashed. It seems to me too clear for argument that such an ordinance deprives the milk dealer of his property without any neglect or wrongdoing on his part. He cannot lawfully regain it unless the consumer, over whom he has no legal control, has previously cleansed the receptacle in which the milk was furnished." The lower court said that a strict construction of the law was precisely what was intended. It was of opinion that the statute was not unreasonable, and was within the police power of the state. It does not deprive the milk company of its property, but merely requires it, before accept-

ing a bottle, or other receptacle, from a customer, to insist that the customer shall observe the law and wash out the receptacle. This can be done easily, by ceasing to deliver milk to a customer who refuses to obey the law, or by lodging an information against the persistent lawbreaker. The court further says the law is undoubtedly drastic, but the danger to be apprehended from the use of unclean receptacles for milk intended for human food is so obvious and so well-known that drastic measures to prevent the possibility of such use are reasonable and justifiable.

In *State ex rel. Lowry v. Davis* (1911) 1 Tenn. C. C. A. 550, an ordinance relating to the licensing of milk dealers was attacked for unconstitutionality, and several matters are considered in the opinion, but the only provision which appeared to affect the complaining party required the maintenance of a wash room for empty milk receptacles, separate from the place where the milk was kept. The court held that this requirement was reasonable, which, under the circumstances, meant constitutional, saying: "It is shown that empty milk cans teem with bacteria; that if they are washed in the room where the milk is kept that the milk becomes contaminated and unwholesome. . . . We do not see that a compliance with this rule would be unreasonably expensive, or place any undue hardship upon the relator. If the facts proven by the bacteriologist in this case are true, the observance of this rule is absolutely necessary to preserve the purity of the milk, and we are constrained to hold that this provision of the ordinance is entirely reasonable. . . . We would hesitate to pronounce an ordinance invalid which had for its purpose the regulation of the milk supply of a great city like Memphis. As before stated, it is a necessary article of food; it is the food of the infant and of the sick and infirm; it must be kept wholesome and free from impurities, otherwise the health of the people may become greatly impaired; and to use an unwholesome milk may result in death. We think it of the

utmost importance that those who sell a commodity of this kind to a large city should observe all necessary rules and regulations necessary to preserve the purity of the milk which they offer for sale, and the disposition of a party to resist these wholesome regulations indicates an improper spirit, and shows the necessity of the regulation. A person who will resist reasonable regulations, in our opinion, would put upon the market his milk in any manner permitted, without reference to its wholesomeness, and with little concern for the result which might follow the sale of impure milk."

VIII. License.

a. In general.

The reported case (*COFMAN v. OUSTERHOUS*, ante, 219) holds that requiring owners or proprietors of cream stations to take out a license, which may be revoked on evidence that the licensee has violated any of the existing dairy statutes, is constitutional.

In *St. Louis v. Grafeman Dairy Co.* (1905) 190 Mo. 492, 1 L.R.A.(N.S.) 936, 89 S. W. 617, an ordinance requiring milk venders to register with the health commissioner, and pay a fee therefor, was attacked as violating constitutional provisions protecting property rights, etc. The court, however, said it was clearly a valid police regulation looking to the protection of the health, and ministering to the welfare, of the public. The fact that the selling of milk is a lawful trade or business does not exempt it from reasonable police regulations. The court says: "When it is considered that no article of food is more universally used by the public, and that no other article is perhaps so sensitive to atmosphere and vegetable influences as milk, and that it is within common knowledge that impure milk is a fruitful source of disease and disorders, especially among children, it needs no discussion to show that the milk business is one which particularly falls within the power of the state and its municipalities to regulate."

An ordinance will not be declared

void for exaction of a fee for licenses to milk dealers, if the revenue derived therefrom is not disproportionate to the cost of the enforcement of the ordinance and the regulation of the business to which the ordinance applies. *Littlefield v. State* (1894) 42 Neb. 223, 28 L.R.A. 588, 47 Am. St. Rep. 697, 60 N. W. 724.

In *Norfolk v. Flynn* (1903) 101 Va. 473, 62 L.R.A. 771, 99 Am. St. Rep. 918, 44 S. E. 717, an ordinance requiring a license to sell milk and prohibiting the sale of impure, adulterated, or unwholesome milk, prescribing a test of what constitutes pure milk, and requiring free inspection and test of milk sold in the city, and exacting a fee to cover the expenses of the inspection, was held to be a valid exercise of the police power.

b. Blood test.

A regulation of the health department, requiring a blood test from all applicants for license to peddle milk as a precaution against typhoid fever, was upheld in *People ex rel. Schulz v. Hamilton* (1916) 97 Misc. 437, 161 N. Y. Supp. 425. The court says: "The requirement of a blood test as a condition for a license to sell milk and cream seems to be a fair and reasonable precaution to protect the public against any increase of typhoid. Milk is a particularly sensitive product, produced under conditions which, if not regulated and controlled, may carry and disseminate the germs of typhoid, or other diseases, and spread them in the community. It is the chief food of infants, and lies at the basis of their health and strength. It may be heated, sterilized, or Pasteurized; but even then contact with unclean utensils or unclean human beings may make it the carrier of disease germs. Unlike other articles of food, it cannot be washed and otherwise cleansed in the home. The impurities may be hidden from sight, and thus a sense of security engendered which may render it a still more serious menace to health. Under these conditions it would seem to impose no unreasonable hardship upon a dealer in milk or cream to require him to submit to a

blood test, to make sure that he has not had typhoid and is not a typhoid carrier. That typhoid is a contagious disease and may be transmitted by one afflicted with the disease is a matter of common knowledge, and the court will take notice of that fact without proof. . . . The court will also take notice of the fact that an examination of a drop of blood will reveal whether or not the person from whom it has been taken has had typhoid. This may not be universally held by scientific men, or universally believed by the people; but, until science disproves the value of the test, it will be accepted by the courts as true. . . . This rule does not infringe upon the civil rights of the individual. Government has been instituted among men for their mutual protection, and no man has the right to make himself or his business a menace to the public health. Take away the regulation and control of individual rights, and organized society would break up into its original elements. Under organized society all rights are subject to such reasonable regulations as may be deemed by the governing authority essential to the society, health, peace, good order, and morals of the community. It is a part of the social compact that government shall be maintained for the common good, for the protection and safety of property, and the happiness of all the people, and that of any particular individual, class, or group of men must give way to the welfare of all." That case was, however, reversed on the ground that there was no statutory authority for prescribing the test sought to be enforced, in (1919) 188 App. Div. 783, 177 N. Y. Supp. 222.

c. Provision for paying bills.

Requiring a bond for payment of debts, or a deposit of securities with a public official, by one seeking to engage in the business of purchasing milk within the state for shipment to market, is valid. *People v. Beakes Dairy Co.* (1918) 222 N. Y. 416, 3 A.L.R. 1260, 119 N. E. 115. The court says: "This statute points to protection from the probability of financial

loss rather than fraud, and goes far beyond any mere licensing statute, by requiring the licensee to give security for payment of his debts to purchasers. . The business regulated is not done with ignorant people, the chosen and easy prey of the cunning and unscrupulous impostor. It is done with men of ordinary intelligence, fully conscious of what they are about.

. . . It is urged that so much of this statute as aims to compel certain purchasers of milk to pay their debts, measured by the standards of the obligations of the state to its citizens as we now understand them, is a hateful interference with the freedom of men to transact ordinary business, not affected with a public interest, with other men as they see fit; that its implication is that bad debts may be secured or prevented by the exercise on the part of the state of its power to regulate trades and callings; that this is a doctrine of paternalism, in direct conflict with our judicial notion of liberty under the Constitution." The court held that the regulation was a valid exercise of the power over a domestic corporation, saying: Defendant is a corporation created by this state, and, therefore, has no natural right to purchase milk without obtaining a license on such terms as the state directs. The court affirmed the decision of the appellate division in (1917) 179 App. Div. 942, 166 N. Y. Supp. 209, because of a defect of pleading, but the lower court had taken the position that the statute was class legislation, and not a valid exercise of the police power, which question the court of appeals holds that defendant is not in a position to raise.

d. Revocation.

A public officer cannot be empowered to revoke a license to sell milk, merely because satisfied that the licensee is unable properly to conduct the business, or intends to deceive, or defraud customers, without notice and an opportunity to be heard. *People ex rel. Levy Dairy Co. v. Wilson* (1917) 179 App. Div. 416, 166 N. Y. Supp. 211.

But in *People ex rel. Lodes v. Health Dept.* (1907) 189 N. Y. 187, 13 L.R.A.

(N.S.) 894, 82 N. E. 197, it was held that no constitutional rights were impaired by revocation of license to sell milk without notice or hearing. The court says: "Milk is an article of food extensively used by our inhabitants, and is chiefly relied upon to support the lives of infant children. If impure or adulterated, or polluted with germs of dangerous or infectious diseases, its use becomes highly dangerous, and the health and welfare of the public demand speedy, and, in some cases, instant, prevention of its distribution to the people. While it is the duty of the board of health to watch, and through its inspectors detect, violations of the statute and the conditions imposed by it, it has been given no judicial power to hear, try, and determine such violations, but must act upon the information obtained by it through its own channels of inquiry. . . . Although the relator had established a business and secured customers under the permit granted to him, the permit itself cannot be treated as property in any legal or constitutional sense, but was a mere license revocable by the power that was authorized to issue it."

IX. Provisions for transportation.

In *Chicago v. Chicago & N. W. R. Co.* (1916) 275 Ill. 30, L.R.A.1917C, 238, 113 N. E. 849, the court, although conceding the right of municipal corporations to regulate the milk supply, held void for unreasonableness a provision of an ordinance forbidding carriers to transport milk which was above a specified temperature, where there was no way for them to ascertain whether the specified temperature was exceeded or not. The question of the constitutionality of the ordinance was argued by counsel, but was not referred to by the court.

X. Discriminatory provisions.

In *State v. Broadbelt* (1899) 89 Md. 565, 45 L.R.A. 433, 73 Am. St. Rep. 201, 43 Atl. 771, a statute was attacked as denying due process of law and depriving of equal protection of the laws, which provided for the registration of all herds of cows the milk from which was sold in cities, towns, or

villages, but which did not apply to herds whose milk was sold elsewhere. The statute also provided for inspection, and the maintenance of prescribed standards of cleanliness in stables where registered herds were kept. The court, in upholding the validity of the statute, said: "The entire act is strictly a police regulation, enacted for the purpose of preserving the public health. The strides which our knowledge of bacteriology has made in recent years are generally known; and the ubiquitous microbe has been shown to be a potent agent in the propagation of disease. Tuberculosis—identical, it is said, with consumption in man—is caused by the organism known as Koch's bacillus, and is readily communicable through milk. Diphtheria is another contagious disease whose specific organism finds in milk favorable conditions of growth; and there is abundant evidence to show that contaminated milk transmits this contagion. Cholera has again and again been traced to the same source; and scarlet fever is generally believed to be communicable by infected milk, and it is said that it may be even caused by an eruption on the udder. Typhoid fever bacilli have been detected in milk supposed to be wholesome. Besides conveying disease, milk occasionally contains certain germs which form poisonous products known as ptomaines. Milk may carry the bacilli of these and perhaps other deadly diseases, to infancy, to adolescence, and to age; to the delicate and to the robust alike, and to persons in every class and condition of society. It may receive these germs direct from the cow, if the cow be unhealthy; or it may absorb them from the dairy, the dairy utensils, or the stable, if these be uncleanly. Though inspection of cattle and dairies may reduce the frequency of infection, the preservation of the public health by preventing the sale of infected milk, or of milk that may come from infected sources, when milk by reason of its almost universal use, in one form or another, as an article of food, is especially likely to spread disease, is one of the most imperative duties of the state, and obviously one most incon-

testably within the scope of the police power. . . . A dairyman has no right to sell milk that may be contaminated, or that may be given by diseased cows, or may be kept on uncleanly premises or in unsterilized utensils; and, if he undertakes to sell milk at all to cities, towns, and villages, he must submit to such reasonable sanitary regulations respecting his property used in that business, as the legislature may deem necessary to prevent that property from being the source of origin of infectious and contagious diseases. No matter how absolute his title, he holds his property subject to this liability—that his use of it may be so regulated as that it shall not be injurious to the community."

A statute imposing a tax on only such milk dealers as use vehicles for the purpose of delivering milk to their customers is invalid for discrimination. *Read v. Graham* (1907) 31 Ky. *L. Rep. 569, 102 S. W. 860.

A classification for the purpose of a license fee, to be exacted from persons selling milk, may be based on the number of cows in the dairy. *State v. McKinney* (1903) 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579.

In *Birmingham v. Goldstein* (1907) 151 Ala. 473, 12 L.R.A.(N.S.) 568, 125 Am. St. Rep. 33, 44 So. 113, an ordinance requiring persons desiring to sell milk within the city to obtain a license, the cost of which was proportioned to the number of cows kept by him, was upheld against a contention that it was void as class legislation. The court asks, Wherein consists the unconstitutionality? stating that it is settled that the constitutional provision with respect to the uniformity of taxes does not apply to license taxes.

An ordinance imposing a license tax on milk dealers is not invalid merely because it does not impose it separately upon grocers who sell milk. *Newport v. French Bros. Bauer Co.* (1916) 169 Ky. 174, 183 S. W. 532. The court says: "It is a matter of common knowledge that grocers sell in their stores all of the articles of both food and drink which go into the daily consumption of the people, and it

would be utterly impracticable, as well as burdensome, to require a separate license for the sale of each article which he vends, and a payment of a separate license tax thereon. If a grocer who sells milk in his store should be required to pay a license tax upon his entire business as a grocer, which would include that of vending milk, as well as the other articles sold from his store, it could not be said that the ordinance under discussion makes a discrimination in his favor against the venders of milk from wagons, and from stores other than grocery stores. Considered in connection with the section of the ordinance which provides that each person who engages in an occupation within the city must pay a license tax, although the part of the ordinance which is copied into the petition does not provide for the levying of a license tax upon a grocer, and the petition failing to allege that such an ordinance was not then in effect, it cannot be presumed that there was no such ordinance, and hence it cannot be said that the ordinance complained of is inherently violative of law, or of the well-settled principles that are generally recognized as limitations upon the enactment of ordinances by municipalities."

Where a license tax was imposed upon venders of milk, which was alleged not to be enforced against merchants selling milk in connection with other commodities, the court held that under the Constitution the ordinance would not be valid unless all venders of milk were taxed, but it would be competent for the council to classify venders of milk, if the classification could be made upon a reasonable and natural basis, and impose a different fee upon each class so created; but that the ordinance was not rendered unconstitutional because the municipal authorities did not enforce it against some persons who were within its terms. *Weyman v. Newport* (1913) 153 Ky. 487, 156 S. W. 109.

One desiring to sell milk is not deprived of the equal protection of the laws by a requirement that he must secure a permit from the board of

health, when such permits are not required of others dealing in food products. *New York ex rel. Lieberman v. Van De Carr* (1905) 199 U. S. 552, 50 L. ed. 805, 26 Sup. Ct. Rep. 144.

The fact that an ordinance requiring containers in which milk is sold to have their capacity stamped on them, and making it a misdemeanor to have in possession, with intent to use, a container of less capacity than is marked upon it, is not invalid as class legislation because it does not apply to the selling of other commodities by liquid measure. *Chicago v. Bowman Dairy Co.* (1908) 234 Ill. 294, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700.

An ordinance is not unconstitutional for partial and unequal operation, which requires cows from which milk is to be sold in the city to be tested with tuberculin when they are kept outside the city, while not requiring such test if the cows are kept within it. *Adams v. Milwaukee* (1911) 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518. The court says, when we consider these two classes of milk dealers from the viewpoint of facility for inspection and regulation, differences sustaining the classification appear. The court further says it would be practically impossible to subject to examination the milk coming into the city every day for sale. On the other hand, every cow within the city can be subjected to individual examination.

The exemption from the provision of a statute providing punishment for selling, or having in possession for sale, milk below a specified standard, of producers, unless the sample was taken from their premises, and they failed, for twenty days after notice, to bring their product up to standard, does not make the statute unconstitutional for discrimination. *Com. v. Titcomb* (1917) 229 Mass. 14, 118 N. E. 328. The court says: "The statute is designed to protect and promote the public health. Under present conditions of life, milk is an essential article of food in almost universal use. Any statute rationally adapted to the end of securing its purity, preserving unimpaired its natural qualities, and

securing it from adulteration, plainly is within the power of the legislature. . . . The main object being to shield the public from an imposition, in guise of a fluid which may look like pure milk and yet be either adulterated or skimmed,—an imposition difficult of detection,—necessarily there must exist a wide discretion in the selection of appropriate means. It would be comparatively simple to ascertain whether the quality of milk offered for sale by the farmer, either at his door or at wholesale or retail delivery, was that produced naturally by his herd. It would be difficult, commonly, to find out whether the milk offered for sale, especially in cities, by dealers who were not producers, was of the natural quality given by the cows from which it had come. . . . When the statute is considered in its application to two venders of milk selling in competition side by side, one a producer and the other a dealer who is not a producer, it has an appearance of inequality. . . . This appearance is strengthened by the suggestion that the non-producing seller may have bought his milk of his competitor who is also a producer. But placing the situation in its true perspective minimizes this seeming inequality, and demonstrates that it may not be substantial. The ultimate aim of the statute is to secure a pure and healthful article of food of widespread use. The individual consumer ordinarily is unable to detect adulteration, and is well-nigh powerless to defend himself against such deception. It is not commonly discernible on a superficial inspection. These factors justify a reasonable classification. The legislature may have found that common experience has demonstrated that impurities and adulterations are found in the vast majority of instances in milk kept for sale by nonproducing dealers, and only in a comparatively insignificant and negligible number of instances in milk offered for sale by the owner of the cows from which the milk comes. It may have found, also, that instances of milk below the established standard, offered for sale by producers,

arise usually from the failure of the cows to produce milk of that quality, rather than from any wilful act of the producer. It is, perhaps, matter of common knowledge that some breeds of cows often do not give milk of the quality required by the Massachusetts standard: . . . If that be so, it may have been thought that the farmer should be given a chance to bring the milk of his herd up to the required standard before rendering him liable to prosecution."

But, under a constitutional provision requiring uniform taxation, an ordinance is invalid which levies a tax on each cow kept in a dairy within a subdivision of a territory to which the jurisdiction of the levying authority extends. *Parish of Orleans v. Nougues* (1856) 11 La. Ann. 739.

A statute is not unconstitutional as providing two penalties for the same offense, because it provides a forfeiture of a specified sum for each offense, and, in addition, makes the sale a misdemeanor punishable by fine and imprisonment. *People v. McDermott Dairy Co.* (1910) 122 N. Y. Supp. 294.

In a prosecution for selling adulterated milk contrary to ordinance, the defense was that the ordinance violated the constitutional prohibition against putting twice in jeopardy, since there was a state statute providing punishment for the same act. The court, however, says the ordinance was in force before the statute, and that, prior to the passage of the statute, there could be no possible doubt as to the constitutionality of the ordinance. The ordinance was held not to be in conflict with the statute, so that there was no unconstitutionality in any event. *State v. Labatut* (1887) 39 La. Ann. 513, 2 So. 550.

In *State v. Fourcade* (1893) 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187, it was held that, since one could be punished as an offender against the state and the municipal law, there was no unconstitutional double jeopardy in an ordinance against selling adulterated milk, although the state statute provided punishment for the same offense.

H. P. F.

SALT LAKE CITY, Plff. in Certiorari,
v.
INDUSTRIAL COMMISSION OF UTAH.

Utah Supreme Court—June 11, 1921.

(— Utah, —, 199 Pac. 152.)

Constitutional law — requiring employer carrying his own insurance to pay into state fund — equal protection.

1. Requiring an employer carrying his own insurance to pay a certain amount into the state treasury, in case of death of an employee without dependents, to provide a fund for compensating employees suffering second disability, which, when combined with the first, causes injuries greater than the compensation provided for the disability from the second injury alone, does not deprive the employer of the equal protection of the laws, nor deprive him of his property without due process of law, where he is privileged to insure in the state fund if he chooses to do so.

[See note on this question beginning on page 267.]

Workmen's compensation — conditions for carrying own insurance. as a condition of permitting him to carry his own insurance against injury to employees.

2. The state may impose any terms it chooses upon an employer of labor,

CERTIORARI to review an order of the Industrial Commission requiring plaintiff to pay a certain amount into the state treasury, and reasonable funeral expenses, under the State Industrial Act, in proceedings before the Commission, by the parents of a deceased person, to recover compensation for his death. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William H. Folland, Horace H. Smith, Shirley P. Jones, and James H. Wolfe, for plaintiff in certiorari:

Subdivision 1, § 3140, of the Laws of Utah 1919, is unconstitutional for the reason that it is a denial of the equal protection of the laws, and it is a taking of property without due process of law.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; American Fuel Co. v. Industrial Commission, — Utah, —, 8 A.L.R. 1342, 187 Pac. 633; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Scranton Leasing Co. v. Industrial Commission, 51 Utah, 368, 170 Pac. 976; Industrial Commission v. Evans, 52 Utah, 394, 174 Pac. 825; Garfield Smelting Co. v. Industrial Commission, 53 Utah, 133, 178 Pac. 57; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Arnold v. State, 163 App. Div. 253, 148 N. Y.

Supp. 479; Re Western Implement Co. 166 Fed. 576; Board of Education v. Hunter, 48 Utah, 373, 159 Pac. 1019; State Industrial Commission v. Newman, 222 N. Y. 363, 118 N. E. 794; State ex rel. Bryant v. Lindsay, 94 N. J. L. 357, 110 Atl. 823.

Messrs. Harvey H. Cluff, Attorney General, J. Robert Robinson, W. Hal Fair, William A. Hilton, and L. A. Murie, Assistant Attorneys General for defendant in certiorari:

In order for an act which is under the police power to be declared unconstitutional, it must be shown that the legislature has made a classification which is unreasonable and arbitrary.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; State ex rel. Bryant v. Lindsay, 94 N. J. L. 357, 110 Atl. 823; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.)

1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189.

Unless a classification adopted by the legislature in the application of the police power is purely arbitrary and capricious, its judgment on the subject should be respected and sustained.

State v. Seney Co. 134 Md. 437, 107 Atl. 189; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Thurman, J., delivered the opinion of the court:

The facts alleged in plaintiff's brief tend to show that on July 12, 1920, one Asa H. Hancock was a regularly employed member of the fire department of plaintiff, and that on that day he was accidentally killed in the course of his employment. Proceedings were had for compensation before the defendant Industrial Commission (hereinafter called Commission) on the part of the father and mother of deceased, claiming to be his dependents. The Commission found, among other things, that plaintiff was an employer and self-insurer, subject to the provisions of the Utah Industrial Act, and that deceased left no dependents. The Commission ordered that plaintiff pay into the state treasury the sum of \$750 and reasonable funeral expenses, not exceeding the sum of \$150, in accordance with the provisions of the statute hereinafter quoted. The case is before us on a writ of certiorari to review the proceedings.

Some contention was made in plaintiff's brief to the effect that the proceedings before the Commission were not had under the Industrial Act, but under the firemen's pension fund, that plaintiff was not a party to said proceedings, and that therefore the Commission was without jurisdiction to make the order. This contention has since been waived by stipulation.

Plaintiff contends, however, that the Commission acted without and

in excess of its jurisdiction, because the statute in pursuance of which the order was made is unconstitutional for the following reasons:

(1) That it is a denial of the equal protection of the laws; (2) that it is a taking of property without due process of law.

Utah Comp. Laws 1917, § 3140, subd. 1, as amended in Sess. Laws 1919, p. 163, is the statute against which the constitutional objection is raised, and reads as follows: "If there be no dependents, the employer or insurance carrier shall pay the burial expenses of the deceased, as provided herein, and shall pay into the state treasury the sum of \$750 unless the employer is insured in the state insurance fund. Such payments shall be held in a special fund for the purposes provided in subdivision 6 of this section. The state treasury shall be the custodian of this special fund and the Commission shall direct the distribution thereof."

Subdivision 6 of the same section, referred to in subdivision 1, states the purpose for which the payment is exacted and is pertinent in this connection:

"If any employee who has previously incurred permanent partial disability incurs a subsequent permanent partial disability such that the compensation payable for the disability resulting from the combined injuries is greater than the compensation which except for the pre-existing disability would have been payable for the latter injury, the employee shall receive compensation on the basis of the combined injuries, but the liability of his employer shall be for the latter injury only and the remainder shall be paid out of the special fund provided for in subdivision 1 of this section."

In its contention that the statute is a denial of the equal protection of the laws, plaintiff's principal grievance seems to be the apparent discrimination in favor of the state insurance fund and the employers insured thereby as against other

(— *Utah*, —, 199 Pac. 152.)

insurance carriers and employers within the act.

The plaintiff, as an employer under the act, had the choice of any one of three methods of insurance: (1) By insuring in the state insurance fund; (2) by insuring in a stock corporation or mutual association; (3) by carrying its own insurance. *Utah Comp. Laws 1917*, § 3114. A fourth method was also available to plaintiff, subject to the approval of the Commission, namely, by entering into an agreement with its employees as provided in § 3124 of the same compilation. By insuring in the state insurance fund plaintiff would have avoided the liability in question, but of its own volition it elected to become a self-insurer. It must be conclusively presumed that plaintiff did so with full knowledge of the contingent liability of which it now complains. It must also be presumed that, notwithstanding such contingent liability, plaintiff believed it would be to its advantage to carry its own insurance. In such case it would be relieved of the payment of premiums to another insurance carrier, and would only be subjected to the payment of such compensation as may become due its employees under the terms of the act. If no accident occurred, no payment would be required. In these circumstances defendant contends that, having obtained these advantages by electing to carry its own insurance, and the contingent liability it assumed having now become a fixed obligation, plaintiff should not be permitted to say that the law which fixes the obligation is unconstitutional in that it is a denial of the equal protection of the laws. In support of this contention it relies on a line of decisions practically uniform in holding that, where an employer has the right to elect whether or not he will come within the provisions of the Workmen's Compensation Act, and elects so to do, he will not be permitted to question the constitutionality of the act. Many such cases will be found in the note to Jensen

v. Southern P. Co. L.R.A.1916A, at page 414, to which we refer the reader. It is not at all clear to the writer that these cases are applicable to the question presented here. They seem to fall within the principle, from which, as far as we are advised, there is no dissent, that where a party voluntarily accepts the provisions of an unconstitutional law and becomes a beneficiary thereof, he cannot deny its constitutionality nor be relieved from its onerous conditions. The following cases are typical illustrations of the principle: *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310, and *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187. In the last case cited the court, in its opinion, at page 421 of 102 U. S., says: "It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect,"—citing cases.

The fundamental distinction between these cases and the case at bar consists in the fact that the plaintiff in the instant case cannot be said to have accepted that provision of the law which it now asserts is unconstitutional. Neither has it received any benefit therefrom; hence it is difficult to see wherein the doctrine of estoppel can apply. In fact, it cannot be contended that plaintiff has voluntarily accepted any provision of the Industrial Act, for the act has been held to be compulsory. *Industrial Commission v. Daly Min. Co.* 51 *Utah*, 602, 172 *Pac.* 301. Plaintiff is within the law because it belongs to that class of employers which come within its provisions, but

while, for the reason above stated, we are compelled to hold that plaintiff is not estopped from asserting that the provision of the law complained of is unconstitutional, and while the statute on its face appears to be discriminatory, we are not prepared to admit, when considered in its entirety, that the statute is a denial of the equal protection of the laws. The authorities relied on by plaintiff in support of this contention are not convincing. The first case to which our attention is called is *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247. The case was appealed from a judgment of the supreme court of Alabama, and the exact question determined by the court is stated in the following language: "The important Federal question for our determination in this case is: When a corporation of another state has come into the taxing state, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is it liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged?"

Without indulging in extended comment, the distinction in the cases is clearly manifest. In that case the foreign corporation was already within the taxing state, carrying on business in compliance with its laws, and had acquired property of a "fixed and permanent nature." The taxing state levied a new and additional franchise tax upon the corporation for the privilege of doing business within the state, which tax was not imposed upon domestic corporations engaged in business of the same character. In the instant case the plaintiff was not engaged in the business of workmen's compensation insurance when the statute in question was enacted; it had

acquired no property of a "fixed and permanent value" or otherwise in such business under previous laws of the state; it had no standing or existence whatever as an agency authorized by law to carry on the business of insurance until the privilege was conferred upon it by the Workmen's Compensation Act in 1917, which act created the contingent liability of which plaintiff now complains. In the Alabama case the Federal Supreme Court held that the statute imposing the discriminating tax was a denial of the equal protection of the laws, and for the reasons stated we are in hearty accord with the conclusion reached. We fail, however, to discern any analogy between that case and the case at bar. Our further reasons for so holding will be stated more clearly before concluding this opinion.

The remaining cases cited by plaintiff in support of its contention under this subhead are the following: *American Fuel Co. v. Industrial Commission*, —Utah, —, 8 A.L.R. 1342, 187 Pac. 633; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Scranton Leasing Co. v. Industrial Commission*, 51 Utah, 368, 170 Pac. 976; *Industrial Commission v. Evans*, 52 Utah, 394, 174 Pac. 825; *Garfield Smelting Co. v. Industrial Commission*, 53 Utah, 133, 178 Pac. 57; *State of South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Arnold v. State*, 163 App. Div. 253, 148 N. Y. Supp. 479; *Re Western Implement Co. (D. C.)* 166 Fed. 576.

As we view the question submitted for our determination, these cases are in no sense controlling. We therefore decline to enter upon an extended review. The Utah cases, if we understand plaintiff's position, are cited primarily to establish the following propositions: (1) That the employer is primarily liable for the payment of compensation and is not relieved therefrom merely because his liability is insured; (2)

that the rate fixed for state insurance becomes the rate to which other insurers must conform; (3) that, although the employer who is insured is not required to pay the award direct, still he has a direct interest in the drafts made upon the insurance fund, because the greater the drafts the greater will be the demands upon the employer who is insured therein; (4) that the same right of access to the judicial tribunals of the state that is accorded to one party must likewise be accorded to the other.

The fundamental idea sought to be deduced from the doctrine of these cases seems to be that all employers are in the same class and all insurance carriers are in the same class, and therefore all in each class should be treated alike, because they are entitled to the equal protection of the laws. The point, apparently most plausible, made by plaintiff, is that, inasmuch as the state has the right to determine the rate it will pay, to which rate other insurers must conform, the requiring of other insurers or employers to pay \$750 in case of no dependents, while the state is exempt from such payment, is an unwarranted discrimination in favor of the state. In this connection the point is also made that, being exempt from paying the \$750, and at the same time having the exclusive right to determine the rate which it should pay, to which rate other insurers must conform, the state by reason of its exemption can fix the rate so low that other insurers will be unable to compete.

Assuming that this is a case in which classification must conform to constitutional principles, and also assuming that the provisions of the statute above quoted are the only provisions that should be considered in determining this question, there would be much force in plaintiff's contention that the statute in question is arbitrary and capricious in its classification, and therefore a denial of the equal protection of the laws. But let us briefly consider

the question from another angle, even as to the question whether or not there is an arbitrary and capricious classification. To do this we should consider the Industrial Act as a whole and apply to it the constitutional provisions invoked by plaintiff as the same have been construed by the court of last resort. First, we shall quote an excerpt from plaintiff's brief, which, in part at least, states a fundamental principle pertaining to this class of legislation: "All employers belong to one class; that is, they are all liable alike for compensation to their employees, and their liability is imposed because *it is now well settled that the cost of human wreckage may be taxed against the industry which employs it*, and upon this theory all employers of labor are held to a primary liability." (Italics ours.)

It being "well settled that the cost of human wreckage may be taxed against the industry which employs it," and it also being conceded by plaintiff that the power of the state within constitutional limits is plenary as to this subject, to what extent, if at all, is the classification arbitrary or capricious, or the statute discriminatory in favor of the state or the state insurance fund? It is true the statute exempts the state from paying the \$750 in question while requiring other employers or their insurers to pay it. Let us see what the state has done as an offset against this exaction from other employers and insurers. Bearing in mind that "the cost of human wreckage may be taxed against the industry which employs it," this cost of human wreckage ought not to be borne by the state or the taxpayers of the state as such, for the primary obligation rests upon the industry which employs labor. Notwithstanding this fact, the state of Utah in 1917, when the Industrial Act was passed, provided, without expense to employers, a tribunal for the administration of the act, consisting of three commissioners, and fixed their salaries at \$4,000

per annum. In the same act it appropriated the sum of \$40,000 for the establishment of a state insurance fund, and the further sum of \$50,000 for the payment of salaries and expenses of the Commission and its employees. In 1919 it appropriated the sum of \$24,000 for the payment of commissioners' salaries during the following biennium, \$3,000 for the payment of their traveling expenses and the investigator's salary, and \$10,000 for general office expenses, including salaries of secretary, stenographers and clerks. The amount appropriated in 1921 for the same purposes amounted to the enormous sum of \$95,000. Enough has been said, we think, to conclusively demonstrate that the state has not discriminated against other employers or insurers, for it has taken upon itself the onerous burden which, according to the admission of plaintiff, might have been imposed solely upon the industries employing labor. As against these contributions of the state for the benefit of industries employing labor,

Constitutional law—requiring employer carrying his own insurance to pay into state fund—equal protection.

can it be justly contended that the demands of the statute that each industry pay into the

state treasury the sum of \$750 in the event of the remote contingency of an employee's death by accident without dependents is either discriminatory or unjust? Can it be justly contended that the classification is arbitrary or capricious, or that the statute is a denial of the equal protection of the laws? We think not. We do not understand that a classification, in order to avoid objections as to its constitutionality, should be absolutely uniform and equal in every respect as between the parties composing the class. That equality is not always practicable is recognized in many cases decided by the Supreme Court of the United States, and especially in *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61. At page 78 (55 L. ed. 369, 377, 31 Sup. Ct. Rep. 340,

Ann. Cas. 1912C, 160), the court, speaking through Mr. Justice Van Devanter, says: "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: (1) The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel v. Wilson*, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 248; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. ed. 77, 86; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553.

1. Tested by the rules stated in the excerpt quoted, not only does it appear that the classification made in the instant case is not arbitrary or capricious so as to render it obnoxious to the equal protection clause of the Constitution, but, if there is any question concerning it, the burden is cast upon plaintiff to show that the classification does not rest upon any reasonable basis, but is essentially arbitrary. We are of the opinion that plaintiff has failed

to discharge the burden thus imposed.

2. But plaintiff also contends that the statute to which objection is made is the taking of property without due process of law. Under this subhead it is contended that the exaction of the \$750 from the employer or his insurer under the terms of the statute is the same in effect as taking money from one person and giving it to another without any connection whatever between the person who receives the money and the person from whom it was exacted. This is hardly a correct statement of either the effect or purpose of the statute. The real purpose of the statute, both subdivision 1 and subdivision 6 heretofore quoted, is the building up and maintaining of a special fund for the compensation of employees who, by a combination of successive injuries, have become permanently and totally disabled, but whose total disability is not otherwise provided for in the Industrial Act. We submit the following as a typical illustration: If A should suffer the total loss of one eye, his compensation under the regular schedule (*Utah Comp. Laws* 1917, § 3138) would be not exceeding \$16 per week for 100 weeks. If he should afterwards lose the other eye in the same or different employment within the act, he would be entitled under the same schedule, to an additional sum of not exceeding \$16 per week for 100 weeks. The total compensation for the loss of both eyes would be not exceeding \$16 per week for 200 weeks. But the loss of both eyes under § 3139 of the same compilation constitutes permanent total disability, for which the injured employee is allowed 60 per cent of his average weekly wages for a period of five years from the date of the injury, and thereafter 45 per cent of such average weekly wages during the remainder of his life, the maximum not to exceed \$16 and the minimum not less than \$7 per week. The discrepancy between the total amount payable to the employee for these

successive injuries under the regular schedule and the amount he would receive had he lost both eyes in the same accident under § 3139 would amount to a considerable sum, dependent entirely upon how long the employee lives after the expiration of the first 200 weeks. The \$750 exaction from employers is to take care of this discrepancy so that the entire burden may not be cast upon the last employer. If the law imposed the liability upon him alone, the result would be that the unfortunate employee who has suffered only the loss of a single member would be handicapped in obtaining employment thereafter, for the loss of another member might result in permanent total disability. *State Industrial Commission v. Newman*, 222 N. Y. 363, 118 N. E. 794.

These were undoubtedly the considerations which moved the legislature to enact the provisions of the statute of which plaintiff complains. It is undeniable that the purpose was commendable and germane to the general purpose of the Industrial Act. In their discussion of this question, counsel for plaintiff indulge in subtleties and refinements which the writer is unable to follow. They cite no case in point or analogous in principle. The only case referred to on this branch of the argument is *State ex rel. Bryant v. Lindsay*, 94 N. J. L. 357, 110 Atl. 823, a New Jersey case arising under a statute of that state. It is stated by the court that the statute is neither an amendment nor a supplement to the Workmen's Compensation Act. Speaking of the statute, at page 358 the court says: "It requires that, in cases where an employee dies as a result of an accident arising out of and in the course of his employment, and leaving no dependents entitled to compensation under the provisions of the Workmen's Compensation Act, and the dependents, if there had been any, would have been entitled to compensation under the said act, then the employer of such person must pay the commissioner

of labor the sum of \$400, which the commissioner is to turn over to the state treasurer, and that all moneys collected under this act shall be used exclusively for the purpose mentioned in another act of 1918 (page 429 of the Pamphlet Laws of that year), which is the act relating to what is called the Workmen's Compensation Bureau."

At another point on the same page the opinion reads: "It seems quite obvious that this is nothing more or less than a tax imposed for the purpose of supporting the expense of a state agency. The act, as we have said, does not pretend to be either a supplement or an amendment of the Workmen's Compensation Act; it is separate and distinct. Consequently it cannot be supported upon the theory of a contract between employer and employee, conclusively presumed because of the absence of dissent, pursuant to the statutory procedure outlined in the Compensation Act."

While the court held the statute to be unconstitutional, it cannot be assumed, in view of the language quoted from the opinion, that the court would have made the same holding had it been construing the Utah statute. The dissimilarity between the two statutes is altogether too pronounced to justify such assumption.

In reply to plaintiff's contention that the statute authorizes the taking of property from one person and giving it to another without any obligatory relation existing between them, counsel for defendant call our attention to an Oklahoma case, *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. The second and last paragraphs of the syllabus reflect the opinion of the court sufficiently for our purpose. For further details the reader is referred to the case itself.

"The broad words of the 14th Amendment are not to be pushed to a dryly logical extreme, and the courts will be slow to strike down

as unconstitutional legislation of the states enacted under the police power."

"The Acts of December 17, 1907, and March 11, 1909, of Oklahoma, subjecting state banks to assessments for a depositors' guaranty fund, are within the police power of the state, and do not deprive banks assessed of their property without due process of law or deny to them the equal protection of the law, nor do they impair the obligation of the charter contracts."

We regard the case last cited as very much in point in support of defendant's position. There are two points of difference between that case and the case at bar: (1) In that case the assessment for the maintenance of the depositors' guaranty fund was made upon all state banks alike. In this case the state insurance fund is exempt from the payment required of others. But that apparent discrimination has been shown to be unreal, in our discussion of the first objection relied on by plaintiff. (2) In the Oklahoma case the assessment for the maintenance of the guaranty fund was compulsory,—the banks were required to pay it,—while in the instant case the plaintiff could have avoided the liability by insuring in the state insurance fund. If there is any substantial distinction between the two cases, in our opinion the defendant in the instant case is in a stronger position than was the defendant in the Oklahoma case.

But, notwithstanding all that has been said in the preceding pages of this opinion, there is a grave question in the mind of the writer as to whether or not there is really any constitutional question involved. It is practically conceded by plaintiff, and if not conceded it must be admitted, that the state has the right and the power to require all employers to insure in the state insurance fund, and not leave it optional, as under the present law. If, then, the right to insure in stock corporations or mutual associations, or of

(— *Utah*, —, 199 Pac. 152.)

self-insurance, is a mere privilege granted by the state, upon what theory can the employer complain of the conditions imposed for the privilege granted? If the state has the power to entirely prohibit other employers from carrying their own insurance or insuring otherwise than in the state insurance fund, why may not the state, if it sees fit to grant the privilege, fix the terms and name the conditions? This question was squarely presented by defendant's counsel in their brief filed in the case, and was of sufficient importance to deserve a reply.

In the absence of some logical reason or authority to the contrary, we feel compelled to hold that the state had the power to name the terms and conditions upon which employers might insure the payment of compensation to their employees even though there was an apparent discrimination in favor of the state.

Workmen's compensation—conditions for carrying own insurance.

For the reason stated, the order of the Commission is affirmed.

Corfman, Ch. J., and Weber, Gideon, and Frick, JJ., concur.

ANNOTATION.

Workmen's compensation: constitutionality and construction of provisions directed against noninsuring or self-insuring employers.

Little authority on the question under consideration has been disclosed.

It will be observed that in the reported case (*SALT LAKE CITY v. INDUSTRIAL COMMISSION*, ante, 259) it was decided that an act requiring an employer carrying his own insurance, in case of death of an employee without dependents, to pay a certain amount into the state treasury, to provide a fund for compensating employees suffering a second disability, did not deprive him of his property without due process of law, where he was privileged to insure in the state fund if he chose to do so.

In *Sperduto v. New York City Interborough R. Co.* (1919) 186 App. Div. 145, 173 N. Y. Supp. 834, appeal dismissed in (1919) 226 N. Y. 73, 123 N. E. 207, where an amendment of the *Workmen's Compensation Act* provided that, if an award required payment of death benefits or other compensation by insurance carrier or employer in periodical payments, the commission might, in its discretion, at any time, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid death benefits, or other compensation in which awards were made for total permanent, or perma-

nent partial, disability for a period of 104 weeks or more, for which liability exists, together with such additional sum as the commission might deem necessary for a proportionate payment of expenses of administering the fund created, it was held that, if this was construed to give the commission power arbitrarily to require mutual and self-insurers, who were solvent, to pay the present value of future instalments of compensation awards, it was an illegal discrimination and invalid. The court said: "The commission has exercised very extraordinary powers, which entirely change, in the case of the self-insurer and the mutual insurer, the plan of payment fixed by the legislature in compensation cases. The theory of the law is that the business, in an easy way, by periodical payments, must bear the losses sustained by the employer or his dependents, and that the losses shall be paid in substantially the manner in which the wages were paid, but that the commission may, in a given case, commute the payments to one or more lump sums, in its discretion and in the 'interest of justice.' The commission has proceeded upon the theory that the legislature has substantially given it the power to reverse § 25 and arbitrarily to make

new laws in certain cases,—a power which the legislature has not the authority to give. If the commission has correctly construed § 27, it is clearly unconstitutional. But the courts will hesitate in construing a statute in a way which makes it unconstitutional, and will go to the limit of construction in sustaining it. Every reasonable intendment is in favor of its validity. There is nothing in the section which permits the commission to make an omnibus order like the one in question, discriminating against certain employees and certain kinds of insurance. The clause in the section, that the commission may commute one or more awards by one or more resolutions, may be construed as meaning that the commission may hold a hearing on notice, inquire into the facts as to an insurer which may have several awards against it, upon facts similar in their nature, and that an investigation and a separate trial in each of such cases is not necessary. It may have other proper construction, but it was not intended to permit the commission arbitrarily to change the Workmen's Compensation Law, and commute awards, without notice and without hearing, based solely on the kind of insurance accepted. By § 50 of the act the employer may furnish one of three kinds of insurance: (1) Subdivision 1 provides for insurance in the state fund; (2) subdivision 2, for insurance in a stock company or mutual association authorized by law to transact such business; or (3) subdivision 3, by the employer qualifying, with the approval of the commission, as a self-insurer. The commission has the right to revoke the consent at any time for cause shown. It seems idle for the statute to provide for three kinds of insurance, unless each insurer is to stand in the same position, with equal liability and responsibility. The payments under the act are to be the same, without regard to the kind of insurance furnished. If an extra burden is placed upon the self-insurer and the mutual association, solely because they are such, it is an illegal discrimination and without effect. When United

States 4½ per cent bonds are selling at a discount when the best railroad companies in the country cannot borrow money at 6 per cent, and, as a favor and in the interest of the public, the government is advancing necessary money to them at 6 per cent, there can be no question but that computing the value of the award on a basis of 3½ per cent interest, and requiring cash payment within a few days, is a heavy burden. Weekly payments of a small amount are not a serious burden upon a self-insurer, but the requirement that the present value of all future payments shall be made in cash at once would be ruinous. Laying aside all other considerations, if a sum is payable each week by a business to a woman during her widowhood, it is a grievous burden to compel it to pay the present value of such payments at once in cash. A government, a bank, insurance company, corporation, or individual, cannot ordinarily pay at once the cash present value of all its obligations payable in the future. Credit is the life of business. The extent of the burden cast upon the appellant as a self-insurer, by the determination, is not the only consideration; an important fact is that it is required to liquidate its liability in a manner different from that required of other employers and insurers, and such requirement is based solely upon the fact of self-insurance. "If the commission may be justified, in any case, in casting such a burden upon an employer, there must be facts and circumstances in the case, and shown in the findings, which move and compel its discretion in that respect. Its action cannot be arbitrary."

In *Thornton v. Duffy* (1920) 254 U. S. 361, 65 L. ed. 304, 41 Sup. Ct. Rep. 137, affirming (1918) 99 Ohio St. 120, 124 N. E. 54, a ruling of a state industrial commission, justified or demanded by a change in the state laws, by which the commission revoked its previous discretionary action, and declared that no employers should be permitted to pay or furnish directly to injured employees, or to the dependents of

killed employees, the compensation and benefits provided for in the state Workmen's Compensation Law, if such employers, by contract or otherwise, should provide for the insurance of the payment by them of such compensation and benefits, or should indemnify themselves against loss sus-

tained by the direct payment thereof, was held not unconstitutional as impairing the obligation of insurance contracts entered into upon the faith of the previous ruling of the commission, or as a violation of the due process or equal protection provisions.

J. T. W.

NATIONAL SURETY COMPANY, Appt.,

v.

LEFLORE COUNTY, Mississippi, et al.

United States Circuit Court of Appeals, Fifth Circuit — December 16, 1919.

(262 Fed. 325.)

Principal and surety — bonds of county depository — effect of invalid designation of depository.

1. A surety on the bond of a depository of county funds cannot contest its liability for breach of the bond on the ground that the depository was not properly designated, because of want of the required vote by the supervisors, since the loss of funds was due to the execution of its bond.

[See note on this question beginning on page 274.]

Appeal — joinder of parties — when necessary.

2. The principal need not be joined in an appeal from a decree dismissing a suit brought by the surety to cancel a bond, or a severance had as to it, where it joins the obligee in contesting the right to cancellation.

Principal and surety — liability in excess of penalty of bond.

3. Damages and counsel fees cannot be assessed against the surety of a county depository in excess of the penalty of its bond, under a statute rendering the depository liable for such charges.

— liability for penalty and counsel fees.

4. The legislature may make a depository of county funds liable for penalty for delay in returning funds deposited, and for counsel fees for services in compelling payment, and a surety on the bond will accept such liability to the extent of the bond.

Depository — necessity of demand for funds.

5. Demand on a depository of county funds is not necessary to put it in default, where it refuses to pay county warrants and closes its doors.

APPEAL by complainant from a decree of the District Court of the United States for the Northern District of Mississippi (Holmes, J.), dismissing a bill filed to cancel a bond executed by plaintiff as surety, and granting relief to defendant on its cross bill. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Walker, Circuit Judge, and Grubb and Erwin, District Judges.

Mr. John R. Tyson for appellant.
Messrs. A. F. Gardner and R. C. McBee, for appellees:

The county, being a governmental agency, can transact its own business

only through its agents, and any act of its officers, acting in and about the county's business, cannot estop the county.

State v. United States Fidelity & G. Co. 81 Kan. 660, 26 L.R.A. (N.S.) 865, 106 Pac. 1040; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199;

People v. Bankers' Surety Co. 158 Mich. 30, 122 N. W. 353.

Complainant is estopped from denying liability as a surety on the depository bond.

United States Fidelity & G. Co. v. Pensacola, 68 Fla. 357, 67 So. 87, Ann. Cas. 1916B, 1236; *Hennepin County v. State Bank*, 64 Minn. 180, 66 N. W. 143; *Mechem, Pub. Off.* § 341; 2 *Brandt, Suretyship*, § 521; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79; *Talley v. State*, 121 Ark. 4, 180 S. W. 330; *Snattinger v. Topeka*, 80 Kan. 341, 102 Pac. 508; *Meeker County v. Butler*, 25 Minn. 363; *Hennepin County v. State Bank*, 64 Minn. 180, 66 N. W. 143; *St. Louis County v. American Loan & T. Co.* 75 Minn. 489, 78 N. W. 113; *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635; *Fremont County v. Fremont County Bank*, 138 Iowa, 167, 115 N. W. 925; *State ex rel. Independence County v. Citizens Bank & T. Co.* 119 Ark. 617, 178 S. W. 929; *Brown v. Wyandotte County*, 58 Kan. 672, 50 Pac. 888; *State v. Pederson*, 135 Wis. 31, 114 N. W. 828; *Western Casualty & G. Ins. Co. v. Muskogee County*, 60 Okla. 140, L.R.A.1917B, 977, 159 Pac. 655.

Even if the Itta Bena Bank & Trust Company was not properly elected, still it was a de facto depository, and therefore complainant is liable as such surety.

13 Cyc. 816; *St. Louis County v. American Loan & T. Co.* 75 Minn. 489, 78 N. W. 113; *Hennepin County v. State Bank*, 64 Minn. 180, 66 N. W. 143; *Renville County v. Gray*, 61 Minn. 243, 63 N. W. 635; *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79; *Harris v. State*, 55 Miss. 54; *State v. Harney*, 57 Miss. 876; *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 815; 29 Cyc. p. 1392; *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 So. 395; *Rosetto v. Bay St. Louis*, 97 Miss. 409, 52 So. 785.

Parol evidence is admissible to show that the minutes of the board of supervisors, as they now appear, are not the true minutes.

Hammond-Gregg Co. v. Bradley, 119 Miss. 72, 80 So. 489; *Sackett v. Rose*, 55 Okla. 398, L.R.A.1916D, 820, 154 Pac. 1177; *Havird v. Boise County*, 2 Idaho, 687, 24 Pac. 542; 10 Cyc. 968; *Brier v. Woodbury*, 1 Pick. 363; *Mitchell v. Kintzer*, 5 Pa. 216, 47 Am. Dec. 408.

Under § 10 of the County Depository Act, providing that, when a county depository fails to pay over money when demanded, the board of supervisors may employ counsel for its collection, and that counsel fees may be allowed, and a penalty of 1 per cent per month for delay in paying over funds, the allowance of such penalty and counsel fees is not improper, as depriving the surety of the depository of property without due process of law.

Fidelity & D. Co. v. Wilkinson County, 109 Miss. 879, 69 So. 865; *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; 15 R. C. L. p. 8; *American Surety Co. v. Pacific Surety Co.* 81 Conn. 252, 19 L.R.A. (N.S.) 83, 70 Atl. 584; *Frink v. Southern Exp. Co.* 82 Ga. 33, 3 L.R.A. 482, 8 S. E. 862; *McMullen v. Winfield Bldg. & L. Asso.* 64 Kan. 298, 56 L.R.A. 924, 91 Am. St. Rep. 236, 67 Pac. 892; *State v. Marshall*, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; 1 Pom. Eq. Jur. § 458; *Story, Eq. Jur.* § 1326; *State v. McBride*, 76 Ala. 51; *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

Mr. E. V. Hughston also for appellees.

Grubb, District Judge, delivered the opinion of the court:

This is an appeal from a final decree, dismissing appellant's bill of complaint, which was filed to cancel a bond executed by appellant as surety in favor of Leflore county, in the state of Mississippi, a municipal corporation, appellee, and also by the Itta Bena Banking & Trust Company, as principal, and granting to appellee Leflore county relief on its cross bill, which sought the enforcement of the bond against the appellant and its codefendant, the Itta Bena Banking & Trust Company. The Itta Bena Banking & Trust Company had acted as depository of the public funds of Leflore county, under a designation claimed by appellant to have been void because its selection was by a bare quorum of the board of supervisors, one of whom was incapacitated to act because he was a director and stockholder of the Itta Bena Banking & Trust Company.

It was called to the attention of

the court, upon the hearing of the appeal, that the Itta Bena Banking & Trust Company had not joined in the appeal, and that there had been no summons and severance as to it. This court has held, in the case of *The Bylands*, 145 C. C. A. 289, 231 Fed. 101, that the failure of a codefendant, where the judgment is joint, to join in the appeal, in the absence of a summons and severance, was fatal to the jurisdiction of the court, and would be noticed by it, though no motion to dismiss the appeal had been made, following the case of *Estis v. Trabue*, 128 U. S. 225, 32 L. ed. 437, 9 Sup. Ct. Rep. 58. In that case, however, the Supreme Court stated that the rule would not apply if the judgment or decree was distributive, so that it could be regarded "as containing a separate judgment against the claimants and another separate judgment against the sureties." Judgments and decrees, under the law of Mississippi, are joint and several, and not merely joint.

It has also been held that, on proper application, the writ of error or appeal may be amended by the insertion of the omitted parties. *Inland Seaboard Coasting Co. v. Tolson*, 136 U. S. 572, 34 L. ed. 539, 10 Sup. Ct. Rep. 1063; *The Mary B. Curtis*, 162 C. C. A. 181, 250 Fed. 9; *The Seguranca*, 162 C. C. A. 191, 250 Fed. 19. In the case of *Winters v. United States*, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207, the Supreme Court, speaking of a case in which five of the defendants, who had defaulted, were not joined in the appeal of other defendants, who had answered and defended the bill, said: "The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established. But the rule only applies to joint judgments or decrees. In other words, when the interest of a defendant is separate from that of

other defendants, he may appeal without them."

The Supreme Court held that the default of the defendants, who did not join in the appeal, separated their interest from that of the defendants who answered and defended the bill, and, for that reason, excused the appellant from joining them in the appeal. The Supreme Court in that case said: "Joinder in one suit did not necessarily identify them. Besides, the defendants other than appellants defaulted. A decree pro confesso was entered against them, and thereafter, according to Equity Rule 19 [29 Sup. Ct. Rep. xxvii.], the cause was required to proceed ex parte and the matter of the bill decreed by the court. *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788. The decree was in due course made absolute, and, granting that it might have been appealed from by the defaulting defendants, they would have been, as said in *Thomson v. Wooster*, absolutely barred and precluded from questioning its correctness, unless on the face of the bill it appeared manifest that it was erroneous and improperly granted. Their rights, therefore, were entirely different from those of the appellants: they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights, and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied, and we proceed to the merits."

In the case of *Orleans-Kenner Electric R. Co. v. Dunbar*, 134 C. C. A. 152, 218 Fed. 344, this court said, in overruling a motion to dismiss an appeal for nonjoinder of appellants: "The interest of the railway company which was affected by the decree rendered was so separate and distinct from that of the other defendant that the former is entitled to maintain an appeal in which the

latter does not join. Obviously, the pecuniary or proprietary interest acquired or claimed by the grantee of such a privilege is very different from that of the public governmental body which undertook to confer the privilege. . . . The beneficial proprietary interest which the latter has in the privilege which it claims to have acquired entitles it to maintain an appeal from a judgment or decree adversely affecting its interest, though the official body which undertook to confer the privilege, and which also was a party defendant to the cause, does not join in the appeal. Where the respective interests of several defendants, which are affected by a judgment or decree against all of them, are separate and different, one of them may appeal without joining the others."

In this case the Itta Bena Banking & Trust Company answered appellant's original bill of complaint by denying the facts stated in it, and that appellant was entitled to the relief asked in it; i. e., the cancellation of the bond. There was, therefore, no identity of interest between appellant and the Itta Bena Banking & Trust Company in the subject-matter of the decree upon the original bill. The Itta Bena Banking & Trust Company did not answer or defend the cross bill of the appellee Leflore county, and was in default upon the cross bill. There was nothing, therefore, in common between its position and that of appellant, even upon the decree upon the cross bill, for it had arrayed itself on the other side of the litigation from appellant. It was not, therefore, necessary that it be joined in the appeal, or a severance had as to it.

The question on the merits of the appeal is whether the invalidity of the proceeding through which the Itta Bena Banking & Trust Company was selected as a depository for the funds of Leflore county avoided the bond executed by appellant as surety, for the purpose of securing the funds of the county de-

posited with the bank. It may be conceded that the appointment was void, and that the interested supervisor, whose vote, was necessary to the designation, was guilty of an offense in casting his vote, according to the Constitution and laws of the state of Mississippi. It is, nevertheless, undisputed that the depository was commissioned, entered upon the discharge of its duties, and received funds of the county under color of its office, which it failed to account for. It was enabled

Principal and surety—bonds of county depository—effect of invalid designation of depository.

to do these things by virtue of the bond which the appellant, as surety, had executed with it. But for the filing of the bond, it could neither have been commissioned as depository nor received the county's funds in that capacity. In view of these undisputed facts, we think the appellant cannot assert, as against the county, the invalidity of the appointment of the depository and of the fidelity bond; this, not merely because the bond recited the appointment, but because, by reason of the execution of it, and its delivery to the county, in consideration of a premium paid to the appellant, the loss of the funds deposited was brought about. We think the weight of reason and authorities supports this conclusion. Of the many cases so holding we cite and quote from one only. In the case of *United States v. Maurice*, 2 Brock. 96, Fed. Cas. No. 15,747, Chief Justice Marshall said: "Admitting the appointment to be irregular,—to be contrary to the law and its policy,—what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the payment of money

received under them? Had this subject been brought before the legislature, and the opinion be there entertained that such appointments were illegal, what would have been the probable course? The Secretary of War might have been censured; an attempt might have been authorized to make him ultimately responsible for the money advanced under the illegal appointment; but is it credible that the bond would be declared void? Would this have been the policy of those who make the law? Let the course of Congress in another case answer this question. It is declared to be unlawful for any member of Congress to be concerned in any contract made on the part of the United States, and all such contracts are declared to be void. What is the consequence of violating this law, and making a contract against its express provisions? A fine is imposed on the violator, but does he keep the money received under the contract? Far from it. The law directs that the money so received shall be forthwith repaid, and, in case of refusal or delay, 'every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted by law, for the recovery of any such sum or sums of money advanced as aforesaid.' If then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose."

We conclude that the district court correctly entered a decree dismissing the original bill, and in favor of the appellee on its cross bill in some amount. The penalty of the bond was \$15,000. The statute of Mississippi (Miss. Laws 1912, § 10, chap. 194), provides that the board of supervisors is authorized to employ counsel to enforce the payment and collection of funds deposited under its authority, and to charge such counsel fees against the depository, and, in addition thereto, that the "deposi-

tory shall be liable for damages at the rate of 1 per cent per month for any delay in paying over any county funds when lawfully demanded, and the bond of any depository shall be liable for said expenses and damages." The district judge awarded damages by way of delay, and counsel fees, in excess of the penalty of the bond and legal interest on it from the date the liability was incurred, upon the theory that the penalty and counsel fees were, by the statute, inflicted primarily upon the surety, as well as upon the depository. We think the statute imposes damages by way of penalty for delay, —liability in and counsel fees for excess of penalty of bond. collection, primarily

only upon the depository, and not upon the surety. The defaults punished by the statute are those of the depository alone, by the very terms of the statute, and the damages and counsel fees are imposed upon the depository, and it alone.

The statute, however, makes the bond of the depository stand as security for such damages and counsel fees, just as it does for the moneys deposited and unaccounted for. Clearly, the total liability for the acts of the depository secured by the bond, and recoverable from the surety, cannot exceed the penalty of the bond. We think, therefore, the district court erred in awarding damages and counsel fees which, together with the moneys deposited and lost, exceeded the penalty of the bond and legal interest from date of accrual of liability. We think the proper rule to be applied would limit the entire damages for which the surety was liable to the appellee for the defaults of his principal, to the amount of the penalty of the bond. If the surety failed to pay the amount of the liability when it was incurred, the utmost for which it could be held liable for its own delay, as distinguished from that of its principal, the depository, would be interest at the legal rate from the date the liability was incurred (in this

case May 28, 1913) until the rendition of the decree, upon an amount not in excess of the penalty of the bond.

We think it was competent for the Mississippi legislature to provide that public depositors should be liable, in case of default, for penalties for delay, and for counsel fees. The terms of the statute in this respect enter into the contract between the county and the depository. The depository was free to accept or reject this added liability. For a like reason it was competent for the legislature to provide that the depository's bond should secure the penalties and counsel fees to

—Liability for
penalty and
counsel fees.

the extent of the
penalty of the bond.

The surety accepted the added responsibility voluntarily, by executing the bond with knowledge of the terms of the statute. *Fidelity & D. Co. v. Wilkinson County*, 109 Miss. 879, 69 So. 865; *Fidelity Mut. L. Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

The refusal of the depository to pay the warrants of the appellees and the closing of its bank excused a demand on the depository. *Fidelity & D. Co. v. Wilkinson County*, 109 Miss. 879, 69 So. 865. It

Depository—
necessity of
demand for
funds.

was, therefore, liable for the statutory penalty and counsel fees, and as the

counsel fees alone, in addition to the moneys deposited and unaccounted for, exceeded the penalty of the bond, the entire penalty of the bond

was a liability of the depository secured by the bond on which appellant was surety. The cross bill averred the employment of counsel by the county, and this averment was not put in issue or denied by appellant, and required no proof to sustain it.

Evidence of the reasonableness of counsel fee was not objected to by appellant, when offered by the appellee. It could have been material only in the event the employment of counsel was authorized, and failure of appellant to object to it constituted a tacit admission of authority.

We think the decree of the District Court, as far as it related to appellant, was erroneous in amount only, and should have been for the sum of \$13,636.13, with interest thereon at the rate of 5½ per cent, the stipulated rate before default, from March 31, 1913, until May 28, 1913, the date of default, and thereafter, and until the decree is finally rendered, at the rate of 6 per cent, the legal rate in Mississippi, and that there should be added to the amount and interest so calculated for counsel fees the sum of \$1,363.87—the difference between the penalty of the bond and the amount of moneys deposited and unaccounted for. No interest before final decree is to be allowed upon the counsel fees.

The decree is reversed, and cause remanded, with directions to enter a decree conformably to this opinion; and it is so ordered.

ANNOTATION.

. Invalidity of designation of officer, fiduciary or depository as affecting liability on bond.

I. Scope of note, 274.

II. Officer or fiduciary, 275.

III. Depository, 276.

I. Scope of note.

This annotation reviews the cases discussing the liability of the obligors on the bond of a public officer,

fiduciary, or depository, where the appointment or designation of the principal is invalid. It excludes the estoppel of the obligors, by recitals in the bond, to deny the validity of the appointment or designation, and also excludes the liability on the

bond of an elected public officer as affected by the invalidity of his election.

II. Officer or fiduciary.

The general rule is that the sureties on a bond given by a designated officer or fiduciary, to enable him to exercise the functions of his office, will not be relieved from liability on the bond because of the invalidity of his appointment.

United States. — *United States v. Maurice* (1823) 2 Brock, 96, Fed. Cas. No. 15,747.

Alabama. — See *Corbitt v. Carrol* (1874) 50 Ala. 315.

Georgia. — *Griffin v. Collins* (1904) 122 Ga. 102, 49 S. E. 827.

Indiana. — Compare *Olds v. State* (1841) 6 Blackf. 91.

Kentucky. — *McChord v. Fisher* (1852) 13 B. Mon. 193; *Com. v. Teal* (1853) 14 B. Mon. 29.

Louisiana. — See *Macready v. Schenck* (1889) 41 La. Ann. 456, 6 So. 517.

Mississippi. — *Taylor v. State* (1875) 51 Miss. 79.

North Carolina. — *Iredell v. Barbee* (1848) 31 N. C. (9 Ired. L.) 250; *Reid v. Humphreys* (1859) 52 N. C. (7 Jones, L.) 258.

Pennsylvania. — *Doner's Estate* (1893) 156 Pa. 301, 27 Atl. 42; *McConomy's Estate* (1895) 170 Pa. 140, 32 Atl. 608.

Virginia. — *Cecil v. Early* (1853) 10 Gratt. 198.

Thus, in *United States v. Maurice* (Fed.) supra, it appeared that the defendant executed a bond conditioned to reimburse the government in a certain sum, in case of the failure of an officer, who had been appointed by the Secretary of War, to discharge his duties. The officer failed to account for a certain sum belonging to the government, which had been received by him, and in an action on the bond the defendant contended that he was not liable, as the appointment to the office was void. It was held that, although the appointment was irregular, the defendant was nevertheless liable, since the bond was valid as a contract to secure the

performance of the duties of the office.

The same rule was applied in *Iredell v. Barbee* (N. C.) supra, wherein it appeared that a bond was given by a guardian who had been illegally appointed.

See to the same effect, *Griffin v. Collins* (Ga.) and *Doner's Estate* (Pa.) supra. In the case first cited the court said: "As to the sureties, their liability is determined by the Civil Code, § 2554, where it is provided that even if the appointment of the guardian, for any cause, is declared void, they shall nevertheless be responsible on the bond for any property which may have been received by him by virtue of his appointment as guardian. It is idle, therefore, to discuss the authority of the ordinary to appoint a guardian for Harriet A. Lane as affecting the liability of the obligors of the bond now sued on."

So, in *Reid v. Humphreys* (N. C.) supra, an action on a bond purporting to be a constable's bond, the court said: "Public officers or agents who are not such 'de jure' by reason of a want of authority in the appointing power or defect in the mode of appointment, but who have acted in the office under such defective appointment, are precluded from alleging the informalities as a defense for misconduct. Neither can the sureties, who have voluntarily joined him in a bond for the performance of his duties, and put him forward as an authorized officer, allege such informalities."

Likewise, in *Com. v. Teal* (Ky.) supra, it was held that, although the appointment of a constable was void, nevertheless, where he gave a bond and incurred liability thereunder, his sureties were liable on the bond as a common-law bond.

In *Taylor v. State* (Miss.) supra, it was held that the sureties on the bond of a tax collector, who was illegally appointed, could be held liable where he failed to pay over money collected by him as required by law, although the bond was given voluntarily.

The same rule was applied in *Mc-*

Chord v. Fisher (Ky.) *supra*, wherein it was held that, although the appointment of an administrator was void, yet a bond given by him was binding on him and his sureties, as to the estate which came into his hands by virtue of the appointment.

In *Cecil v. Early* (Va.) *supra*, it was held that the official bond of a person who had been appointed and acted as deputy sheriff was not avoided by the fact that the deputy had not taken the several oaths, etc., as required by the state.

So, in the case of *McConomy's Estate* (Pa.) *supra*, it was held that the sureties on a bond given by a person who had been appointed trustee of an estate would not be relieved from liability on the bond because the trustee had been appointed by a court which had no jurisdiction.

But in *Olds v. State* (Ind.) *supra*, it was held that the sureties on the bond of a constable could not be held liable for a default of the constable, where the appointment was made by a justice of the peace at a time when there was no vacancy to fill, and as a result the appointment and the bond were both void.

III. Depository.

The sureties on an official bond given by a designated depository, who receives and holds public funds, will not be relieved from liability because of the invalidity of the designation of the depository. *Buhrer v. Baldwin* (1904) 137 Mich. 263, 100 N. W. 468; *Meeker County v. Butler* (1879) 25 Minn. 363; *Hennepin County v. State Bank* (1896) 64 Minn. 180, 66 N. W. 143; *Henry County v. Salmon* (1907) 201 Mo. 136, 100 S. W. 20; *Western Casualty & G. Ins. Co. v. Muskogee County* (1916) 60 Okla. 140, L.R.A. 1917B, 977, 159 Pac. 655. See also *Snattinger v. Topeka* (1909) 80 Kan. 341, 102 Pac. 508. And see the reported case (*NATIONAL SURETY CO. v. LEFLORE COUNTY*, *ante*, 269).

Thus, in *Hennepin County v. State Bank* (1896) 64 Minn. 180, 66 N. W. 143, it appeared that a bank was designated as a depository of the

county funds by the board of county commissioners, and not, as the statute required, by the board of auditors. The county funds were deposited pursuant to the designation, and subsequently the bank defaulted in payment. In an action on the bond executed by the bank, conditioned on the proper fulfilment of its duty as depository, the sureties defended on the ground that the designation was invalid. It was held that, although the designation of the bank was absolutely void, the sureties were liable, the court saying: "Public interests would be seriously jeopardized if the sureties upon a county depository bond could exonerate themselves from liability by showing that he was not such *de jure*. It is true, the condition of the bond is that, if the principal shall be designated a depository pursuant to the statute, the sureties shall be liable for its default; but the regularity or legality of the designation is not of the substance of the condition, for its substance is that, if the funds of the county are deposited with the principal as a depository, it shall pay over the money on demand."

So, in *Meeker County v. Butler* (1879) 25 Minn. 363, an action against the surety on a bond executed by the defendant as a depository, the court said: "If Butler [defendant] has been duly designated as such depository in the manner provided by law, his sureties are clearly liable for any breach in the condition of the bond; and if he has not been so duly designated, they are equally liable, because they are, as against the public, i. e., the county, estopped to deny such designation, by the consideration that to permit such denial would be to allow them to take advantage of their own wrong in unlawfully getting possession of the county moneys."

Likewise, in the reported case (*NATIONAL SURETY CO. v. LEFLORE COUNTY*), the sureties are held liable on the official bond of a depository, although the designation of the depository was void. See to the same effect, *Western Casualty & G. Ins. Co. v. Muskogee County* (Okla.) *supra*.

In *Henry County v. Salmon* (1907) 201 Mo. 136, 100 S. W. 20, it was held that the sureties were liable on a bond given by a banker, which was conditioned on the performance of his duty as county depository, although the county judge made no preliminary order designating the banker as depository, as was required by a statute. The court said: "By signing and delivering the bond in suit the sureties intended Salmon & Salmon should be county depository. That act enabled them to get hold of the county moneys. Under such conditions it becomes immaterial whether there was any formal order designating Salmon & Salmon county depository. Such order

was not intended for the benefit of the sureties; it was no concern of theirs. Its office was to give authority to the depository to demand the county funds from the treasurer, and its force is spent in that direction. . . . The engagement of these sureties was to stand sponsor for Salmon & Salmon—to answer for their default."

And see *Burher v. Baldwin* (1904) 137 Mich. 263, 100 N. W. 468, wherein it was held that a surety who guaranteed the payment of county funds to be deposited in an unincorporated bank, was liable, although the contract of the county board of auditors to deposit in such a bank was prohibited by statute. L. W. B.

ED A. SAWYER et al., Appts.,

v.

PABST BREWING COMPANY.

Arizona Supreme Court—May 27, 1921.

(— Ariz. —, 198 Pac. 118.)

Corporation — doing business through dormant corporation — liability.

1. Persons who attempt to do business under the guise of a dormant corporation, paying in subscriptions to capital stock by consent of the one holding the office of president and treasurer with the expectation that the corporation will be reorganized, are not liable as partners for its debts, although no reorganization is effected.

[See note on this question beginning on page 282.]

— incomplete organization — liability as partners.

2. Persons attempting to do business as a corporation are not liable as partners if the acts done toward the organization of the corporation are sufficient to constitute it a corporation de facto.

[See 7 R. C. L. 352; 2 R. C. L. Supp. 366.]

— dealing with corporation — estoppel.

3. One who transfers an account for supplies sold from an individual to a corporation with capital stock much in excess of the stock of goods which the individual had on hand, and continues to do business with the corporation until it becomes insolvent, cannot hold the stockholders liable as partners.

[See 7 R. C. L. 105, 352; 2 R. C. L. Supp. 297.]

APPEAL by defendants from a judgment of the Superior Court for Maricopa County (Gibbons, J.) in favor of plaintiff in an action brought to recover a balance alleged to be due upon an account for supplies alleged to have been sold and delivered by plaintiff to defendants. *Modified.*

Statement by Ross, Ch. J.:

The Pabst Brewing Company sued the Arizona Mercantile Company, alleging it to be a partnership consisting of Sawyer, Olney, and Wolpe. The Mercantile Company and Wolpe defaulted. Defendants Sawyer and Olney joined in an answer to the complaint, in which they alleged that the goods for the value of which plaintiff sued were sold and delivered to the Arizona Mercantile Company, a duly organized and existing corporation doing business in Arizona. They also alleged that they were not partners with the Mercantile Company, or with Wolpe; that they had, at the special insistence and request of the Mercantile Company and its president, Wolpe, made, from time to time, advances to the Mercantile Company for the purpose of carrying on its business, and, to the extent of such advances, were creditors of such Mercantile Company.

The case was tried before a jury, which found the issues in favor of the plaintiff, and thereafter judgment was entered thereon. At the close of the evidence, both plaintiff and defendants asked for an instructed verdict. The defendants assign as error the refusal of the court to instruct the jury to return such verdict, and also the giving of certain instructions.

The facts, briefly stated, are: Defendant Wolpe, prior to April, 1917, had been engaged in the selling in Arizona of a drink known as "Pablo," which he had bought from the plaintiff. About that time he solicited the other defendants to join him in the business of buying and selling soft drinks, including "Pablo," to which they consented. It was agreed among them that their operations would be carried on by a corporation. They went together to the office of Mr. George S. Stoneman, a practising attorney of Phoenix, and submitted to him the matter of making proper arrangements, and while in his office Wolpe suggested that he was president and treasurer of the Arizona Mercantile

Company, an already organized and existing corporation, and it was thereupon mutually agreed that they would take over that corporation and carry on their business enterprise through it. There was some discussion as to the shares that each of the parties would receive, and how the business was to be managed. Wolpe was to take to Stoneman's office the minutes and by-laws of the Arizona Mercantile Company, and a meeting of the stockholders was to be arranged for the purpose of reorganization. Stoneman advised them that they could not issue stock or elect a new board of directors until a meeting of the stockholders had been called, and that he would attend to the issuing of the stock to the three of them in proper proportions as soon as such meeting was had. They were advised by Stoneman that they could conduct the business under the name of the Arizona Mercantile Company pending the reorganization, although, as he says, "I expressed some disapproval." The Arizona Mercantile Company had theretofore been engaged in the wholesale liquor business under the management and control of Wolpe, who was its president and treasurer. It had liquidated its business, and at the time had no assets and owed no debts. At this meeting it was definitely settled that defendants Sawyer and Olney would invest in the enterprise \$1,500 each, and that Wolpe would put into the concern whatever stock he had on hand, estimated to be worth \$1,500 or \$1,600, and that stock of the corporation would be issued to them later on. Sawyer and Olney thereupon deposited in the bank to the credit of the Arizona Mercantile Company \$1,500 each. The business was thereafter conducted under the management of Wolpe in the name of the Arizona Mercantile Company. In that name it bought goods from plaintiff from April, 1917, to September, valued at \$12,128, and paid it all except \$1,212.80. The corporation was not reor-

ganized, and no certificates of stock were ever issued to defendants, Sawyer, Olney, or Wolpe. The plaintiff knew no one in its dealings except the Mercantile Company and Wolpe, and did not learn of Sawyer's or Olney's connection with the business until sometime in August, when it discovered that the Mercantile Company was in failing condition. When this fact became known, Olney, who was on the ground, took steps, along with an agent of plaintiff, in investigating, collecting, and conserving the assets of the concern, and it is in evidence that he on one occasion stated that he, Sawyer, and Wolpe were partners in the soft drink business. Wolpe owned or had in his name one share of stock of the par value of \$100. There were outstanding, besides the Wolpe share, two other shares. Wolpe had been in charge of and controlled the Arizona Mercantile Company for some seven years before the soft drink business started. While it appears that the Arizona Mercantile Company was a subsidiary corporation to Melczar Brothers, who had formerly carried on business in Phoenix, Wolpe testified he was in fact the owner of the Mercantile Company. It is in evidence that Wolpe, Olney, and Sawyer never intended to form a partnership, but believed they were operating as a corporation.

Messrs. Baker & Whitney, for appellants:

Plaintiff can recover only upon one theory; that is, upon the ground of partnership.

Santa Fé, P. & P. R. Co. v. Hurley, 4 *Ariz.* 258, 36 *Pac.* 216.

The evidence wholly fails to establish any partnership between the appellants and I. F. Wolpe.

Meehan v. Valentine, 145 *U. S.* 611, 36 *L. ed.* 835, 12 *Sup. Ct. Rep.* 972; 1 *Rowley, Partn. p.* 25; 20 *R. C. L.* 801; *Cudahy Packing Co. v. Hibou*, 18 *L.R.A.(N.S.)* 975, and note, 92 *Miss.* 234, 46 *So.* 78.

In the absence of an agreement to become partners the appellants cannot be held liable as such, unless they held themselves out as partners in the business; and a partnership is not the

necessary legal consequence of an abortive attempt to form a corporation.

Owensboro Wagon Co. v. Bliss, 132 *Ala.* 253, 90 *Am. St. Rep.* 907, 31 *So.* 81; *Richards v. Minnesota Sav. Bank*, 75 *Minn.* 196, 77 *N. W.* 822; *United States Wood Preserving Co. v. Lawrence*, 89 *Conn.* 633, 95 *Atl.* 8; *Rutherford v. Hill*, 17 *L.R.A.* 549, and note, 22 *Or.* 218, 29 *Am. St. Rep.* 596, 29 *Pac.* 546; *Gartside Coal Co. v. Maxwell*, 22 *Fed.* 197; 20 *R. C. L.* 844.

Plaintiff was estopped to deny the corporate existence of the Arizona Mercantile Company, and was estopped from asserting any partnership liability.

Lynch v. Perryman, 29 *Okla.* 615, 119 *Pac.* 229, *Ann. Cas.* 1913A, 1065; *Bradley v. Reppell*, 138 *Mo.* 545, 54 *Am. St. Rep.* 685, 32 *S. W.* 645, 34 *S. W.* 841; *Harrill v. Davis*, 22 *L.R.A.* (N.S.) 1153, 94 *C. C. A.* 47, 168 *Fed.* 187; *Gartside Coal Co. v. Maxwell*, 22 *Fed.* 197; 1 *Cook, Corp.* 6th ed. p. 663; *Allen v. Hopkins*, 62 *Kan.* 175, 61 *Pac.* 750; *Owensboro Wagon Co. v. Bliss*, *supra*.

Messrs. Townsend, Stockton, & Drake, for appellee:

Where there is not even a colorable organization, and business associates are common proprietors of a business, the associates are liable as partners on all contracts impliedly authorized by them unless the party dealing with them is estopped to deny their corporate existence.

14 *C. J.* 200; *Cook, Corp.* 6th ed. § 233; 30 *Cyc.* 397; *Rowley, Partn.* § 240; 4 *Thomp. Corp.* 2d ed. § 47; *Bank of De Soto v. Reed*, 50 *Tex. Civ. App.* 102, 109 *S. W.* 256; *Cummings Mfg. Co. v. Smith*, 113 *Me.* 347, 93 *Atl.* 968; *Ward-Truitt Co. v. Bryan*, 144 *Ga.* 769, 87 *S. E.* 1037; *Forbes v. Whittemore*, 62 *Ark.* 229, 35 *S. W.* 223; *Rutherford v. Hill*, 22 *Or.* 218, 17 *L.R.A.* 549, 29 *Am. St. Rep.* 596, 29 *Pac.* 546.

Plaintiff is not estopped from denying the corporate existence of the defendants.

14 *C. J.* 243; *Clark & M. Corp.* 281; *Doyle v. Mizner*, 42 *Mich.* 332, 3 *N. W.* 968; *Harrill v. Davis*, 22 *L.R.A.* (N.S.) 1153, 94 *C. C. A.* 47, 168 *Fed.* 187.

Ross, Ch. J., delivered the opinion of the court:

It is the contention of defendants on this appeal that the above facts clearly show that they were not a

partnership, and that the court, therefore, erred in its refusal, at the close of the evidence, to instruct the jury to return a verdict in their favor.

"As to ability to transact business, corporations may be divided into three classes: First, *de jure* corporations, or those where the organization is entirely and legally perfected; second, *de facto* corporations, where there has been a bona fide attempt to organize a corporation and a user of corporate powers, but the organization is defective; third, corporations not sufficiently organized to come within the latter class." *Alder Slope Ditch Co. v. Moonshine Ditch Co.* 90 Or. 385, 176 Pac. 593.

In cases where parties associated together to carry on a business have been sought to be held as partners, notwithstanding they have thought themselves to be a corporation, the decisive question is always as to whether what they have done, or caused to be done, toward organization, is sufficient to constitute them a corporation *de facto* or *de jure*. The courts are not agreed as to what acts will constitute a *de facto* corporation, largely, we think, because the incorporating laws of the states differ; but they unite in agreeing, when the acts done, although falling short of constituting a *de jure* corporation, are sufficient to constitute a *de facto* corporation, the associates are not individually liable

on contracts entered into by the corporation. In the present case we are not bothered with

**Corporation—
incomplete
organization—
liability as
partners.**

the question as to whether the Arizona Mercantile Company was a *de facto* or a *de jure* corporation. It is conceded by both parties to be of the latter character. It was properly and legally chartered, fully organized, and, under its articles of incorporation, empowered to carry on the business undertaken; and, had the board of directors or the stockholders authorized the stock subscriptions that its president and

treasurer accepted, the transaction could not be questioned. Appellee asserts that what was done did not effect a merging of the defendants into the dormant corporation; that there was not even a *de facto* or colorable reorganization, and the defendants merely used the Arizona Mercantile Company as a tradename in anticipation of gaining control of the dormant corporation.

As we gather it, the dominant idea in this proposition is that, because there was no reorganization of the Arizona Mercantile Company by the defendants, they had no right to do their business under that name as a corporation. It cannot reasonably and fairly be said that the defendants arbitrarily assumed to use the name of the Arizona Mercantile Company, for the reason that its president and treasurer, who seemed to be its alter ego, and who at least had been in control of it, assumed the right and authority to accept subscriptions of stock from the defendants, and did on behalf of the corporation receive from them \$3,000, which, together with his contribution, constituted the entire paid-in capital of the company.

Wolpe was not a stranger to the Mercantile Company. He was its chief executive officer, and, as its treasurer, held its purse strings. If he did not own it, as he claimed, his relation to it was of such an intimate and commanding nature as to cause Sawyer, Olney, and Wolpe, under the advice of their lawyer, to assume to carry on the business in its name pending a reorganization and the issuing of their stock. They did not adopt the name and carry on their business in it with the intention of later incorporating, as is common in so many of the cases cited by plaintiff. On the contrary, they, in good faith and under legal advice, paid hard cash into an existing body corporate, and in its name thereafter the business was transacted. They may have expected—in fact, we know they expected—to reorganize the Arizona Mercantile Company; but their failure to do so

did not make it any the less a de jure corporation, and did not in the least mislead the plaintiff.

Whether the company was regularly, or in strict compliance with law, prepared to accept stock subscriptions and enter into the business of buying and selling soft drinks, or not, it unquestionably did so through the offices of its president and treasurer, and presumably with the acquiescence and consent of all of its officers and stockholders. In such circumstances, the corporation, having received the benefits

—doing business
through
dormant
corporation—
liability.

from the stock sale, would not be permitted to retain those benefits and repudiate its obligations thereunder. This, we think, is the universal rule. *Weathersby v. Texas & O. Lumber Co.* 7 A.L.R. 1440, and note at page 1446, 107 Tex. 474, 180 S. W. 735.

Our research, which has been somewhat extensive, has not brought to light, nor has counsel's industry called our attention to, any cases wherein the facts were as they are in the present case. *Wesco Supply Co. v. Smith*, 134 Ark. 23, 203 S. W. 6, we think is of sufficient similarity to be referred to as authority. In that case the Arkansas Public Service Company was organized by U. S. Bratton and others, Bratton being the principal owner of the proposed corporation, and its president. He sold practically one-half interest in the concern for \$20,500, to one Smith, to be paid at various times thereafter. Smith paid in part of the purchase money, and took control of and managed the business for a while. For debts contracted during this time, the Arkansas Public Service Company gave its notes to the Wesco Supply Company. The service company becoming insolvent, the supply company sued Bratton and Smith as partners. The lower court gave judgment in favor of Smith, and, upon appeal, the judgment was affirmed; the court using this language: "The undisputed facts here

show that appellant dealt with the service company as a corporation. Such being the case, there is no good reason why the appellant should be permitted to hold the appellee individually liable as a partner for the debts of the service company. Appellant did not deal with the appellee, but dealt with the corporation, and appellant would get all that it was entitled to in justice, according to its contract, if it maintained a liability against the corporation or its individual stockholders. Appellee, under the evidence, was certainly not one of the original incorporators, and did not undertake by his supposed purchase of stock to become liable as a partner for the debts of the corporation, nor assume any other liability than would be incumbent upon him as a shareholder in proportion to his interest.

. . . But neither does it follow that, because the incorporators or the individual stockholders might be liable under a given state of facts, one who had contracted for the purchase of stock, but to whom no stock in fact, has been transferred, would also be liable as a partner. Here the undisputed evidence shows that Smith was not an original incorporator, and that he had in fact only entered into a contract for the purchase of stock."

In the present case plaintiff had been selling its product to defendant Wolpe, and when the Arizona Mercantile Company took over the business plaintiff simply transferred its account from Wolpe to the Arizona Mercantile Company, with a \$4,500 or \$4,600 capital, as against the \$1,500 or \$1,600 stock of goods that Wolpe then had on hand. It had the benefit of this increased financial ability of its creditor, and dealt with it with absolutely no knowledge that defendants Sawyer and Olney were in any way at all identified with the corporation. It appears to us that, in equity, the plaintiff would secure all that it was entitled to, if the obligation sued upon be held to be

—dealing with
corporation—
estoppel.

that of the Arizona Mercantile Company, a corporation. If Olney stated on one occasion—and this he denies—that the business was a partnership, it would not make it so, if, under the facts, it was a corporation. The ordinary layman is hardly able to determine so involved and intricate a question, when lawyers so radically differ.

Appellee cites the case of *Bank of De Soto v. Reed*, 50 Tex. Civ. App. 102, 109 S. W. 256, as sustaining its position, but in that case the question involved was as to whether the proposed corporation was in fact a de facto corporation, and the court held that it was not under the laws of Texas. Appellee also relies upon *Forbes v. Whittemore*, 62 Ark. 229, 35 S. W. 223. In that case the purchasers of the Southwestern Arkansas College's real and personal property, after taking possession, contracted some debts and gave notes in the name of the Southwestern Arkansas College. It was held that the parties who purchased the property of the college were personally liable on the notes, and that the college was not. The court said these parties were not the agents of the college, or members of the college. "In their contract with it, each party preserved its individuality, neither being merged into the other."

And further observed that there was no organization of the purchasers into a corporation, that they were not a de facto corporation, and that the assumption of the name of the corporation did not constitute them a corporation, or give them the right to act in a corporate capacity. The facts in the case are not parallel to the facts of the present case, for several reasons; the principal one being that in the agreement it was stipulated the property should revert to the Southwestern Arkansas College, on default of payments as provided therein. The contract was not made by the president of the Southwestern Arkansas College, and did not purport to be for its benefit. On the contrary, it was an effort to charge its property without its consent and to its damage.

We conclude that the court erred in refusing to instruct the jury to return its verdict in favor of defendants Sawyer and Olney, upon their motion at the close of the evidence. The cause is therefore remanded, with directions that judgment be modified by striking out any recovery against defendants Sawyer and Olney.

Baker and McAlister, JJ., concur.

Petition for rehearing denied July 15, 1921.

ANNOTATION.

Personal liability of persons doing business in the name of a dormant corporation.

There is no direct authority other than the reported case (*SAWYER v. PABST BREWING Co.* ante, 277) upon the state of facts there involved, as to the liability of those doing business in the name of a dormant corporation. In *Cummings Mfg. Co. v. Smith* (1915) 113 Me. 347, 93 Atl. 968, persons (apparently directors) who became the owners of a mortgage upon the corporate property, and who upon its foreclosure became the purchasers, and after the expiration of the redemption were the absolute owners

of every item of property of which the corporation had been possessed, and during this time proceeded to do business in the name of the corporation, and contracted the whole account for which the suit was brought, except one item, were held liable to the person thus selling goods, as partners. The court says: "The defendants were the absolute owners of every conceivable item of property of which the F. J. Smith Company had been possessed. During this time they proceeded to do business in the name

of the F. J. Smith Company, as they had a right to do, and contracted the whole account for which the plaintiff brings this suit except one item. But doing business in its name did not alter the fact that this company was out of business, and was dead in law and in fact. . . . So far as financial responsibility was concerned, they might just as well have done business in the name of the F. J. Jones Company. But it is said although they owned the property they did not take possession of it, but continued the business in the name, and obtained credit on the responsibility, of the corporation, and that the plaintiff, having given credit upon this theory, should now be confined for redress to the corporation to which he gave credit. This might be true if the plaintiff had known or had been informed of the true condition of the corporation. But had it known that this company had been stripped of every vestige of property, and was utterly worthless, it may be fairly assumed that it would not have given any credit whatever. The case shows that the plaintiff believed it was giving credit to a going concern, possessed of the apparent assets and good will of the business, and acted upon this understanding. It follows that the plaintiff cannot as a matter of law, under those circumstances, be held to have given credit to the F. J. Smith Company, although its account is charged to that company. . . . The remaining question is, In what capacity was the credit obtained by the defendants as partners or tenants in common? The broadest definition of partnership should be invoked to cover the relation of the defendants to the plaintiff in this case. At least technicality of definition should not be allowed to defeat the plaintiff's suit. It should be observed that a partnership is not what the associated parties say it is, nor what they think it is, nor does it depend upon any particular agreement, but is an inference of law from existing facts. . . . Therefore, what the defendants intended or thought does not necessarily control. The question is

whether the plaintiff, when it discovered the true state of affairs, was authorized to regard the relation of the defendants to the credit it had given as that of a partnership in this particular case." It further appears in this case that, after the goods had been obtained, these, together with all the other property of the defunct corporation, were sold to a new corporation organized by the defendants. The fact that the defendants thus obtained possession of the goods is a determinative factor in the decision. On this point the court said: "There was a community of interest among the defendants. They had the benefit of the credit. They, not the corporation, had the benefit of the profits, if any. They sold them to themselves, by the vote of purchase. The inference of law is, in this particular transaction, that they were partners in obtaining the credit which they received from the plaintiff."

Cases passing upon the liability of those transacting business as a corporation after the expiration of the charter may be useful in this connection, and some are included, but no exhaustive discussion of these cases is attempted.

Where the stockholders of a corporation which had become extinct by the expiration of the time limited for its existence by its charter agreed to furnish, in proportion to the stock respectively owned by them, the necessary capital to carry on the business carried on by the corporation, and appointed one of their number as agent or superintendent for that purpose, the parties being entitled under the agreement to participate in the profits in proportion to their interest therein, and being liable in the same proportion, as between each other, for any loss that might be incurred, such parties are partners as to third persons. *National Union Bank v. Landon* (1871) 45 N. Y. 410. The argument was advanced in this case that, as the plaintiff did not know of the existence of the partnership at the time of discounting the drafts and notes sued upon, it could not recover against the members as partners. In

answer to this contention the court, admitting its truth, says: "He [the cashier of the plaintiff's bank] testified that the plaintiff had discounted paper for the corporation, and that he was unaware of its dissolution, and supposed that this was corporation paper. But this furnishes no answer to the claim of the plaintiff. The latter believed the paper to be that of the corporation from the fact that the firm did their business in the same name, but this did not affect the right of the plaintiff to proceed against the real makers of the note upon discovering who were transacting business under that name." It does not seem to have been contended in this case, however, that the liability was that of the corporation. The liability of the defendants as partners was sought to be avoided, on the theory that the relation of the defendants to each other was not that of partners, but that the transaction was a joint adventure merely, without interest in the profit and loss resulting therefrom; that the agreement entered into between the defendants defined the extent of the agent's powers, and that he could not bind them by any obligations made by him in which they did not all assent.

But in *Central City Sav. Bank v. Walker* (1876) 66 N. Y. 424, the stockholders in a corporation were held not liable as partners, where, after the expiration of the company's charter, its business was continued and conducted the same as before, by an agent who had theretofore managed and conducted it, in the name of the corporation, the agents being ignorant of the expiration of the charter, as were also the stockholders sued. The obligation sued upon was a note given for money borrowed after the expiration of the charter, for the use of, and to carry on the business of, the company. The court says: "The defendants did not hold themselves out as copartners; neither did they, by word or act, assent to the making of the note in suit, or to the transaction of any business in the name of the corporation in their behalf, or with knowledge that its legal existence had terminated. Some six months after

the expiration of the charter a dividend was paid to the defendants, as from the earnings of the corporation, by the check of the treasurer, as annual dividends had been paid in former years, but without notice to them that it was not paid from the earnings of the corporation, or that the corporation had ceased to exist; and there was no proof that it was paid from the earnings of the business transaction in the name of the company after the lapse of the twenty years from its organization. The claim to recover is based solely on the fact that the agent of the corporation, without any authority other than that conferred by resolution of the trustees, and under an appointment by them during the existence of the corporation, continued to carry on the business and contract debts, including that in controversy, in the name of the corporation, after the term for which it was created had expired."

The case of *National Union Bank v. Landon* (N. Y.) *supra*, is referred to, and is held to be distinguishable by the fact that in the *Landon* Case there was a special agreement between the stockholders, under which the business was conducted after the legal expiration of the charter, by which they made themselves partners in fact as well as in law. See *Wilson v. Brown* (1919) 107 Misc. 167, 175 N. Y. Supp. 688, affirmed in (1919) 190 App. Div. 926, 179 N. Y. Supp. 958.

In *Ewald Iron Co. v. Com.* (1910) 140 Ky. 692, 131 S. W. 774, (1911) 142 Ky. 465, 134 S. W. 481, a case involving the question whether the property of a corporation, which continued to do business after its charter had expired, should be taxed to the corporation or to the sole stockholder thereof, the court, after referring to the statute which provides that, when any corporation expires by the terms of the articles of incorporation, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose, says: "The statute provides that the corporation shall continue to act for the purpose of closing up its business, but for no other purpose. When, as in this case,

the corporation continues to act and carry on its business as before, taking no steps to close up after the articles of incorporation have expired, the stockholders are simply doing business as partners. They are personally liable for all debts made; and acts done are not the acts of the corporation, but the acts of the stockholders."

According to the court in *Wasson v. Boland* (1909) 136 Mo. App. 622, 118 S. W. 663, under the law as administered in Iowa, stockholders of a corporation which continued to do business after its charter had expired cannot be held as partners, in the absence of a statute imposing such liability.
W. A. E.

FIDELIA CRANE

v.

LEONARD, CROSSETTE, & RILEY et al., Plffs. in Certiorari.

Michigan Supreme Court—June 6, 1921.

(— Mich. —, 183 N. W. 204.)

Workmen's compensation — injury out of state — application of statute.

Where the provisions of a workmen's compensation act are optional the relation between master and servant is contractual, and, where the parties have accepted the provisions of the act, the right to compensation exists in cases of injury out of the state as well as in those arising within its borders, and it is immaterial that the statute restricts the right to compensation to such as is provided by this act, and provides that the hearing shall be held at the locality where the injury occurred.

[See note on this question beginning on page 292.]

CERTIORARI to the Industrial Accident Board to review its award to plaintiff in a proceeding by her under the Workmen's Compensation Act to recover compensation for the death of her husband. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Clark C. Coulter, for appellants:

The Michigan Workmen's Compensation Act is not extraterritorial in effect.

Mackin v. Detroit-Timkin Axle Co. 187 Mich. 8, 153 N. W. 49; *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482; *Andrejwski v. Wolverine Coal Co.* 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724, 6 N. C. C. A. 807; *Foley v. Detroit United R.* 190 Mich. 507, 157 N. W. 45; *Wilcox v. Clarage Foundry & Mfg. Co.* 199 Mich. 79, 165 N. W. 925; *Curtis v. Hayes Wheel Co.* 211 Mich. 260, 178 N. W. 675; *Margenovitch v. Newport Mining Co.* 213 Mich. 272, 181 N. W. 994; *Willis v. Oscar Daniels Co.* 200 Mich. 19, 166 N. W. 496, 16 N. C. C. A. 510; *Keyes-Davis Co. v. Alderdyce*, cited in 3 N.

C. C. A. 639, note; *Tomalin v. S. Pearson & Son*, 2 B. W. C. C. 1; *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; *Union Bridge & Constr. Co. v. Industrial Commission*, 287 Ill. 396, 122 N. E. 609.

Messrs. Griswold & Cook, for appellee:

Defendants' liability is not to be measured or determined by the place of the accident.

Anderson v. Miller Scrap Iron Co. 169 Wis. 106, 170 N. W. 275, 171 N. W. 935; *Grinnell v. Wilkinson*, 39 R. I. 447, L.R.A.1917B, 767, 98 Atl. 103, Ann. Cas. 1918B, 618; *Gooding v. Ott*, 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862; *State ex rel. Maryland Casualty Co. v. District Ct.* 140 Minn. 427, 168 N. W. 177; *State ex rel. Chambers v. District Ct.* 139 Minn. 205, 3 A.L.R. 1347, 166 N. W. 185; *Pierce v. Bekins*

Van & Storage Co. 185 Iowa, 1346, 172 N. W. 191; Barnhart v. American Concrete Steel Co. 227 N. Y. 531, 125 N. E. 675; Mackin v. Detroit-Timkin Axle Co. 187 Mich. 8, 153 N. W. 49; Matheson v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871.

Fellows, J., delivered the opinion of the court:

Plaintiff's husband, George M. Crane, was in the employ of defendant Leonard, Crossette, & Riley, an Ohio corporation authorized to do business in this state. It was engaged in buying and shipping produce, and operated at about forty points in Michigan, among the points being Greenville, where Mr. Crane was employed. It had elected to come under the Workmen's Compensation Act (Comp. Laws 1915, chap. 101), and defendant Southern Surety Company carried the risk. On December 11, 1919, the company shipped out three cars of potatoes, one to Chicago and the others to St. Louis. It was the custom of the company at that time of year to have an employee accompany the shipment, for the purpose of keeping up a fire in the cars to prevent the freezing of the potatoes. Mr. Crane was employed for this purpose. The car arrived in Chicago the following day. In the evening of December 13th, Mr. Crane was found unconscious in one of the cars with a badly crushed skull. He was hurried to a hospital, but died soon after. The evidence is convincing that he must have received his injury after the cars arrived in Chicago. The board awarded compensation upon the theory that the act applied, whether the death occurred within or without the state.

We, therefore, have submitted to us for the first time the question—and it is the only question in the case—of whether the employer who has elected to become subject to the Workmen's Compensation Act is liable, where the employee, who has also elected to become subject to the act, receives his injuries outside the state while in the course of the em-

ployment. The case has been ably briefed, and the labors of the court materially lightened by the research of counsel.

The contention of defendants' counsel that the act does not apply where the accident occurs outside the state finds support in the English cases. See Hicks v. Maxton, 1 B. W. C. C. 150; Tomalin v. S. Pearson & Son [1909] 2 K. B. 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477, 2 B. W. C. C. 1; Schwartz v. India-rubber, G. & Teleg. Works Co. [1912] 2 K. B. 299, 81 L. J. K. B. N. S. 780, [1912] W. N. 98, 106 L. T. N. S. 706, 28 Times L. R. 331, [1912] W. C. Rep. 190, 5 B. W. C. C. 390. These cases unequivocally hold that no liability exists where the accident occurs outside the British Empire.

Undoubtedly the earliest case in this country is Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60. This is a case of first impression so far as the rule in this country is concerned. In it the Massachusetts court followed the English holdings, and found insuperable difficulties in holding otherwise. We shall not attempt to distinguish this case from the holdings in other states where the same question has arisen, nor is there such a difference between the Massachusetts act and our own as to justify us in saying that it is not applicable. If we accept it as controlling authority, it would necessarily follow that defendants' contention must be sustained. That it has not been followed in many states, and that its doctrine has met much adverse criticism, will be demonstrated by an examination of the authorities to which we shall presently refer. Mr. Bradbury followed it in the first edition of his work (see Bradbury, Workmen's Comp. 1st ed. p. 44), but when the second edition was prepared he had modified his views (see 1 Bradbury, Workmen's Comp. 2d ed. pp. 50, 51), and in the third edition (see Bradbury, Workmen's Comp. 3d ed. p.

92), he said: "Therefore, now, as in the second edition of this work, partially receding from the position taken in the first edition of this work, although that position has been sustained by eminent authority, it is believed that the doctrine which must be established finally will be, in effect, that the law of the place where a contract of employment is made will govern the rights and liabilities of employees and employers to claim and to pay compensation."

That Mr. Bradbury was convinced that the weight of authority was against the Massachusetts holding, and that it should not be followed, is evidenced by a note prepared by him to the case of *Spratt v. Sweeney & G. Co.* 168 App. Div. 403, 153 N. Y. Supp. 505, found in 9 N. C. C. A. 918. After citing the *Gould Case* and early holdings of our board and the Wisconsin commission, he said: "Upon more mature deliberation, however, other courts came to a contrary conclusion. They held that, inasmuch as the liability of an employer to pay compensation for injury to an employee was essentially a contractual one under the Workmen's Compensation Acts, such statutes had extraterritorial effect, to the extent that where the employer and the employee were both residents of the state where the contract of employment was made, the law of that state would be applied, even though the accident happened without the state."

After considering some of the authorities, he continues: "If, however, a claim under a compensation act is based on a contract, either express or implied, then there is no more reason why such a claim should not be so decided in accordance with the law of the place where the contract is made, any more than there would be for a claim for wages in accordance with the law where the contract was made, even though the employee performed the services in several states."

The Illinois court also sustains the contention of defendants' counsel. *Union Bridge & Constr. Co. v. In-*

dustrial Commission, 287 Ill. 396, 122 N. E. 609. While it is true that by the title to the Illinois act (*Laws 1913*, p. 335) it is limited to "accidental injuries or deaths suffered . . . within the state," the court did not rest decision on this fact alone, but followed the doctrine of the *Gould Case*.

The supreme court of California in *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, L.R.A.1917E, 642, 162 Pac. 93, held that the act of that state did not cover accidents occurring outside the state. But the California act is a compulsory one—not optional, as is ours. This undoubtedly had much to do with the result in this case, which was disposed of on rehearing.

Mr. Honnold, treating of this subject (1 *Honnold, Workmen's Compensation*, § 8), says: "In view of the conflict of authority and differences between the various acts, it is difficult to formulate a precise rule relative to the extraterritorial operation of these laws; but it may be stated on the weight of authority that acts not construed to be contractual in character do not, in the absence of unequivocal language to the contrary, apply where the injury occurs outside the state, while, on the other hand, acts construed to be contractual protect one injured outside the state, where the contract of employment was made within the state and is governed by the laws of the state."

We shall now consider the decision of some of the states sustaining the contention of plaintiff's counsel. The gist of the later decisions is quite well stated by the supreme court of Colorado in *Industrial Commission v. Aetna L. Ins. Co.* 64 Colo. 480, 3 A.L.R. 1336, 174 Pac. 589, where this question was before that court. After considering the *Gould Case* and quoting from Bradbury's 2d edition, it is said:

"The later authorities in this country base the conclusion chiefly on the proposition that, under voluntary compensation statutes such as ours, the cause of action of petition-

er is *ex contractu*, and that *lex loci contractus* governs the construction of the contract and determines the legal obligations arising under it.

"The provisions of the Compensation Act are to be construed as written into the contract, and therefore a part of it."

The question has been before the courts of New Jersey on several occasions. In *Rounsaville v. Central R. Co.* 87 N. J. L. 371, 94 Atl. 392, it was said: "We are now dealing with the simpler question whether a New Jersey court will enforce a New Jersey contract according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident to the assured in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance."

In *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. 121, where the question was before the court, it was said: "It appears that there is an implied contract to compensate for injuries arising out of and in the course of the employment, and under it all other methods and rights to any other form of compensation are relinquished. The statute can have no extraterritorial effect, but it can require a contract to be made by two parties to a hiring that the contract shall have an extraterritorial effect. The contract is binding on the employee himself and upon the employer, and it is conclusively presumed that the parties have accepted the provisions of § 2 and have agreed to be bound thereby. The method of termination of the contract is provided for in ¶ 10. It would seem that the reasonable construction of the statute is that it writes into the contract of employment certain additional terms. The cause of action of petitioner is *ex contractu*. The *lex loci contractus* governs the construction of the contract and determines the legal obligations arising from it."

And in *Foley v. Home Rubber Co.* 89 N. J. L. 474, 99 Atl. 624, compensation was awarded for the death of an employee who went down with the *Lusitania* on his way to Europe in the master's service.

Plaintiff's contention is supported by *Kennerson v. Thames Towboat Co.* 89 Conn. 367, 94 Atl. 372. This is an exhaustive opinion. We shall not quote from it. It will be found in L.R.A.1916A, 436, accompanied by a note having reference to the authorities.

We shall not consider the earlier New York cases disposed of by courts other than the court of last resort, as the court of appeals of that state has had the question before it, and has determined it in accordance with plaintiff's contention in the case of *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888. It was there said: "The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and the employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for a disability or the death of the employee, as therein stated. The duty under the statute defines the terms of the contract."

The supreme court of Rhode Island fully considered the question in an exhaustive opinion in *Grinnell v. Wilkinson*, 39 R. I. 447, L.R.A. 1917D, 767, 98 Atl. 103, Ann. Cas. 1918B, 618, and concluded: "We are of the opinion that the reasoning of the cases above cited from New York, New Jersey, and Connecticut is quite applicable to the case at bar; that under the Workmen's Compensation Act of Rhode Island the relation of employer and employee is contractual, and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that on principle and in reason, and in view of the purpose, scope, and character of the act, it should be

construed and held to include injuries arising out of the state as well as those arising within it; and that the weight of authority upon acts similar to our own gives full support to our conclusion."

The question was before the supreme court of Iowa in *Pierce v. Bekins Van & Storage Co.* 185 Iowa, 1346, 172 N. W. 191. We quote quite extensively from what was there said:

"We hold that we are not precluded from finding that our own statute covers injuries sustained in another state because the act does not, in terms, declare that the statute shall have such effect, and that we may find it has such effect, because its language is broad enough to cover such injuries, and that to construe it as covering them effects the broad, beneficial object of the enactment.

"Our statute is confessedly elective. We are told that no distinction in construction is to be based upon whether the act is compulsory or elective. That is true as to some provisions of Compensation Acts. But that the statute is elective has controlling bearing on one thing that is most highly important. Where the statute is elective as to both employer and employee, payment of compensation is not the performance of a statute duty, but the performance of conditions in the contract of hiring, which conditions are in the contract by means of reading the Compensation Statute into the contract. . . . The entire structure of the Iowa act not only fails to prohibit such a contract, but, by being elective, creates a contractual relation under a contract providing for settlement on a standard fixed by the Iowa act. Such a contract is no more objectionable than one providing for a common-law arbitration. See *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886. Under such a contract, the employee could not refuse to obey if the master directed

him to leave the state to perform an act in the course of the employment. If he did obey, there is no reason why the master should be allowed to repudiate that part of the contract of employment which provided how compensation should be made if the servant suffered an injury while obeying this direction. Such a contract protects both, and defines the rights of both. The master is assured of the limitations of his liability. The servant is assured of definitely fixed compensation, mutually agreed upon as adequate, and that he will receive the same promptly, and without the vexation or expense of litigation.

We hold that the employee in this case has a valid contract, which allows him to recover compensation according to the terms of the statute for an injury suffered in Nebraska; that the case stands precisely as if it had been expressly contracted that, for an injury suffered outside of the state, the compensation due should be determined by the terms of the Iowa statute."

The West Virginia court was called upon to consider the question in *Gooding v. Ott*, 77 W. Va. 487, L.R.A.1916D, 637, 87 S. E. 862, where the court said: "A distinction has been noted in some of the authorities between cases arising under compulsory statutes, and those controlled by statute, as in New Jersey, and we think in this state, which are optional. Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside the state. But where, as in New Jersey and in this state, the statute makes acceptance optional, and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof, binding the parties, and enforceable in any jurisdiction the same as any other contract."

This case was followed in *Foughty v. Ott*, 80 W. Va. 88, 92 S. E. 143, 15 N. C. C. A. 919.

The supreme court of Minnesota in *State ex rel. Chambers v. District Ct.* 139 Minn. 205, 3 A.L.R. 1347, 166 N. W. 185, had this question before it. It called attention to the diversity of authorities, and tersely stated: "The weight of authority supports the view that under an elective act like ours, and with facts such as are present, an accidental injury, though it occurs outside the state, is compensable. This view we adopt."

The supreme court of Wisconsin considered the question in the very recent case of *Anderson v. Miller Scrap Iron Co.* 169 Wis. 106, 170 N. W. 275, 171 N. W. 935, and there said: "As has been said, the Workmen's Compensation Act is based upon the economic theory that it is in the interest of the general welfare that damages arising from injuries sustained by persons engaged in a particular industry shall be borne by that industry. The liability of the employer at common law was limited to cases where negligence could be established. Where negligence was established, the burden was borne in the first instance by the employer, who ordinarily had an opportunity to pass all or a part of the burden on. In cases where negligence could not be established, the injured employee bore the entire burden, with no opportunity to pass it on. Under the Workmen's Compensation Act the burden falls upon society at large, and is not borne entirely either by the employer or by the employee. If the application of the law be limited to injuries occurring within this state, then in the case of injuries sustained without the state the employer will not be liable except he be negligent, and where he is not negligent the whole loss must be borne by the employee, and the whole legislative purpose is, as to injuries sustained without the state, defeated. We have extensive borders; thousands of employees are passing out of and into Wisconsin daily, and almost hourly, in the discharge of their ordinary duties. Can it be that the legislature intend-

ed that every time these employees crossed the state line their right to compensation for injuries incidental to and growing out of their employment should be changed, and that as to injuries which occur beyond the state line the old system instead of the new should apply?

"If the Workmen's Compensation Acts of the several states are to be given effect so as to make them general in their application, they must be held to apply to injuries to employees wherever they occur. If accidents occurring without the state are to be in one class and accidents occurring within the state are to be in another class, every state might have a workmen's compensation act, and yet both the old and the new systems would still be in force and the legislative purpose would not be accomplished. The construction here placed upon the act will give the legislative intent full effect, and, if recognized by the courts of sister states, will give every employee the remedy provided by the Workmen's Compensation Act under which his contract of employment was made."

The authorities, and particularly the later ones, lead irresistibly to the conclusion that where the act is an optional one, as is ours, the relations are contractual, and the provisions of the act become a part of the contract of employment, the employer agreeing to pay, and the employee agreeing to accept, compensation, in case of accident, in accordance with the provisions of the act. That the relation under our act is contractual has been recognized by this court. In *Mackin v. Detroit-Timkin Axle Co.* 187 Mich. 8, 153 N. W. 49, it was said: "In some states the law is made compulsory upon both parties, or upon one with choice to the other, giving rise to questions which need not be considered here, since the law in this state, as applied to this case, becomes operative upon neither employer nor employee who does not

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expressly or implied consent; but, if the employer so elects, and the employee does not give written notice to the contrary, he is conclusively presumed to have consented, and comes under the act."

And in *Dettloff v. Hammond, S. & Co.* 195 Mich. 117, 161 N. W. 949, 14 N. C. C. A. 901, it was said: "On the other hand, the liability of the creamery company, by virtue of the Workmen's Compensation Act, rests solely upon contract."

Reliance is placed on *Willis v. Oscar Daniels Co.* 200 Mich. 19, 166 N. W. 496, 16 N. C. C. A. 510, to sustain defendants' position. But that case dealt with an accident on government land to an employee in the employ of a government contractor. It did not involve the question here before us. Commenting on this case, we said in *Oscar Daniels Co. v. Sault Ste. Marie*, 208 Mich. 363, 175 N. W. 160: "Willis v. Oscar Daniels Co. supra, may, and should, rest upon the ground that the state legislation sought there to be enforced affected the United States in a matter over which it had exclusive jurisdiction, namely, the building of a lock in the ceded territory."

But it is insisted by defendants' counsel that the act, being in derogation of the common law, must be strictly construed; that certain provisions of the act show a legislative intent that it shall not apply to accidents occurring outside the state. Manifestly, if the act shows such intent, it is our duty to so hold. It is first pointed out that the concluding words of the title are: "And restricting the right to compensation or damages in such cases to such as are provided by this act."

We cannot feel that the legislature in the use of this language intended to limit the locus of the accident, or to intend that compensation for injuries should only be allowable where the accident occurred within the state. If such had been the intent of the legislature, a few simple words would have clearly expressed it. The other provisions which are

thought to be persuasive are the provisions in § 8 of part 3 (§ 5461, Comp. Laws 1915), providing that the hearings of the committee of arbitration "shall be held at the locality where the injury occurred," and the provision found in § 13 of part 3 (§ 5466, Comp. Laws 1915), providing for presentation of a certified copy of the award "to the circuit court for the county in which such accident occurred," and providing for judgment "without notice." Similar provisions to these were deemed persuasive to the Massachusetts court in the *Gould Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60, but, as already indicated, we do not follow that holding. The provision for the hearings of the committee of arbitration need not be literally followed; the hearing need not be held at the very spot the accident occurred. It was designed that it should be held at a convenient place for parties and their witnesses, and does not make void a result reached at some other place, in the absence of rights being prejudicially affected. It does not convince us that compensation should be refused where it is impracticable to hold the hearing on the very place of the accident. The other provision, it will be noted, permits rendition of judgment "without notice." We are not persuaded that this provision is exclusive. As pointed out by plaintiff's counsel, if judgment is desired without notice to the other party, it may be entered under the provisions of this section, but if these provisions are not applicable, there is nothing in the act which prevents suit upon the award as upon a common-law arbitration. Both of these provisions are found in the part of the act dealing with "Procedure," and not in the parts of the act dealing with liability. We must decline to follow defendants' counsel in this contention.

To recapitulate: Plaintiff's husband was employed in Michigan to work for defendant. The contract of employment was a Michigan con-

tract, and the Workmen's Compensation Act became and was a part of it. Both parties agreed to be bound by its terms. The contract was to be performed within and without the state. Deceased met his death within the ambit of his employment. The rights, being con-

tractual, accompanied the employee wherever he went within the ambit of his employment. This construction is within the legislative intent when we consider the purposes of the act. And this is the construction it must receive at our hands.

The award is affirmed.

ANNOTATION.

Extraterritorial operation of workmen's compensation statutes; conflict of laws.

I. Introductory, 292.

II. Extraterritorial operation of statutes:

- a. Extraterritorial operation necessary to carry out purposes of statutes, 292.
- b. Acceptance of elective acts as constituting contract effective in other states, 293.

This annotation supplements that in 3 A.L.R. 1351, on the above question.

I. Introductory.

(Supplementing annotation in 3 A.L.R. 1351.)

In *Quong Ham Wah Co. v. Industrial Acci. Commission* (1920) — Cal. —, 12 A.L.R. 1190, 192 Pac. 1021, in considering the constitutionality of the California Compensation Act, it was held that a state might extend the provisions of the act to residents working abroad under contracts entered into within the state.

(The question of constitutionality of provisions of workmen's compensation acts which are limited to residents of the state is covered in the annotation accompanying this case in 12 A.L.R. 1207.)

As to applicability of state statutes and rules of law to actions under Federal Employers' Liability Act, see annotation in 12 A.L.R. 693.

II. Extraterritorial operation of statutes.

a. Extraterritorial operation necessary to carry out purposes of statutes.

(Supplementing annotation in 3 A.L.R. 1351.)

A rehearing of the decision in *Anderson v. Miller Scrap Iron Co.*

II.—continued.

c. Effect of miscellaneous provisions in statutes, 293.

d. Doctrine that statutes do not have extraterritorial operation, 294.

III. Conflict of laws, 294.

(1919) 169 Wis. 106, 170 N. W. 275, set out in the prior annotation, at page 1352, was denied without opinion in (1919) 169 Wis. 119, 171 N. W. 935.

In *Stansberry v. Monitor Stove Co.* (1921) — Minn. —, — A.L.R. —, 183 N. W. 977, it was held that an Ohio corporation, whose northwestern business was localized at a Minneapolis branch, was, as to employees of that branch, within the Minnesota Compensation Act, and a traveling salesman, employed in connection with that branch, was held to be within such act, although he was injured by an accident outside of the state.

In *Pickering v. Industrial Commission* (1921) — Utah, —, 201 Pac. 1029, a resident of Utah, who was hired in that state by a partnership whose place of business was also located there, was held entitled to compensation under the Utah Compensation Act, for an injury sustained in another state while superintending work there, where the act referred to provided that, if a workman who had been hired in that state should receive an injury by accident, he should be entitled to compensation according to the law of Utah, "even though injury was received outside of this state," and this conclusion was reached although the employer carried compen-

sation insurance in the state where the injury occurred, as well as in Utah.

In *State Industrial Commission v. Barene* (1919) 107 Misc. 486, 177 N. Y. Supp. 689, it was held that the State Industrial Commission of New York had jurisdiction to make an award for an injury sustained by an employee in Connecticut, where he was hired in New York to perform work in Connecticut by a company which, at the time of the hiring, was not performing any work within New York that was considered hazardous by the Workmen's Compensation Laws.

In *Baggs v. Standard Oil Co.* (1920) 180 N. Y. Supp. 560, it was held that, although there may be liability under the Compensation Act where the employer and employee are both residents of New York, notwithstanding the fact that the accident occurs on the high seas, and although the act applies where the contract of employment is made in New York, notwithstanding it is to be performed outside that state, yet, where the injured employee is not a resident of New York, and is not hired in that state, and renders no services within such state, but is injured in another state, the New York Compensation Act does not apply.

And in *Thompson v. Foundation Co.* (1919) 188 App. Div. 506, 177 N. Y. Supp. 58, it was held that the claimant was entitled to compensation under the Pennsylvania Workmen's Compensation Act, and not under the New York act, where it appeared that the employer was a New York corporation, having its principal office in that state, and was engaged in construction work in both states, and that the claimant, while in New York, received a letter from a boss carpenter of the employer engaged in construction work in Pennsylvania, and that the claimant went to the latter state, and there entered into a written contract of employment with such boss, and began working, and that while so employed he received an injury, the court holding that the contract of employment was made in Pennsylvania, apparently assuming that, had it been

made in New York, the Compensation Act of that state would have governed.

b. Acceptance of elective acts as constituting contract effective in other states.

(Supplementing annotation in 3 A.L.R. 1355.)

The court, in *Anderson v. Miller Scrap Iron Co.* (1919) 169 Wis. 119, 171 N. W. 935, without opinion, denied a rehearing of (1919) 169 Wis. 106, 170 N. W. 275, set out in the prior annotation at page 1356.

It will be observed that in the reported case (*CRANE v. LEONARD, CROSSETTE, & RILEY*, ante, 285) it was held that under the provisions of the Michigan Workmen's Compensation Act, which were optional, the relation of master and servant is contractual as to parties who have accepted the provisions of the act, and that the right to compensation exists in cases of injury out of the state, as well as in those arising within its borders, and that it was immaterial that the statute restricted the right to compensation to such as was provided by the act, and provided that the hearing should be at the locality where the injury occurred.

See also *Carl Hagenbeck & G. W. Show Co. v. Randall* (1920) — Ind. App. —, 126 N. E. 501, and *Barnhart v. American Concrete Steel Co.* (1920) 227 N. Y. 531, 125 N. E. 675, *infra*, III.

c. Effect of miscellaneous provisions in statutes.

(Supplementing annotation in 3 A.L.R. 1357.)

In *Home Life & Acci. Co. v. Orchard* (1920) — Tex. Civ. App. —, 227 S. W. 705, where an insurer, in its policy issued to an employer operating in Texas and Louisiana and insuring the holder's Texas employees, contracted "to pay in the manner provided by the laws of such states or commonwealths of the United States as are in force at the time this policy takes effect, or any subsequent amendments thereto," and subsequently, before an injury occurred, the Texas Workmen's Compensation Act, which gave no extra-territorial effect to the policy, was

amended by a clause providing that, if an employee who had been hired in that state sustained an injury in the course of his employment, he should be entitled to compensation according to the law of that state, even though the injury was received outside the state, it was held that this amendment came within the terms of the policy, and gave extraterritorial effect thereto as to one who was injured in Louisiana, but who was hired by the employer in Texas to act as foreman in the employer's oil fields, located in Louisiana and Texas, it appearing that his permanent home was retained in Texas, the court holding that he was a Texas employee and within the protection of the policy.

d. Doctrine that statutes do not have extraterritorial operation.

In *Perlis v. Lederer* (1919) 189 App. Div. 425, 178 N. Y. Supp. 449, where the claimant entered into a contract of employment in New York for services to be performed in Pennsylvania, and was injured in the latter state while performing the services contemplated by the contract, it was held that she was not entitled to compensation under the New York act. The court said: "The state industrial commission, on the supposed authority of *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, has made an award for such injuries. In that case the hazardous business was conducted in the state of New York, and the employee was injured while temporarily employed away from the plant of the employer in New Jersey; but it was not held that the mere fact that the contract was made in New York was the controlling factor. It was based upon the proposition that the hazardous employment carried on by the employer was within the state of New York, the employment within the state of New Jersey away from the plant of the employer being merely incidental. The recent case of *Smith v. Heine Safety Boiler Co.* (1918) 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316, puts the matter clearly, and there is no doubt that a contract made within the state

of New York for services to be performed wholly in a sister state is without the police power of the state of New York, and does not give a right to compensation under our Workmen's Compensation Law."

In *Farr v. Babcock Lumber & Land Co.* (1921) — N. C. —, 109 S. E. 833, where the contract of employment was made in Tennessee and the employee was injured while working in North Carolina, it was held that the Tennessee Compensation Act did not interfere with the jurisdiction of the superior court in the county in North Carolina where the injury occurred, to entertain actions for the employer's failure to keep a physician at the camp to attend the employee after he was injured, or for its employment of an incompetent physician, or for its negligent failure to provide the employee transportation to his home.

III. Conflict of laws.

(Supplementing annotation in 3 A.L.R. 1361.)

In *Carl Hagenbeck & G. W. Show Co. v. Randall* (1920) — Ind. App. —, 126 N. E. 501, where an Indiana corporation gave no notice of election not to be bound by the Workmen's Compensation Act, and by the terms of the act was presumed to have accepted its provisions, it was held liable to pay compensation under the act for injuries to an employee in Indiana, the industrial board not lacking jurisdiction by reason of the contract of employment, which was entered into in Ohio, and which provided that the parties agreed that the place of the contract was the District of Columbia, and that the laws of that District should control, the court holding that the employer could not relieve itself of the statutory obligation by a foreign contract, its obligation under the Indiana Compensation Act being superimposed upon the Ohio contract as a condition of performance in Indiana. And the decision in the *Hagenbeck Case* was held decisive in *Carl Hagenbeck & G. W. Show Co. v. Ball* (1920) — Ind. App. —, 126 N. E. 504, upon a like state of facts.

The decision in *Barnhart v. Ameri-*

can Concrete Steel Co. (1917) 181 App. Div. 881, 167 N. Y. Supp. 475, set out in the prior note, p. 1362, was affirmed in (1920) 227 N. Y. 531, 125 N. E. 675, the court holding that a judgment for personal injuries received in New York should be reversed, where the defendant was a New Jersey corporation, and the contract of hiring was entered into in the latter state, and the employee had exercised the option to accept the provisions of the Compensation Act. The court pointed out that there was a fundamental difference between the Workmen's Compensation Acts of New Jersey and New York, one being optional and the other mandatory, and said: "The New Jersey statute is different. Under that statute the rights which it creates and the duties which it imposes are contractual in the strict sense. It is optional with the employer, as well as the employee, whether or not the compensation, in case of injury or death, shall be paid. If a servant prefers to retain his common-law remedies he may give notice within a certain time after his employment, and the remedies will be retained. If he chooses to renounce them in return for the statutory scheme of compensation, his voluntary choice is the source and origin of his right. The plaintiff's intestate, having the right to accept or reject the statutory scheme of compensation, exercised the option to accept it, and contracted accordingly with the defendant. Such contract became binding upon him, and, like any other valid contract, enforceable in the state of New York, unless opposed to its public policy."

In *Rorvik v. North Pacific Lumber Co.* (1920) 99 Or. 58, 190 Pac. 331, 195 Pac. 163, where the employee of a California steamship company was killed while the vessel was being loaded at defendant's plant in Oregon, it was held that his widow did not divest herself of the right to bring an action under the Oregon Employers' Liability Law, by presenting a claim under the California Workmen's Compensation Act against her husband's employer, although such act provided that the commission should have ju-

risdiction over all controversies arising out of injuries suffered without the territorial limits of the state, where the injured employee was a resident of the state at the time of the injury, and the contract of hire was made within the state, and further provided that the making of a lawful claim against an employer for compensation under the act for an injury to or death of an employee should operate as an assignment to the employer of any right to recover damages which the injured employee, or his representatives, have against any other party for the injury or death, the court holding that a right of action for tort was not assignable in Oregon, and that it would be contrary to the policy of the laws of that state to give effect to the California act.

In *Lennon v. Montreal Transp. Co.* (1917) Rap. Jud. Quebec 53 C. S. 239, where the claimant was hired in Ontario as a deck hand on a steamship, and was injured in the port of Montreal, Quebec, in which place the employer had its head office, it was held that the Workmen's Compensation Act of Quebec applied, and not that of Ontario, it appearing that there had been no election to claim under the latter act, which provided that, where by the law of the place in which an accident happens the workman or his dependents are entitled to compensation, they shall be bound to elect whether they will claim compensation under this act, and to give notice of such election, and if such election is not made, and notice given, it shall be presumed that they have elected not to claim under this act.

In *Smith v. Heine Safety Boiler Co.* (1921) 119 Me. 552, 112 Atl. 516, the industrial accident commission of Maine was held to have jurisdiction to hear the claim of the widow of an employee who was accidentally killed while working in that state, although the employer was a foreign corporation, and the decedent was not a resident of Maine, and the contract of employment was made in a third state.

See also *Barnhart v. American Concrete Steel Co.* (1920) 227 N. Y. 531, 125 N. E. 675, supra. J. T. W.

MARGARET B. MINNICH

v.

EASTON TRANSIT COMPANY, Appt.

Pennsylvania Supreme Court — April 19, 1920.

(267 Pa. 200, 110 Atl. 273.)

Automobile — negligence of guest — effect on recovery.

1. When dangers which are either reasonably manifest, or known to an invited guest, confront the driver of a vehicle, and the guest has an adequate and proper opportunity to control or influence the situation for safety, if he sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery.

[See note on this question beginning on page 309.]

Trial — question for jury — negligence of automobile guest.

2. Unless the facts of a collision injuring a guest in an automobile are manifest, and the inferences to be drawn therefrom clear beyond peradventure, the jury must determine the question of the negligence of the guest.

Automobile — negligence of guest in taking a chance with driver.

3. The mere fact that a guest in an automobile, injured by collision with a street car at a highway crossing,

states that she was willing to take a chance with the driver in going across the track without stopping or slowing up to see if a car was coming, does not, as matter of law, indicate that she joined with the driver in testing the danger, where he had the car under full control, indicated a sense of care and responsibility by sounding the horn, and the driver and guest were keeping a lookout for danger while an approaching car with passengers for that stop would make the stop before crossing the street.

APPEAL by defendant from a judgment of the Court of Common Pleas for Northampton County (McKeen, J.) denying a motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Robert A. Stotz, for appellant:

The plaintiff can recover, if at all, only if she brings herself within the rule that, being a gratuitous passenger riding in the automobile by mere invitation, the negligence of the driver cannot be imputed to her, and that she herself was free of negligence.

Carlisle v. Brisbane, 113 Pa. 544, 57 Am. Rep. 483, 6 Atl. 372; Carr v. Easton, 142 Pa. 139, 21 Atl. 822; Walsh v. Altoona & L. Valley Electric R. Co. 232 Pa. 479, 81 Atl. 551; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; Proctor v. Lehigh Valley Transit Co. 235 Pa. 373, 83 Atl. 1019; Trumbower v. Lehigh Valley Transit Co. 235 Pa. 397,

84 Atl. 403; Senft v. Western Maryland R. Co. 246 Pa. 446, 92 Atl. 553.

If the danger is as open, obvious, and well-known to the passenger as it is to the driver, and the passenger, without protest, permits herself to be driven into such patent danger, and joins the driver in taking a chance and testing the danger, the plaintiff, although only a gratuitous passenger, cannot recover.

Crescent Twp. v. Anderson, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379; Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; Winner v. Oakland Twp. 158 Pa. 405, 27 Atl. 1110, 1111; Dryden v. Pennsylvania R. Co. 211 Pa. 620, 61 Atl. 249; Kunkle v. Lancaster Coun-

ty, 219 Pa. 52, 67 Atl. 918; Thompson v. Pennsylvania R. Co. 215 Pa. 113, 64 Atl. 323, 7 Ann. Cas. 351, 20 Am. Neg. Rep. 483; Vocca v. Pennsylvania R. Co. 259 Pa. 42, 102 Atl. 283; Proctor v. Lehigh Valley Transit Co. 235 Pa. 373, 83 Atl. 1019; Senft v. Western Maryland R. Co. supra; Trumbower v. Lehigh Valley Transit Co. 235 Pa. 397, 84 Atl. 403; Walsh v. Altoona & L. Valley Electric R. Co. 232 Pa. 479, 81 Atl. 551.

Messrs. F. P. McCluskey and C. P. Maxwell, for appellee:

Plaintiff was not guilty of contributory negligence as a matter of law.

Dunlap v. Philadelphia Rapid Transit Co. 248 Pa. 133, 93 Atl. 873; Vocca v. Pennsylvania R. Co. 259 Pa. 45, 102 Atl. 283; Azinger v. Pennsylvania R. Co. 262 Pa. 249, 105 Atl. 87; Nicholson v. Pittsburgh R. Co. 58 Pa. Super. Ct. 106; Randall v. Philadelphia Rapid Transit Co. 62 Pa. Super. Ct. 531; Hermann v. Rhode Island Co. 36 R. I. 447, 90 Atl. 813; Walsh v. Altoona & L. Valley Electric R. Co. 232 Pa. 479, 81 Atl. 551; Latdenberger v. Easton Transit Co. 261 Pa. 288, 104 Atl. 588.

Moschzisker, J., delivered the opinion of the court:

On Sunday, April 9, 1916, a little before noon, at a point about three city blocks from the place where the collision giving rise to this case occurred, Jerome Garr invited plaintiff, Margaret B. Minnich, into an automobile, which he owned and was at the time driving upon the streets of Easton, Pennsylvania. She accepted and took the right-hand front seat as a gratuitous guest.

The motor proceeded south along Twelfth street toward Ferry street, which crosses the former highway at right angles. On Ferry street there is a single-track line of defendant's trolley road, on which suburban cars are operated in both directions, according to a regular hourly schedule; east-bound cars being due at Twelfth street, about five minutes before the hour, and west-bound five minutes after the hour. Ferry street is 69 feet 2 inches wide between house lines, and the first rail of the trolley tracks is 27 feet 4 inches from the north house line. Both Garr and plaintiff were well

acquainted with the general character of the crossing, the location of the track, and the trolley time schedule.

The automobile was running at a speed of 10 to 12 miles an hour, on the right of the middle of the street, 6 feet from the west curb line. The speed was not appreciably checked as the cross thoroughfare was approached, and, due to the construction of the buildings on both highways, no extended view could be had along Ferry street in either direction, before the house line was reached. The driver, however, gave warning by frequently sounding a "good, loud" electric horn; and at the first available place looked east, then west.

Thirty-seven feet north of the Ferry street house line at a point 6 feet from the west curb of Twelfth street, it is possible for one to see 88½ feet to the west along Ferry street, owing to the first story of the corner building being cut at an angle, and, at the house line, a view of two or three blocks can be had in that direction.

Defendant's car, approaching from the west, was nearing Twelfth street at twenty-five miles an hour, but, in all probability because of the rate of speed, neither the driver of the machine nor the motorman of the car saw the other in time to avoid a collision; the latter gave no warning whatever, and the former either could not or did not so control his machine as to bring it to a stop before reaching the track. In an effort to prevent a collision, Garr swung sharply to the left, and the motorman applied the air brake; but the two vehicles crashed together, the "left front point" of the car striking the automobile a glancing blow.

As they were drawing near the intersection of the streets, Miss Minnich, who was then "looking west for the car," saw it at the first possible moment—when, seated in the automobile, she was about 30 feet, and the car at least 70 feet, from the place of collision. Plain-

tiff at once made an outcry, exclaiming, "Oh, the car!" and that is all she did to avoid the accident.

The automobile was not seriously damaged, but Garr's passenger suffered personal injuries. She brought suit against defendant, and the case was submitted to the jury in a manner which is not complained of. Plaintiff obtained a verdict, upon which judgment was entered, a motion for judgment n. o. v. was denied, and this appeal followed.

When dangers, which are either reasonably manifest or known to an invited guest, confront the driver of a vehicle, and the guest has an adequate and proper opportunity to control or influence the situation for safety, if he sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery. Although a guest is

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not required to exercise the same degree of care and watchfulness as the driver, and the carelessness of the latter is not imputed to the former, yet a passenger must bear the consequences of his own negligence, when he joins in testing a danger; but the extent to which one in the position of a guest should appreciate an impending peril, and act in relation thereto, depends upon the facts peculiar to each case; unless these are manifest and the inferences to be drawn therefrom

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guest.**

clear beyond peradventure, the issues involved must be submitted to the jury for determination. Moreover, the authorities recognize the fact that, in measuring the adequacy of the opportunity for control, there are occasions when any pronounced effort in that direction might do more harm than good.

Cases on the governing principles just stated are cited in *Hardie v. Barrett*, 257 Pa. 42, 46, 47, L.R.A. 1917F, 444, 101 Atl. 75, 16 N. C. C. A. 485, but, since the writer of that opinion occupies the same po-

sition here, he takes the opportunity to say that, while the rule there laid down is appropriately put for purposes of the case then under consideration, it is somewhat too narrow and limited for a guiding statement of general principles. We refer to the following additional authorities: *Proctor v. Lehigh Valley Transit Co.* 235 Pa. 373, 83 Atl. 1019; *Sission v. Philadelphia*, 248 Pa. 140, 93 Atl. 936; *McLaughlin v. Pittsburgh R. Co.* 252 Pa. 32, 97 Atl. 107; *Lancaster v. Reese*, 260 Pa. 390, 103 Atl. 891; *Laudenberger v. Easton Transit Co.* 261 Pa. 288, 104 Atl. 588; *Azinger v. Pennsylvania R. Co.* 262 Pa. 242, 105 Atl. 87; *Martin v. Pennsylvania R. Co.* 265 Pa. 282, 108 Atl. 631.

While not so deciding, we shall, for present purposes, assume Garr's contributory negligence; but it by no means follows plaintiff can be held, as a matter of law, to have joined therein, or that she in any way contributed toward the accident which caused her injuries. On the evidence, the court below very properly submitted these issues to the jury, and they were found against defendant; but appellant contends that plaintiff confessed she willingly joined the driver of the automobile in testing a known danger, which, in itself, should put her out of court. Let us see how far this is true.

On cross-examination, Miss Minnich testified she knew a trolley car was "about due at that time." Defendant's attorney then said, "But you were willing to take a chance with him in going across there without stopping or slowing up to see if there was a car coming," adding the query, "Weren't you?" to which she answered, "Yes, sir." This incident in the examination was called to the attention of the jurors by the trial judge, who told them to consider it. In so doing, however, they, no doubt, very properly took into consideration the fact that the words of plaintiff's so-called confession of fault were really those of her cross-examiner, and that Garr, who was driving at a moderate speed,

not only had his machine under apparent control, but was indicating a sense of care and responsibility by sounding his horn, while Miss Minnich was also keeping a lookout for danger. Furthermore, the jurors had a right to regard the fact that the intersection in question is not peculiarly disadvantageous, so far as opportunities for view are concerned, nor, like a railroad crossing, inherently perilous. Plaintiff was not obliged to anticipate she was taking a chance on a trolley car advancing upon her without warning, at the negligent rate of 25 miles an hour (*Simon v. Lit Bros.* 264 Pa. 121, 107 Atl. 635), particularly when the near side of the street was a designated and usual stopping place; and we cannot say, as a matter of law, she meant to suggest a willingness so to do —that was for the jury to decide. When all the elements present are given due weight, it is in no way

Automobile—
negligence of
guest in taking
a chance with
driver.

apparent that plaintiff, in any real sense, joined the driver in testing a danger, or that, on cross-examination, she expressed a willingness to take any other or greater chance than every automobile passenger must take when traveling upon built-up city streets, in approaching a trolley line.

The assignments of error complain only because defendant was not given binding instructions in its favor, or granted judgment n. o. v. They are overruled, and the judgment for plaintiff is affirmed.

NOTE.

The subject of personal care required of one riding in an automobile driven by another, as affecting his right to recover against a third person, is the subject of an extended annotation following *BEUBAKER v. IOWA COUNTY*, post, 309. Specifically, as to injury by street car, see subd. III. of that note.

WILBUR H. KIRBY

v.

KANSAS CITY, KAW VALLEY, & WESTERN RAILWAY COMPANY,
Appt.

Kansas Supreme Court—January 10, 1920.

(106 Kan. 163, 186 Pac. 744.)

Negligence — of guest in automobile — failure to look at railroad crossing.

A mature person, who attempts to cross an interurban railroad track without taking any precautions for his own safety, while riding in an automobile with another, who is driving, cannot recover damages for injuries sustained in a collision with a car on the track, when by looking he could have seen the approaching car in time to have warned the driver of the danger.

[See note on this question beginning on page 309.]

Headnote by MARSHALL, J.

APPEAL by defendant from a judgment of the District Court for Wyandotte County (Fisher, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. E. McFadden and O. Q. Claffin, Jr., for appellant.

Messrs. J. O. Emerson and D. J. Smith, for appellee:

Whether Hart was negligent is immaterial. He was the driver of the car, and the plaintiff a mere guest, and the negligence of the driver of a vehicle is not imputable to his guest, who does not have or exercise any control over the driver.

Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764; Denton v. Missouri, K. & T. R. Co. 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639; Williams v. Withington, 88 Kan. 809, 129 Pac. 1148; Reading Twp. v. Telfer, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134, 2 Am. Neg. Rep. 138; Anthony v. Kiefner, 96 Kan. 194, L.R.A.1915F, 876, 150 Pac. 524, Ann. Cas. 1916E, 264; Denton v. Missouri, K. & T. R. Co. 97 Kan. 498, 155 Pac. 812; Burzio v. Joplin & P. R. Co. 102 Kan. 287, L.R.A.1918C, 997, 171 Pac. 351.

Defendant was negligent in maintaining a defective crossing, and this was one of the proximate causes of the plaintiff's injury.

Johnson v. Chicago, R. I. & P. R. Co. 80 Kan. 456, 103 Pac. 90; Rickel v. Atchison, T. & S. F. R. Co. 104 Kan. 453, 179 Pac. 550; Atchison, T. & S. F. R. Co. v. Henry, 60 Kan. 322, 56 Pac. 486, 5 Am. Neg. Rep. 593; Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257.

Marshall, J., delivered the opinion of the court:

The defendant appeals from a judgment against it for injuries sustained by the plaintiff in an accident at a crossing of a public highway and the defendant's railroad. The evidence showed that the defendant operated an interurban railroad from Kansas City to Lawrence through a station known as Grinter Heights, where a public road crossed the railroad almost at right angles; that a macadam road ran along the south side of the railroad; that A. H. Hart with an automobile was standing east of the road which crossed the railroad on the north side of the macadam road, but south of the railroad track; that the plaintiff went to Hart and, after a little

conversation, got into the automobile with Hart and started to ride with him to Hart's house; that in doing so it was necessary to cross the railroad track; that Hart drove the automobile; that they started across the track without looking for an approaching car; that, after they got on the track, they saw a car coming from the west, about 100 feet away; that the plaintiff jumped out of the automobile and was injured; that Hart remained in the automobile and went across the track and was not injured; and that the automobile was not struck. There was evidence which tended to show that the automobile stopped about 4 feet south of the track, then started across, and stopped again on the track, and then went across, and that the automobile jumped in crossing the track. The evidence also tended to show that there was a grade in the road from the south up to the track, and that the plank on the side of the track was about 4 inches thick and about 4 inches above the ground. The plaintiff at that time was twenty-six or twenty-seven years old.

The jury made special findings of fact as follows:

"(1) When plaintiff got into the automobile with Mr. Hart, was it with intention to ride to Mr. Hart's home for the purpose of visiting with him during a part of the day?

"A. Yes.

"(2) Was the plaintiff familiar with the location of defendant's tracks at the time and place in question when he got into the automobile to go to Hart's home?

"A. Yes.

"(3) Did plaintiff know that in going to Mr. Hart's home in the automobile they would have to cross the track of the defendant?

"A. Yes.

"(4) Did plaintiff know that cars, both passenger and express, were operated on and along the tracks of defendant at different intervals during the day, and over the crossing in question?

"A. Yes.

"(5) From the time the automobile in which plaintiff was riding started until it reached a point where the front wheels were upon defendant's track, did he look to see if there was a car approaching the crossing from the west?"

"A. No.

"(6) If plaintiff or the driver of the automobile had looked toward the west at any time after the automobile was started and before it reached the railroad track, could they, or either of them, have seen the approaching car in time to have stopped before going upon the track?"

"A. Yes.

"(7) When the automobile got upon defendant's track, what distance was the approaching car from the crossing?"

"A. On or about 100 feet.

"(8) Did Mr. Hart tell the plaintiff to remain in the automobile when he saw that plaintiff was preparing to get out?"

"A. Yes.

"(9) If the plaintiff had remained in his seat in the automobile, would he have been injured?"

"A. No.

"(10) Was plaintiff struck by defendant's car at the time in question?"

"A. Yes.

"(11) If you answer question No. 10, 'Yes,' then state on what witness's testimony you base such answer.

"A. Mr. Kirby, H. C.

"(12) After the motorman saw the automobile start to cross the track in front of his car from the place where he testified it had stopped immediately south of the track, did he do all he could properly do to stop his car before reaching the crossing?"

"A. Yes."

"(14) Did the automobile in which plaintiff was riding pass over the railroad track without being struck by the car?"

"A. Yes."

For the purpose of discussion, it is assumed that the defendant was

negligent in some one or more of the particulars alleged.' The defendant argues that the court erred in overruling its demurrer to the plaintiff's evidence, in refusing to give defendant's peremptory instruction for a verdict in favor of the defendant, in overruling the motion of the defendant for judgment on the special findings and to set aside the general verdict, in entering a judgment for the plaintiff, and argues that the judgment is contrary to law and without evidence to support it. The decision turns on the contributory negligence of the plaintiff.

Was the plaintiff guilty of contributory negligence? He and the driver of the automobile started across the railroad track without looking to see if a car were approaching. The driver of the automobile was clearly guilty of negligence. If he had sustained any injury, he could not recover therefor. *Jacobs v. Atchison, T. & S. F. R. Co.* 97 Kan.-247, L.R.A.1916D, 783, 154 Pac. 1023, Ann. Cas. 1918D, 384; *Wehe v. Atchison, T. & S. F. R. Co.* 97 Kan. 794, L.R.A.1916E, 455, 156 Pac. 742.

In *Corley v. Atchison, T. & S. F. R. Co.* 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764, this court said: "One who, while riding in an automobile as the guest of the driver, is injured by a collision at a railroad crossing, caused by the negligence of the company, is not precluded from recovering damages therefor by the fact that the failure of the driver to exercise due caution was a contributing cause of the injury." Syl. ¶ 2.

In *Schaeffer v. Arkansas Valley Interurban R. Co.* 104 Kan. 394, 179 Pac. 323, the court used the following language:

"Persons in complete and independent control of their own movements, who are about to cross a railway track, like pedestrians and drivers of horse vehicles and automobiles, will not be permitted to recover against a negligent railway company unless they themselves are free from negligence.

Atchison, T. & S. F. R. Co. v. Priest, 50 Kan. 16, 23, 31 Pac. 674; Chicago, R. I. & P. R. Co. v. Wheelbarger, 75 Kan. 811, 88 Pac. 531; Wehe v. Atchison, T. & S. F. R. Co. 97 Kan. 794, L.R.A.1916E, 455, 56 Pac. 742; Williams v. Iola Electric R. R. Co. 102 Kan. 268, 170 Pac. 397.

"There is a somewhat different rule which applies to persons riding in a buggy or automobile who have no control of the vehicle. While such persons are charged with the duty of looking out for their own safety as far as practicable (Bush v. Union P. R. Co. 62 Kan. 709, 64 Pac. 624; Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Bressler v. Chicago, R. I. & P. R. Co. 74 Kan. 256, 86 Pac. 472; Fair v. Union Traction Co. 102 Kan. 611, 171 Pac. 649; and note in L.R.A. 1915B, 955 et seq.), yet they are not necessarily negligent merely because their driver is negligent (Williams v. Withington, 88 Kan. 809, 129 Pac. 1148; Denton v. Missouri, K. & T. R. Co. 90 Kan. 51, 47 L.R.A. (N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639; Denton v. Missouri, K. & T. R. Co. 97 Kan. 498, 155 Pac. 812; Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764; Burzio v. Joplin & P. R. Co. 102 Kan. 287, L.R.A.1918C, 997, 171 Pac. 351)." 104 Kan. 398.

The following language is found in Bush v. Union P. R. Co. supra: "Where one person is riding with another for the mutual pleasure of both, with equal opportunity to see and ability to appreciate the danger, and is in fact looking out for herself, but makes no effort to avoid the danger, she is chargeable with

the want of care which results in injury." Syl. ¶ 3.

The plaintiff was under some obligation to look out for his own safety. He should not have attempted to cross the railroad track, relying completely upon the driver of the automobile to take the necessary steps for their safety. The plaintiff ought to have

Negligence—of guest in automobile—failure to look at railroad crossing.

looked for the approaching car, and, if he had seen one, he should have notified the driver. That much he ought to have done for his own protection. When he saw the defendant's car approaching, he did undertake to protect himself by jumping out of the automobile, doing that contrary to the request of the driver that he remain. Probably that appeared to the plaintiff as the safest thing to do. That was not contributory negligence on his part; but, because of his failure to look for a car before going upon the railroad track, he was guilty of such negligence. That prevents his recovery.

The judgment is reversed, and judgment is rendered for the defendant.

NOTE.

The personal care required of one riding in an automobile driven by another and affecting his right to recover against a third person is the subject of the annotation following *BRUBAKER v. IOWA COUNTY*, post, 309; specifically, as to damage in collision with interurban car, see II. b, of that note.

LINDA LEE BRUBAKER, Resp.,
v.
IOWA COUNTY, Appt.

Wisconsin Supreme Court — July 13, 1921.

(— Wis. —, 183 N. W. 690.)

Automobile — negligence of passenger — failure to control movement of car.

1. A passenger on the back seat of an automobile cannot be charged with negligence in failing to see signals along the road, warning of danger, when there is no evidence that any existed which would warn an ordinarily prudent traveler, or in failing to control the speed of the car when there is nothing to show that he could have formed any intelligent estimate of the rate of speed.

[See note on this question beginning on page 309.]

Negligence — imputed — husband's to wife — joint enterprise.

2. The mere fact that a man and his wife are journeying together in a motor car from one city to another for the purpose of changing their abode, with the intention on his part to teach and on her part to prepare for and take a business position, does not constitute their journey a joint enterprise so as to impute to her his negligence in handling the car.

[See 2 R. C. L. 1208; 20 R. C. L. 149, 159.]

— effect of marital relationship.

3. The negligence of a man is not imputed to his wife, riding with him in an automobile, from the mere fact of the marital relationship between them.

[See 20 R. C. L. 160.]

Automobile — duty to watch for imperfections.

4. A passenger on the back seat of an automobile traveling over a road in apparently good condition is not bound to pay constant attention to the management of the car, or to keep constant lookout for imperfections in the road.

Highway — liability of county for defect — statutory duty.

5. A county attempting to repair a defect in a trunk highway is liable for injury to a traveler caused by insuffi-

ciency and want of repair within the meaning of the statute.

[See 13 R. C. L. 308; see note in 2 A.L.R. 721.]

— when closed to travel.

6. A highway under repair cannot be regarded as closed to travel if there are no barriers and the public is using it to the knowledge of the public officials.

Appeal — instruction — immaterial error.

7. In an action by a passenger in an automobile for injury due to a defect in the highway, where there is nothing to show that she knew or had any reason to know that the car was being driven at excessive speed, it is not reversible error to instruct that a stranger driving upon a public highway has a right to presume that it is in reasonably safe condition for ordinary travel, even though the instruction is incorrect.

— reversal to permit defendant to secure contribution.

8. A judgment in favor of a wife against a county, for injury caused by a defect in the highway and negligence of her husband in driving the automobile in which she was riding, will not be reversed to permit the county to implead the husband so as to secure contribution from him, but the county will be left to its independent action against him.

APPEAL by defendant from a judgment of the Circuit Court for Iowa County (Bancroft, J.) in favor of plaintiff in an action brought to recover

damages for personal injuries alleged to have been caused by the insufficiency of a certain highway in the defendant county. *Affirmed.*

Statement by Jones, J.:

On August 25, 1919, plaintiff, her husband, and her sister were proceeding from Oshkosh, Wisconsin, to Sioux City, Iowa, where plaintiff and her husband intended to reside. They were traveling in the husband's automobile. He was driving, and plaintiff and her sister sat in the rear seat. The car was relatively heavy, had good brakes, and good lights. They were traveling, at least in the main, on the state trunk highway between Madison and Dodgeville. As they approached the latter city, it was between twilight and dark, and the lights on the car were lighted. The driver testified that he was keeping good watch of the road ahead and was going not over 20 miles per hour. Plaintiff was paying no attention to the driving, but both she and her sister testified that they were going slowly. There was no other direct testimony on the question of speed. It was undisputed that the road at this point was commonly traveled, and was in good shape for travel, up to the place of the accident.

While thus proceeding the driver suddenly noticed a sharp incline over a culvert which crossed the road. He stated that he noticed this condition only when very close, about two or three car lengths, probably 40 or 50 feet, from the place. Plaintiff testified she first noticed it when it was right in front of the car. The driver attempted to stop the car, but was unable to do so until he had passed over the culvert and some 45 feet beyond, all distances, presumably, being measured from the front of the car. In passing over the incline plaintiff was thrown out of the car upon the ground and received the injuries complained of. The highway was being relocated in places, and repairs and construction were being made on parts of the old road. The diagram used at the trial does not appear in the record, and it is difficult for this court to exactly locate

all the roads and points mentioned in the testimony, and to determine which are new and which are old.

There was much testimony to the effect that the road was closed to travel and that signs were posted to that effect. The testimony regarding these signs was confusing. It appeared they were sometimes in place and sometimes out of place, that at least one was in place the night of the accident, and that there were none near the culvert itself. Some things appeared clearly: There was no sign or barrier across or upon the traveled track, no lights were placed, none of the signs were of very large size or great prominence, and it was well known to authorities, and expected, that persons would continue to use the road despite the signs. None of the occupants of the car saw any signs. The road beyond the signs and up to the culvert was in good repair and without evidences of incomplete construction.

There was a traveled turnout at the culvert, by which cars could pass around instead of over it, and it seemed that this was customarily used by persons acquainted with the situation. The occupants of the car did not notice it, however. The culvert was covered with a layer of dirt, and it formed an elevation of 18 or 20 inches in a slope of 6 feet; the slope being steeper on the side from which the car approached than it was on the side beyond. Several travelers on the highway came along shortly after the accident. One of these testified that there was just enough dirt over the culvert so that a person who did not know the situation would drive on it; that there was a track over it, presumably the track of plaintiff's car, but no indicated travel over the top. Another of these testified that a stranger who did not know the road would drive over the culvert, and not look to the side of the road, for there had been several cars passing over it. There was no testimony as to the

space required to stop plaintiff's car from a speed of 20 miles per hour or less.

The jury found that the highway at this place was not in a reasonably safe condition for public travel by persons in the exercise of due care, and that this condition was the proximate cause of the accident. They found that there were no signs or barriers, such as would attract the attention of an ordinarily prudent traveler, to notify him that the highway was not open to travel; that there was want of care on the part of the driver, which proximately contributed to the injury; and fixed damages at \$1,200. The trial court changed the finding of negligence on the part of the driver, and ordered judgment for the plaintiff.

Mr. R. T. Jackson and Messrs. Fiedler, Fiedler, & Jackson, for appellant:

Plaintiff's driver was guilty of negligence proximately contributing to produce the injury.

Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629; Pietsch v. McCarthy, 159 Wis. 251, 150 N. W. 482; Moody v. Milwaukee Electric R. & Light Co. 173 Wis. 65, 180 N. W. 266; Samulski v. Menasha Paper Co. 147 Wis. 285, 133 N. W. 142.

The negligence of plaintiff's driver was legally imputable to her.

Reiter v. Grober, 173 Wis. 493, post, 362, 181 N. W. 739; Ertel v. Milwaukee Electric R. & Light Co. 164 Wis. 380, 160 N. W. 263.

Plaintiff was guilty of negligence proximately contributing to produce her injury and barring her recovery.

Howe v. Corey, 172 Wis. 537, 179 N. W. 791; Winston v. Henderson (Farmers' Bank & T. Co. v. Henderson) 179 Ky. 220, L.R.A.1918C, 646, 200 S. W. 330; Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A. 1915B, 953, 133 C. C. A. 9, 216 Fed. 503; Jefson v. Crosstown Street R. Co. 72 Misc. 103, 129 N. Y. Supp. 233; Terwilliger v. Long Island R. Co. 152 App. Div. 168, 136 N. Y. Supp. 733, affirmed in 209 N. Y. 522, 102 N. E. 1114; United R. & Electric Co. v. Crain, 123 Md. 332, 91 Atl. 405, 10 N. C. C. A. 571; Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 528; Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 18 A.L.R.—20.

764; Chadbourne v. Springfield Street R. Co. 199 Mass. 574, 85 N. E. 737; Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; Senft v. Western Maryland R. Co. 246 Pa. 446, 92 Atl. 553; Sherwood v. New York C. & H. R. R. Co. 120 App. Div. 639, 105 N. Y. Supp. 547.

The alleged highway was closed to public travel in the manner required and provided for by statute.

Spence v. Milwaukee Electric R. & Light Co. 163 Wis. 120, 157 N. W. 517; Meissner v. Southern Wisconsin R. Co. 160 Wis. 507, 152 N. W. 291; Schmidt v. Milwaukee Electric R. & Light Co. 158 Wis. 505, 149 N. W. 221.

In order for a municipal corporation to be liable for injuries sustained by reason of defects in highways or bridges, the municipal corporation must have had actual knowledge of such defect, or it must have existed for such length of time that, in the exercise of ordinary care and prudence, the officers of the municipal corporation would have known of its existence.

Goodnough v. Oshkosh, 24 Wis. 549, 1 Am. Rep. 202; Hiner v. Fond du Lac, 71 Wis. 74, 36 N. W. 632; Cooper v. Milwaukee, 97 Wis. 458, 72 N. W. 1130, 3 Am. Neg. Rep. 304.

A stranger has no right to presume that a highway is in a reasonably safe condition for ordinary travel.

Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629.

Mr. J. P. Smelker also for appellant. Messrs. McGeever & McGeever, for respondent:

Plaintiff's driver was not guilty of any negligence which proximately contributed to produce the injury.

Hanson v. Chippewa Valley & N. R. Co. 150 Wis. 104, 135 N. W. 488; Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629; Dralle v. Reedsburg, 140 Wis. 319, 122 N. W. 771; Wall v. Highland, 72 Wis. 435, 39 N. W. 560; Maxon v. Gates, 136 Wis. 270, 116 N. W. 758.

Plaintiff was not guilty of any negligence proximately contributing to produce her injury.

Hedges v. Mitchell, 69 Colo. 285, 194 Pac. 620.

The driver's negligence, if there were any, could not be imputed to the plaintiff.

Reiter v. Grober, 173 Wis. 493, post, 362, 181 N. W. 739; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Basler v. Sacramento Gas & E. Co. Ann. Cas. 1912A, 648, note; Dudley v. Peoria R. Co. 153 Ill. App. 624; Munger v. Sedalia, 66 Mo. App. 629; Reading Twp. v. Telfer, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134, 2 Am. Neg. Rep. 138.

The highway was not closed to public travel in such a manner as to protect travelers on the highway from injury.

Raymond v. Sauk County, 167 Wis. 125, L.R.A.1918F, 425, 166 N. W. 29.

The court did not err in its refusal to submit the question of whether any defects in the highway had existed for such a length of time that the county or its officers, in the exercise of ordinary care and prudence, ought to have known thereof.

Ward v. Jefferson, 24 Wis. 342; Harper v. Milwaukee, 30 Wis. 377; Prideaux v. Mineral Point, 43 Wis. 522, 28 Am. Rep. 558; Klatt v. Milwaukee, 53 Wis. 202, 40 Am. Rep. 759, 10 N. W. 162; Bell v. Lessor, 143 Wis. 557, 128 N. W. 52; Adams v. Oshkosh, 71 Wis. 49, 36 N. W. 614.

A stranger driving upon a public highway has a right to presume that such highway is in a reasonably safe condition for the ordinary traveler passing along and over the same.

Raymond v. Sauk County, supra; Seward v. Milford, 21 Wis. 485; Wall v. Highland, 72 Wis. 435, 39 N. W. 560; Simonds v. Baraboo, 93 Wis. 40, 57 Am. St. Rep. 895, 67 N. W. 40.

Jones, J., delivered the opinion of the court:

It is earnestly argued by appellant's counsel that the court erred in changing the answer of the jury in which they found that the driver of the car was guilty of contributory negligence. There is undoubtedly some force in the claim that he should have sooner seen the elevation in the road, and that he should have sooner stopped the car. But, in view of the rule which now obtains in this state it becomes unnecessary to decide whether the ruling of the court complained of was erroneous. Under the rule which long prevailed in Wisconsin, as declared in *Prideaux v. Mineral Point*, 43

Wis. 513, 28 Am. Rep. 558, one voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill and care of the person guiding it. As pointed out by Mr. Justice Vinje in a recent case, this rule of imputed negligence has never received extended judicial approval, and has been adhered to in only a few states. Since it was not a rule of property, this court felt at liberty to change it in the interests of justice, and to conform to the overwhelming majority rule. The opinion closed with this language: "Only so much of the *Prideaux Case* is overruled as imputes the negligence of the driver to an occupant in a private conveyance, who has no control over the driver, is not engaged in a joint undertaking with him, is guilty of no negligence himself, and stands in no other relation to him requiring his negligence to be imputed to the occupant." *Reiter v. Grober*, 173 Wis. 493, post, 362, 181 N. W. 739.

Thus we are squarely confronted with the question whether the facts of this case are such that negligence of the driver would have defeated a recovery by the plaintiff. Appellant's counsel argue that plaintiff and her husband were engaged in a joint undertaking. The argument is based on the fact that they were moving their home from Oshkosh to Sioux City. The husband intended to teach, and the plaintiff to attend college to improve her stenography, and obtain a position. There is no evidence that the journey was undertaken merely at the request of the wife, or of any fact showing that the husband was acting as her agent, or that they were jointly operating or controlling the movements of the car at the time of the accident. Nor is there any proof that they were engaged in any joint financial undertaking. As fellow

(— Wls. —, 183 N. W. 690.)

travelers they were going from Oshkosh to Sioux City to pursue their several avocations. In one sense, husbands and wives in their journey through life are always engaged in joint enterprises, sometimes successful, sometimes disastrous. But the mere fact that they

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imputed—
husband's to
wife—joint en-
terprise.

travel in the same car, whether for pleasure or to change their abode, does not constitute

a joint enterprise within the meaning of the rule under discussion.

Doubtless there may be such special facts showing agency, or such joint financial interest in the undertaking, as to make the negligence of the husband imputable to the wife and to defeat a recovery on her part. But no such facts are found in this case, and there is certainly no presumption that any such relation existed. It was merely the ordinary social and domestic relationship involved when husband and wife are traveling together. There are numerous cases which hold that when a wife is traveling with her husband, when they are not engaged in any joint enterprise, and when she has no direction or control over his movements, she is

—effect of
marital relation-
ship.

not chargeable with his negligent acts.

In other words, from the mere marital relationship the contributory negligence of the husband is not to be imputed to the wife. *Louisville, N. A. & C. R. Co. v. Creek*, 130 Ind. 139, 14 L.R.A. 733, 29 N. E. 481; *Louisville R. Co. v. McCarthy*, 129 Ky. 814, 19 L.R.A. (N.S.) 230, 130 Am. St. Rep. 494, 112 S. W. 925; *Finley v. Chicago, M. & St. P. R. Co.* 71 Minn. 471, 74 N. W. 174; *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379; *Reading Twp. v. Telfer*, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134, 2 Am. Neg. Rep. 138; *Dudley v. Peoria R. Co.* 153 Ill. App. 624; *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715, 16 N. C. C. A. 1050.

It is argued by appellant's coun-

sel that the court erred in refusing to submit to the jury the question of the contributory negligence of the plaintiff herself. Doubtless the plaintiff was bound to use such care as a reasonably prudent person would exercise under similar circumstances. It cannot be successfully claimed that plaintiff should have seen signals warning him of danger, since the jury found on sufficient evidence that there were none which would warn an ordinarily prudent traveler. It is claimed that the rate of speed was excessive, and that plaintiff should have known it and remonstrated. There was no direct evidence that they were going faster than 20 miles per hour, but it is argued that the physical facts show a much greater speed. In this argument there is the weakness that no testimony was offered to show within what distance such a car, going at the rate of 20 miles per hour, could have been stopped. Even if plaintiff had been intent upon the subject, it is doubtful whether, under the conditions she could have formed any intelligent estimate of the rate of speed. There is no evidence that she had any reason to doubt the care or skill of the driver of the car.

Automobile—
negligence of
passenger—
failure to
control move-
ment of car.

There is no evidence that she had any reason to doubt the care or skill of the driver of the car.

It is true that she was not paying attention at the time to the operation of the car. But we do not understand that a wife, sitting in the rear seat, when her husband is driving a car over a road apparently in good condition, is bound to pay constant attention to the management of the car, or to

—duty to watch
for imperfec-
tions.

keep a constant lookout for imperfections in the road. Much advice and many suggestions to the driver by one sitting in the rear seat are not conducive to the best management of the car. If the occupant sees the driver is driving at a dangerous rate of speed, or in violation of the law, reasonable care would require that the passenger protest.

This was illustrated in the recent case of *Howe v. Corey*, 172 Wis. 537, 179 N. W. 791, cited by appellant, where the plaintiff, a guest, testified that they were going at least 50 miles per hour in a city; he was sitting on the front seat, keeping no watch, and merely remarked that they were going pretty fast. They ran into a railroad train standing on a crossing, and it was held that plaintiff could not recover. Other cases might be cited where the passenger knew, or ought to have known, of the danger, and, failing to remonstrate, was denied recovery; but they do not seem to us controlling under the facts of the present case. The trial judge, after hearing the testimony and seeing the witnesses, held that there was no credible evidence to be submitted to the jury on this question, and we agree.

Appellant's counsel urge that the highway, at the point where the accident occurred, was not part of the trunk system of highways for the maintenance and repair of which the county was responsible. The complaint alleged that the highway in question was part of the trunk highway system. The answer set up that the highway had never been adopted by the county, nor had it become a part of the county highway system, but expressly alleged that the place where the accident occurred was and is on the state trunk highway, and set up that at the time of the accident it was closed, owing to repairs being made thereon. That the scene of the accident was a point on a part of the trunk highway system going through the county seems established by the admission in the answer, as well as by the testimony of one of the county officers. The testimony was undisputed that the culvert and grading at this point were ordered by the county authorities as part of the permanent construction of the trunk highway, and that the work was performed under the supervision of the state authorities. Since the work of grading the culvert was

done by the defendant, and since it was left in an unsafe condition, as found by the jury, we are convinced that defendant had notice of the defect, and that there was insufficiency and want of repair within the meaning of § 1317, subsec. 5, for which defendant was liable.

Highway—
liability of
county for
defect—statutory duty.

We do not think that there is merit in the claim that the road was closed for travel. As appears from the statement of facts, there were no barriers, and the road at this point was being used by the public, as defendant's officers knew. The finding of the jury as to want of proper signals was sustained by the evidence. If defendant intended to close the road for travel, more effective means should have been taken.

—when closed
to travel.

Appellant claims error in giving the following instruction: "In that connection I further instruct you that a stranger, driving upon a public highway, has a right to presume that such highway is in reasonably safe condition for the ordinary travel passing along and over the same."

Since we have held that the negligence of the husband, if any, was not imputable to plaintiff, and that the court properly refused to submit the question of plaintiff's negligence to the jury, it seems unnecessary to discuss the merits of this contention. Of course, the existence or nonexistence of this presumption would have a bearing on the question of how great a speed might be attained, without raising a duty on the part of the passenger to remonstrate. But the evidence does not show that the plaintiff knew, or had reason to know, of such a speed, even if it be assumed that the instruction was incorrect.

Appeal—
instruction—
immaterial
error.

It is suggested by appellant's counsel that, if the court should be of the opinion that the negligence of the driver cannot be imputed to the

(— *Wls.* —, 183 N. W. 690.)

plaintiff, a new trial should be granted, in order that the defendant might have the privilege of interpleading the plaintiff's husband as a defendant in this case, in order that appellant might have contribution. If so advised, the county may, of course, bring its independent action against the driver of the car, on the ground that his alleged negli-

gence jointly contributed to the plaintiff's injuries. But in our judgment the interests of justice would not be served by requiring the plaintiff to await the delay which would be caused by the proceeding suggested by appellant.

—reversal to permit defendant to secure contribution.

Judgment affirmed.

ANNOTATION.

Personal care required of one riding in automobile driven by another as affecting his right to recover against third person.

I. In general, 309.

II. At railroad crossings:

a. Steam railroads, 315.

b. Interurban railroad, 334.

I. In general.

The related question as to the liability of a guest for injury to a third person, due primarily to the negligence of the driver, is treated in the annotation following *Relter v. Grober*, post, 365.

It will be observed that the question under annotation is distinct from the question whether the negligence of the driver is imputable to one riding with him. The question also presupposes that there is no other relationship between the driver and the person injured, which would charge the latter with the former's negligence.

A person riding in an automobile driven by another, even though not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable or ordinary care to avoid injury, i. e., such care as an ordinarily prudent person would exercise under like circumstances.

United States.—*Brommer v. Pennsylvania R. Co.* (1910) 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179 Fed. 577, writ of certiorari denied without opinion in (1911) 223 U. S. 718, 56 L. ed. 628, 32 Sup. Ct. Rep. 522; *Hines v. Johnson* (1920) — C. C. A. —, 264 Fed. 465; *Pla y Hernandez v. San Juan Light & P. Co.* (1908) 4 Porto Rico Fed. Rep. 138.

III. As to street cars, 338.

IV. In collisions with vehicles, 352.

V. As to defects or obstructions in highways, 356.

Alabama.—*Birmingham R. Light & P. Co. v. Barranco* (1920) 203 Ala. 639, 84 So. 839.

Arkansas.—*Carter v. Brown* (1918) 136 Ark. 23, 206 S. W. 71; *Pine Bluff Co. v. Whitlaw* (1921) 147 Ark. 152, 227 S. W. 13.

California. — *Thompson v. Los Angeles & S. D. B. R. Co.* (1913) 165 Cal. 748, 134 Pac. 709; *Parmenter v. McDougall* (1916) 172 Cal. 306, 156 Pac. 460; *Irwin v. Golden State Auto Tour Corp.* (1918) 178 Cal. 10, 171 Pac. 1059; *Drouillard v. Southern P. Co.* (1918) 36 Cal. App. 447, 172 Pac. 405; *Carpenter v. Atchison, T. & S. F. R. Co.* (1921) — Cal. App. —, 195 Pac. 1073.

Colorado.—*Colorado Springs & Interurban R. Co. v. Cohun* (1919) 66 Colo. 149, 180 Pac. 307.

Connecticut. — *Clarke v. Connecticut Co.* (1910) 83 Conn. 219, 76 Atl. 523; *Weidlich v. New York, N. H. & H. R. Co.* (1919) 93 Conn. 438, 106 Atl. 323.

Illinois.—*Opp v. Pryor* (1920) 294 Ill. 538, 128 N. E. 580; *Grifenhagen v. Chicago R. Co.* (1921) 299 Ill. 590, 132 N. E. 790; *Fredericks v. Chicago R. Co.* (1917) 208 Ill. App. 172.

Indiana. — *Union Traction Co. v. Hawarth* (1917) 187 Ind. 451, 115 N. E. 753, 119 N. E. 869.

Iowa. — *Bradley v. Interurban R. Co.* (1921) — Iowa, —, 183 N. W. 493.

Kansas.—*Schaefer v. Arkansas Valley Interurban R. Co.* (1919) 104 Kan. 394, 179 Pac. 323, rehearing denied in (1919) 104 Kan. 740, 181 Pac. 118.

Kentucky.—*Winston v. Henderson (Farmers' Bank & T. Co. v. Henderson)* (1918) 179 Ky. 220, L.R.A.1918C, 646, 200 S. W. 330; *Graham v. Illinois C. R. Co.* (1919) 185 Ky. 370, 215 S. W. 60; *Milner v. Evansville R. Co.* (1920) 188 Ky. 14, 221 S. W. 207.

Maine.—*Blanchard v. Maine C. R. Co.* (1917) 116 Me. 179, 100 Atl. 666; *Kamillowitz v. Cumberland County Power & Light Co.* (1920) 119 Me. 588, 109 Atl. 487.

Massachusetts.—*Salisbury v. Boston Elev. R. Co.* (1921) — Mass. —, 182 N. E. 239.

Minnesota.—*Carnegie v. Great Northern R. Co.* (1914) 128 Minn. 14, 150 N. W. 164; *Zenner v. Great Northern R. Co.* (1916) 135 Minn. 37, 159 N. W. 1087; *Kokesh v. Price* (1917) 136 Minn. 304, 161 N. W. 715, 16 N. C. C. A. 1050; *McDonald v. Mesaba R. Co.* (1917) 137 Minn. 275, 163 N. W. 298; *Praught v. Great Northern R. Co.* (1919) 144 Minn. 309, 175 N. W. 998.

Missouri.—*Rappaport v. Roberts* (1918) — Mo. App. —, 203 S. W. 676; *Leopard v. Kansas City R. Co.* (1919) — Mo. App. —, 214 S. W. 268; *Davis v. City Light & Traction Co.* (1920) 204 Mo. App. 174, 222 S. W. 884.

Montana.—*Sherris v. Northern P. R. Co.* (1918) 55 Mont. 189, 175 Pac. 269.

New Hampshire.—*Collins v. Hustis* (1920) — N. H. —, 111 Atl. 286.

Ohio.—*Toledo R. & Light Co. v. Mayers* (1916) 93 Ohio St. 304, 112 N. E. 1014; *Rohr v. Scioto Valley Traction Co.* (1920) 31 Ohio C. A. 108.

Oregon.—*White v. Portland Gas & Coke Co.* (1917) 84 Or. 643, 165 Pac. 1005; *Elling v. Blake-McFall Co.* (1917) 85 Or. 91, 166 Pac. 57; *Robinson v. Oregon-Washington R. & Nav. Co.* (1918) 90 Or. 490, 176 Pac. 594; *Johnson v. Underwood* (1922) — Or. —, 203 Pac. 879.

Pennsylvania.—*Wachsmith v. Baltimore & O. R. Co.* (1912) 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679;

Senft v. Western Maryland R. Co. (1914) 246 Pa. 446, 92 Atl. 553; *Dunlap v. Philadelphia Rapid Transit Co.* (1915) 248 Pa. 130, 93 Atl. 873; *McLaughlin v. Pittsburgh R. Co.* (1916) 252 Pa. 32, 97 Atl. 107; *Martin v. Pennsylvania R. Co.* (1919) 265 Pa. 282, 108 Atl. 631; *MINNICH v. EASTON TRANSIT Co.* (reported herewith) ante, 296.

Rhode Island.—*Hermann v. Rhode Island Co.* (1914) 36 R. I. 447, 90 Atl. 813; *Coughlin v. Rhode Island Co.* (1921) — R. I. —, 115 Atl. 323.

Tennessee.—*Hurt v. Yazoo & M. Valley R. Co.* (1918) 140 Tenn. 623, 205 S. W. 437; *Stem v. Nashville Interurban R. Co.* (1920) 142 Tenn. 494, 221 S. W. 192.

Texas.—*Ferrell v. Beaumont Traction Co.* (1919) — Tex. Civ. App. —, 207 S. W. 654; *Chicago, R. I. & G. R. Co. v. Wentzel* (1919) — Tex. Civ. App. —, 214 S. W. 710.

Vermont.—*Wentworth v. Waterbury* (1916) 90 Vt. 60, 96 Atl. 334.

Virginia.—*Virginia & S. W. R. Co. v. Skinner* (1916) 119 Va. 843, 89 S. E. 887.

Washington.—*Sadler v. Northern P. R. Co.* (1922) — Wash. —, 203 Pac. 10.

The same rule applies also to passengers in other vehicles.

United States.—*Pyle v. Clark* (1897) 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744, 2 Am. Neg. Rep. 100; *Davis v. Chicago, R. I. & P. R. Co.* (1907) 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10.

California.—*Bresee v. Los Angeles Traction Co.* (1906) 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152; *Fujise v. Los Angeles R. Co.* (1909) 12 Cal. App. 207, 107 Pac. 317; *Ilardi v. Central California Traction Co.* (1918) 36 Cal. App. 488, 172 Pac. 763.

Colorado.—*Denver City Tramway Co. v. Armstrong* (1912) 21 Colo. App. 640, 123 Pac. 136.

Delaware.—*Farley v. Wilmington & N. C. Electric R. Co.* (1902) 3 Penn. 581, 52 Atl. 543; *Ewans v. Wilmington City R. Co.* (1907) 7 Penn. 458, 80 Atl. 634; *Campbell v. Walker* (1910) 2 Boyce, 41, 78 Atl. 601.

Georgia.—*Central of Georgia R. Co.*

v. Reid (1919) 23 Ga. App. 694, 99 S. E. 235.

Illinois.—*Pienta v. Chicago City R. Co.* (1918) 284 Ill. 246, 120 N. E. 1; *Storm v. Cleveland, C. C. & St. L. R. Co.* (1910) 156 Ill. App. 88; *Odettt v. Chicago City R. Co.* (1911) 166 Ill. App. 270.

Indiana.—*Miller v. Louisville, N. A. & C. R. Co.* (1890) 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; *Indianapolis Street R. Co. v. Johnson* (1904) 163 Ind. 518, 72 N. E. 571; *Vincennes v. Thuis* (1902) 28 Ind. App. 523, 63 N. E. 315; *Chicago & E. R. Co. v. Biddinger* (1915) 61 Ind. App. 419, 109 N. E. 953.

Iowa.—*Herdman v. Zwart* (1914) 167 Iowa, 500, 149 N. W. 681.

Maine.—*Whitman v. Fisher* (1904) 98 Me. 575, 57 Atl. 895.

Massachusetts.—*Barber v. Boston Elev. R. Co.* (1921) — Mass. —, 131 N. E. 298.

Minnesota.—*Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1895) 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102; *Cotton v. Willmar & S. F. R. Co.* (1906) 99 Minn. 366, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935.

New Jersey.—*Mittelsdorfer v. West Jersey & N. R. Co.* (1909) 77 N. J. L. 698, 73 Atl. 538.

New York.—*Hoag v. New York C. & H. R. R. Co.* (1888) 111 N. Y. 199, 18 N. E. 648; *Flanagan v. New York C. & H. R. R. Co.* (1902) 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed without opinion in (1903) 173 N. Y. 631, 66 N. E. 1108.

Ohio.—*Pennsylvania Co. v. Stahl* (1912) 34 Ohio C. C. 157.

Pennsylvania.—*Trumbower v. Lehigh Valley Transit Co.* (1912) 285 Pa. 397, 84 Atl. 403; *Kirschbaum v. Philadelphia Rapid Transit Co.* (1920) 73 Pa. Super. Ct. 536.

Tennessee.—*James v. Memphis Street R. Co.* (1912) 3 Tenn. C. C. A. 298.

Texas.—*Galveston, H. & S. A. R. Co. v. Kutac* (1889) 72 Tex. 643, 11 S. W. 137.

Utah.—*Atwood v. Utah Light & R. Co.* (1914) 44 Utah, 366, 140 Pac. 137.

Virginia.—*Southern R. Co. v. Jones* (1916) 118 Va. 685, 88 S. E. 178.

The law fixes no different standard of duty for a passenger in an automobile than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with this duty must depend upon all the circumstances, one of which—and unquestionably an important one—is that he is merely a passenger, having no control over the management of the automobile in which he is riding. *Clarke v. Connecticut Co.* (1910) 83 Conn. 219, 76 Atl. 523.

The failure of a passenger in an automobile to use due care will not prevent a recovery by him against a third party, unless such failure contributed to the injury. *Carter v. Brown* (1918) 136 Ark. 23, 206 S. W. 71; *Pine Bluff Co. v. Whitlaw* (1921) 147 Ark. 152, 227 S. W. 13; *Clarke v. Connecticut Co. (Conn.) supra*; *Griffin v. Hustis* (1919) 234 Mass. 95, 125 N. E. 387; *Labrecque v. Donham* (1920) 236 Mass. 10, 127 N. E. 537; *Kalland v. Brainard* (1918) 141 Minn. 119, 169 N. W. 475; *Davis v. City Light & Traction Co.* (1920) 204 Mo. App. 174, 222 S. W. 884.

And the same is true as to passengers in other vehicles. *Chicago & E. R. Co. v. Biddinger* (1915) 61 Ind. App. 419, 109 N. E. 953.

The question of the contributory negligence of one injured while riding in an automobile driven by another is usually for the jury. *Carpenter v. Atchison, T. & S. F. R. Co.* (1921) — Cal. App. —, 195 Pac. 1073; *Clarke v. Connecticut Co. (Conn.) supra*; *Bradley v. Interurban R. Co.* (1921) — Iowa, —, 183 N. W. 493; *Waring v. Dubuque Electric Co.* (1922) — Iowa, —, 186 N. W. 42; *Schaefer v. Arkansas Valley Interurban R. Co.* (1919) 104 Kan. 394, 179 Pac. 323, rehearing denied in (1919) 104 Kan. 740, 181 Pac. 118; *Washington, B. & A. R. Co. v. State* (1920) 136 Md. 103, 111 Atl. 164; *McDonald v. Mesaba R. Co.* (1917) 137 Minn. 275, 163 N. W. 298; *White v. Portland Gas & Coke Co.* (1917) 84 Or. 643, 165 Pac. 1005; *Coughlin v. Rhode Island Co.* (1921) —

R. I. —, 115 Atl. 323; *Sadler v. Northern P. R. Co.* (1922) — Wash. —, 208 Pac. 10.

And the same may be said as to passengers in other vehicles. *Fujise v. Los Angeles R. Co.* (1919) 12 Cal. App. 207, 107 Pac. 317; *Denver City Tramway Co. v. Armstrong* (1912) 21 Colo. App. 640, 123 Pac. 136; *Odett v. Chicago City R. Co.* (1911) 166 Ill. App. 270.

And, as well put in *Washington, B. & A. R. Co. v. State* (1920) 136 Md. 103, 111 Atl. 164, while there are cases in which the guests or occupants of vehicles have been held guilty of such contributory negligence as to preclude recovery as matter of law, it will be found, by examination of the numerous cases on the subject, that generally the question must be submitted to the jury.

Unless the evidence is all one way, the question whether a passenger in an automobile exercised ordinary care for his own safety is a question of fact, and must be submitted to the jury. *Drouillard v. Southern P. Co.* (1918) 36 Cal. App. 447, 172 Pac. 405.

And it was held in *Ilardi v. Central California Traction Co.* (1918) 36 Cal. App. 488, 172 Pac. 763, an action for injury to one riding in a wagon, that, unless the evidence showed beyond question that such passenger or guest failed to exercise such care as was necessary for his own safety, the question whether he was remiss in that respect, or was guilty of negligence contributing to his injury, was primarily for the jury.

It was held in *Carpenter v. Atchison, T. & S. F. R. Co.* (1921) — Cal. App. —, 195 Pac. 1073, that, in the absence of evidence to the contrary, the law presumes that a passenger in an automobile did everything that a reasonably prudent man would have done under the same circumstances for the protection of his own safety. This holding is based upon provisions of the California Code of Civil Procedure, to the effect that the presumption that a person takes ordinary care of his own concerns may be controverted, but, unless controverted,

the jury are bound to find according to the presumption.

And, in an action for injury to a passenger in a buggy, it was held in *Cotton v. Willmar & S. F. R. Co.* (1906) 99 Minn. 366, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935, that the primary duty of caring for the safety of the vehicle and passengers rests upon the driver, and unless the danger is obvious, or is known to the passenger, the latter may rely upon the assumption that the driver will exercise proper care and caution in approaching a place of danger. But if the passenger knows that the driver is incompetent and careless, or sees that the driver is not aware of the danger and is not taking proper precautions, it is his duty to notify him of the danger, and a failure to do so is negligence.

To aid in determining whether one injured while riding as a passenger in an automobile was guilty of contributory negligence, the courts of Pennsylvania have laid down in striking form a rule—probably, in principle, in force in other states—to the effect that, if a passenger voluntarily joins the driver in testing a known or manifest danger, the former is chargeable with such contributory negligence as will prevent a recovery. *Wachsmith v. Baltimore & O. R. Co.* (1912) 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *Senft v. Western Maryland R. Co.* (1914) 246 Pa. 446, 92 Atl. 553; *Carbaugh v. Philadelphia & R. R. Co.* (1918) 262 Pa. 25, 104 Atl. 860; *McLaughlin v. Pittsburgh R. Co.* (1916) 252 Pa. 32, 97 Atl. 107; *Hardie v. Barrett* (1917) 257 Pa. 42, L.R.A. 1917F, 444, 101 Atl. 75, 16 N. C. C. A. 485; *Azinger v. Pennsylvania R. Co.* (1918) 262 Pa. 242, 105 Atl. 87; *MINNICH v. EASTON TRANSIT Co.* (reported herewith) ante, 296; *Farquhar v. Webster, M. B. & F. C. S. R. Co.* (1912) 50 Pa. Super. Ct. 536.

The same rule was laid down by the same courts, and by the supreme court of Colorado, in reference to persons riding in other vehicles. *Colorado & S. R. Co. v. Thomas* (1905) 33 Colo. 517, 70 L.R.A. 681, 81 Pac.

801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316; *Walsh v. Altoona & L. Valley Electric R. Co.* (1911) 232 Pa. 479, 81 Atl. 551; *Trumbower v. Lehigh Valley Transit Co.* (1912) 235 Pa. 397, 84 Atl. 403; *Kirschbaum v. Philadelphia Rapid Transit Co.* (1920) 73 Pa. Super. Ct. 536.

And, in an action for injury to one while riding in a buggy, it was held in *Atwood v. Utah Light & R. Co.* (1914) 44 Utah, 366, 140 Pac. 137, that a passenger in a vehicle, in the exercise of ordinary care and prudence to avoid injury to himself, must, in case of imminent danger, leave the vehicle in case such a course is practicable and necessary to avoid injury, and may not sit silently by and permit the driver of the vehicle to encounter or enter into open danger without protest or remonstrance, and take the chances, and, if injured, seek to recover damages.

It is no less the duty of one riding in an automobile, where he has the opportunity to do so, than of the driver, to use reasonable care to learn of and avoid danger. *Opp v. Pryor* (1920) 294 Ill. 538, 128 N. E. 580; *Barrett v. Chicago, M. & St. P. R. Co.* (1920) — Iowa, —, 175 N. W. 950, rehearing denied in (1920) — Iowa, —, 180 N. W. 670.

And the same has been held in reference to persons riding in other vehicles. *Farley v. Wilmington & N. C. Electric R. Co.* (1902) 3 Penn. (Del.) 581, 52 Atl. 543; *Campbell v. Walker* (1910) 2 Boyce (Del.) 41, 78 Atl. 601; *Pienta v. Chicago City R. Co.* (1918) 284 Ill. 246, 120 N. E. 1; *Storm v. Cleveland, C. C. & St. L. R. Co.* (1910) 156 Ill. App. 88; *Lake Shore & M. S. R. Co. v. Boyts* (1897) 16 Ind. App. 640, 45 N. E. 812; *Vincennes v. Thuis* (1902) 28 Ind. App. 523, 63 N. E. 315; *Smith v. Maine C. R. Co.* (1895) 87 Me. 339, 32 Atl. 967; *Whitman v. Fisher* (1904) 98 Me. 575, 57 Atl. 895; *Meenagh v. Buckmaster* (1898) 26 App. Div. 451, 50 N. Y. Supp. 85.

In *Birmingham R. Light & P. Co. v. Barranco* (1920) 203 Ala. 639, 84 So. 839, the principle governing the duty of a passenger in an automobile is

stated as follows: "There rests upon even a mere guest, normal with respect to the senses, in a vehicle over whose operation or its operator (not shown to be incompetent for any reason) such guest has no right of control, and toward whom the guest bears no relation of agency, the duty to observe ordinary care—the care an ordinarily prudent person, in like circumstances, would observe—in respect to dangers or perils known to such guest, or suggested by attendant circumstances that would have advised a reasonably prudent person likewise situated that danger or peril was imminent or impending; but there is no duty on such guest to anticipate that the independent driver of the vehicle in which such guest is riding will enter the sphere of danger or peril ahead, or will omit to exercise commensurate care to sense the approach, or the probable approach, of other agencies of transportation with reference to which the ordinarily prudent driver should, in due observance of his duty, govern the movement of the vehicle he controls. Where, however, such guest knows of the danger or peril into or toward which the vehicle is being driven, or the circumstances of realized speed of the vehicle, and known location, and its surroundings ahead are such as to suggest, to a reasonably prudent person likewise situated, the probability that a sphere of danger or peril may be created thereby, or may be entered in course of the vehicle's movement, it is the duty of such guest to warn the driver in the premises, and to protest a continuance of a movement so actually or probably fraught with danger or peril to such occupant of the vehicle. In other words, the duty imposed upon such person, whatever his seat in the vehicle, is created by either known dangers or perils that the attendant circumstances reasonably suggest or foreshadow. The duty is, therefore, not original with respect to the operation of the vehicle, but resultant, and that only from known and appreciated circumstances capable of bringing it into effect. Otherwise, the law would be held to

sanction this irrational result: Such person would be allowed to close his senses to known dangers, or to perils reasonably suggested by the attendant circumstances indicated, in blind reliance upon the unaided care of another, independent of such person's control though that other is, without assuming the consequences of the omission of such ordinary care as the attendant circumstances or known perils create."

Generally, a passenger in an automobile should sit still and say nothing, because any other course is fraught with danger. Interference by laying hold of an operating lever, or by exclamation, or even by direction or inquiry, is generally to be deprecated, as in the long run the greater safety lies in letting the driver alone. *Southern P. Co. v. Wright* (1918) 160 C. C. A. 339, 248 Fed. 261; *Clarke v. Connecticut Co.* (1910) 88 Conn. 219, 76 Atl. 523.

And in *Bradley v. Interurban R. Co.* (1921) — Iowa, —, 183 N. W. 493, the court said: "Within reasonable limits, the invited passenger in an automobile may reasonably and lawfully rely on the skill and judgment of the driver. He cannot physically interfere with the driver's control of the car without peril of disaster. He may, under proper circumstances, sound an alarm if he sees danger ahead of which the driver seems oblivious, but even then he must still, to some extent, place his reliance upon the driver to avoid it. There is no rule of law which obligates him to forcibly seize the steering wheel and wrest it from the hands of the owner, or to jump from the rapidly moving vehicle to certain injury or death. The appearance of danger of this character, in almost every case, comes in an instant of time; the peril is immediate—imminent—and, if a collision occurs, the destruction is accomplished in a twinkling."

And as to whether a guest or passenger in an automobile had exercised reasonable care for his own safety, the court stated in *Hermann v. Rhode Island Co.* (1914) 36 R. I. 447, 90 Atl. 813: "It cannot be said as a matter

of law that such guest or passenger is guilty of negligence because he has done nothing. In many such cases the highest degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in its results. While it is true that it is the duty of such guest or passenger not to submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use reasonable care for his own safety, nevertheless he should not, in every case, be held guilty of contributory negligence merely because he has done nothing. If there be threatened danger which is known to the passenger and unobserved by the driver, the passenger would be guilty of negligence if he failed to notify and warn the driver; also, if the driver be careless or reckless in his conduct, and this is known to the passenger, and there be reasonable opportunity to do so, it would be the passenger's duty to caution the driver and remonstrate with him, and, if he persisted in his improper conduct, to leave the vehicle; but manifestly that would not be possible, nor could it be required, in every case."

It was held in *Gersman v. Atchison, T. & S. F. R. Co.* (1921) — Mo. —, 229 S. W. 167, to be the rule in Kansas that where one person is riding in an automobile with another for a common purpose, with equal opportunity to see and ability to appreciate the danger, and is in fact looking out for himself, and makes no effort to avoid danger, he is chargeable with a want of care which results in injury.

The fact that one injured while riding in an automobile had employed an unlicensed person to operate it, contrary to statute, will not of itself prevent holding the one responsible for the accident liable for the injuries, but it is some evidence that the injured person was not in the exercise of due care. *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A.(N.S.) 801,

104 N. E. 487; *Griffin v. Hustis* (1919) — Mass. —, 125 N. E. 387.

II. At railroad crossings.

a. Steam railroads.

In general.

A passenger does not have the right to rely wholly on the driver for protection, but is obliged to look out for himself, in approaching a railroad crossing in an automobile. *Virginia & S. W. R. Co. v. Skinner* (1916) 119 Va. 843, 89 S. E. 887.

And it has been held, in reference to passengers in other vehicles, that the fact that one is a passenger does not relieve him from the duty of looking and listening for himself in approaching a railroad crossing, and doing all that a careful and prudent man would do under similar circumstances. *Hoag v. New York C. & H. R. R. Co.* (1888) 111 N. Y. 199, 18 N. E. 648; *Flanagan v. New York C. & H. R. R. Co.* (1902) 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed without opinion in (1903) 173 N. Y. 631, 66 N. E. 1108.

It is the duty of one riding in an automobile, though drunk, to exercise, in approaching a railroad crossing, the same degree of care for his own safety that is required of a sober person under the same circumstances. *Graham v. Illinois C. R. Co.* (1919) 185 Ky. 370, 215 S. W. 60.

And the occupant of an automobile, in approaching a railroad crossing where he knows there is danger, is under the duty of looking and listening, both being effective. *Morris v. Chicago, B. & Q. R. Co.* (1917) 101 Neb. 479, 163 N. W. 799.

Where there was no eyewitness to a railroad accident in which a passenger in an automobile was killed, the jury may infer, from the instinct of self-preservation, that he used due care in looking and listening for approaching trains. *Barrett v. Chicago, M. & St. P. R. Co.* (1920) — Iowa, —, 175 N. W. 950, rehearing denied in (1920) — Iowa, —, 180 N. W. 670.

And it was held in *East Tennessee, V. & G. R. Co. v. Markens* (1891) 88 Ga. 60, 14 L.R.A. 281, 13 S. E. 855, 11 Am. Neg. Cas. 313, that where there

is no evidence that a female passenger in a public hack knew of danger from an approaching train at a public crossing, the court may state to the jury that there is no evidence of any failure of duty on the part of such passenger to avoid the injury.

A passenger in an automobile, in approaching a railroad crossing, should exercise the care usually exercised by ordinarily prudent persons under the circumstances to ascertain the approach of trains and keep out of their way, and to warn the driver of the approach of a train, and prevent him from driving on the crossing in the way of the train, if it can be done before the automobile gets upon the tracks, or to leave it, if by the use of ordinary care it can be done before the automobile is struck by the train. *Graham v. Illinois C. R. Co.* (1919) 185 Ky. 370, 215 S. W. 60.

And in *Roach v. Western & A. R. Co.* (1894) 93 Ga. 785, 21 S. E. 67, where a passenger in a buggy was injured when it was struck by a railroad train at a crossing, the court said that the duty of self-preservation, the omission to guard which would amount to negligence on the part of the passenger, would arise, if from drunkenness or other cause the driver was obviously incompetent to exercise the proper care, and the passenger failed to interpose, or else leave the vehicle in time to escape the collision.

The mere sight of a railroad crossing by a passenger in an automobile approaching such crossing, where there is then present no apparent danger in making it, does not make it his duty to warn the driver of the crossing, or of the mere approach of the automobile thereto, and a passenger has the right to assume that the driver will, in such a case, exercise due care to avoid the usual ordinary dangers of the road. *Ellis v. Central California Traction Co.* (1918) 37 Cal. App. 390, 174 Pac. 407.

And a female passenger in a public hack is under no duty to supervise the driver at a public railroad crossing, or to look or listen for approach-

ing trains, unless she has some reason to distrust the diligence of the driver himself in respect to these matters. *East Tennessee, V. & G. R. Co. v. Markens* (1891) 88 Ga. 60, 14 L.R.A. 281, 18 S. E. 855, 11 Am. Neg. Cas. 313.

A guest on the rear seat of an automobile owes a very limited degree of care, and is not expected to direct the driver, or to keep a lookout at a railroad crossing, but of sudden dangers, known to him, he must warn the driver, and, for his failure to do so, he is chargeable with having proximately contributed to the accident, unless a reasonable person, under all the circumstances, would not have given the warning. *Weidlich v. New York, N. H. & H. R. Co.* (1919) 93 Conn. 438, 106 Atl. 323.

But where a guest is sitting on the front seat of an automobile with the driver, and enjoys opportunities for seeing and listening for approaching trains at a railroad crossing equal to those of the driver, his duty, in the exercise of ordinary care for his own protection, to keep a vigilant lookout for approaching trains when about to pass over the railroad crossing, does not exact a less degree of care in these respects than is required of the driver. *Barrett v. Chicago, M. & St. P. R. Co.* (1920) — Iowa, —, 175 N. W. 950, rehearing denied in (1920) — Iowa, —, 180 N. W. 670.

And in *Beemer v. Chicago, R. I. & P. R. Co.* (1917) 181 Iowa, 642, 162 N. W. 43, where a woman was riding in an automobile with her husband, who drove, without looking, in front of a passenger train, it was held that the wife, who sat on the front seat beside her husband, with the same knowledge of the approach to the crossing and the danger thereof, was as much under the duty of lookout and discovery as he was.

And where one is sitting at the right of the driver in front, with at least equal opportunity to observe danger and the approach of trains, being bound to prove that he exercised ordinary care, it is no less his duty than that of the driver of the automobile to observe and avoid dan-

ger, if practical, and to warn the driver thereof. *Opp v. Pryor* (1920) 294 Ill. 538, 128 N. E. 580.

And a guest in a cutter, if he has the opportunity to do so, is under no less duty than the driver, when approaching a railroad crossing, to look and listen, and to learn of danger and avoid it, if practicable. *Lake Shore & M. S. R. Co. v. Boyts* (1897) 16 Ind. App. 640, 45 N. E. 812.

But it was held in *Thomas v. Illinois C. R. Co.* (1915) 169 Iowa, 337, 151 N. W. 387, an action for the death of a passenger in an automobile caused by its collision with a fast passenger train, that a passenger is not under the same duty as the driver of the automobile in approaching a railroad crossing, but that the passenger has a right to rely upon what the driver of the machine is doing, and upon his care for the safety of himself and the passenger.

And that there is a difference in the amount of care required to be exercised by a passenger and a driver, in approaching a railroad crossing in an automobile, is recognized in the case of *Drouillard v. Southern P. Co.* (1918) 36 Cal. App. 447, 172 Pac. 405. The court, in answering the question as to whether the passenger had exercised that care which the law exacts of everyone in a similar position, said that, in deciding that question, they must, of course, distinguish between the driver and the guest; that, while for the purposes of the case it might be conceded that, within the rule often announced in reference to railroad crossings, the driver was chargeable in this case with such negligence that no action in his behalf would lie against the railroad company, this concession would not militate against the view that the same defense was not available in an action by the passenger; that, in other words, certain things are sometimes required of the driver, to satisfy the requirements of ordinary care and prudence, that it would be unreasonable to demand of the guest, who has no control over the driver and who is not directing the movements of the machine.

One who is traveling in another's carriage on a mission in which both are interested, having as much right as the owner of the carriage, who is driving the horse, to control the course, is bound to take precautions to avoid injury upon approaching a railroad crossing, and cannot absolve himself of the charge of negligence on the theory that he relied on the driver to do so. *Davis v. Chicago, R. I. & P. R. Co.* (1907) 88 C. C. A. 488, 16 L.R.A. (N.S.) 424, 159 Fed. 10.

And it was held in *Morel v. New York, N. H. & H. R. Co.* (1921) 238 Mass. 392, 131 N. E. 175, an action by a helper in a motor truck for injuries sustained in a railroad crossing accident, under § 245 of N. Y. Laws 1906, chapter 463, making a railroad company liable for injuries caused by failure to give the statutory signals required from those in charge of locomotives at grade crossings, that there was no presumption in favor of the plaintiff that he was in the exercise of due care under chapter 553 of the Statutes of 1914, since such statute was inapplicable to actions for injuries, under § 245.

Matter of law.

Under the Pennsylvania rule that it is contributory negligence, as a matter of law, to fail to stop, look, and listen before crossing a railroad track at a highway crossing, a guest in an automobile, who knowingly and without protest suffers the chauffeur to drive upon a railroad track without stopping to look and listen, has been held guilty of contributory negligence as matter of law. *Brommer v. Pennsylvania R. Co.* (1910) 103 C. C. A. 135, 29 L.R.A. (N.S.) 924, 179 Fed. 577, writ of certiorari denied without opinion in (1911) 223 U. S. 718, 56 L. ed. 628, 33 Sup. Ct. Rep. 522; *Eline v. Western Maryland R. Co.* (1918) 262 Pa. 33, 104 Atl. 857; *Martin v. Pennsylvania R. Co.* (1919) 265 Pa. 282, 108 Atl. 631. While in all these cases the driver and the guest were said to have been engaged in a common purpose, with a common object in view, and in the first and last cases the holding appears to be based partly upon this fact, it is clear that the

court did not mean to imply that the negligence of the driver was imputable to the persons riding with him, but apparently the thought was to distinguish the case from one where the relation is that of a passenger and a quasi carrier for hire.

Contributory negligence on the part of one riding on the front seat of an automobile driven by another whose negligence is not imputable to the former has been held to be shown as a matter of law in the following circumstances:

—where one, on approaching, in broad daylight, a railroad crossing in plain sight for 300 feet, though not familiar with the locality, permitted, without protest, the automobile to be driven, at the rate of about 10 or 12 miles an hour, upon and over the crossing, without stopping, or even hesitating, to ascertain the movements of trains, and only called the attention of the driver to the train when the collision was inevitable, where he saw, or, by the exercise of reasonable care, should have seen, the crossing, in time to have warned the driver of the danger, *Martin v. Pennsylvania R. Co.* (Pa.) supra;

—where, in approaching a railroad crossing, plaintiff saw and observed the train when about 60 or 70 feet from the track, but remained in the automobile, which neither stopped nor checked its speed, but, after passing the open space, ran on behind obstructions to sight and sound, blindly relying on the chance that it would beat the train to the crossing, when plaintiff, even if the driver had refused to stop at his request, was in a position to avoid injury by jumping from the automobile, its speed not being so great as to offer a serious hindrance to such an attempt, *Coby v. Quincy, O. & K. C. R. Co.* (1913) 174 Mo. App. 648, 161 S. W. 290;

—where the only inference permissible from the evidence was that the regular warnings and signals were given by the train before reaching the crossing, which was familiar to the plaintiff, and his failure to hear one or more of them, and to observe the smoke issuing from the engine,

or to hear the rumble and noise of the fast-moving train, in time to have avoided the accident, could not, in the face of the undisputed evidence, be accounted for or explained on any other theory than that of indifference, inattention, and lack of ordinary care and caution on his part, *Lawrence v. Denver & R. G. R. Co.* (1918) 52 Utah, 414, 174 Pac. 817;

—where plaintiff did not look or listen when approaching a railroad crossing, being engaged in conversation with another passenger, but relied exclusively upon the open gates at the crossing, and where, if he had looked, he must have seen the train, and, if he had listened, he must have heard the bell and the other noises of the train, in time to have warned the driver and to have requested him to stop, *Blanchard v. Maine C. R. Co.* (1917) 116 Me. 179, 100 Atl. 666;

—where one approached a railroad crossing without looking for the approaching train, which was in plain sight, when, if he had looked in time, he would have had an abundance of opportunity to have called the attention of the driver to the approaching engine, or to have jumped from the motor truck in time to have avoided the collision, *La Goy v. Director General* (1921) 231 N. Y. 191, 131 N. E. 886;

—where had plaintiff looked up the track, of which he had an unobstructed view of 1,000 feet, on his side of the automobile, at any time after it started, from a point 100 feet away, up the incline toward the track, at a speed of 3 miles per hour, he could not have avoided discovering the train, and observing its rapid approach, and the slightest warning to the driver would have caused him to stop in time, and, at the rate the automobile was moving, plaintiff could have left it without danger to himself. *Sadler v. Northern P. R. Co.* (1922) — Wash. —, 203 Pac. 10.

—where one, riding on the side from which a regular train, then due to his knowledge, was approaching a crossing with which he was familiar, failed to keep a continuous and vigilant outlook for approaching trains, and could have seen the train, if he

had looked, in time to have warned the driver of the danger, *Hoyle v. Northern P. R. Co.* (1919) 105 Wash. 652, 178 Pac. 810;

—where one who knew the dangerous character of the railroad crossing, and that he could not see in the direction in which the train came, because of obstructions, and whose opportunity to be on the lookout was better than that of the driver, failed to caution the latter of the impending danger before they reached the tracks, and made no effort to induce the driver to slow down or stop the machine, *Morris v. Chicago, B. & Q. R. Co.* (1917) 101 Neb. 479, 163 N. W. 799.

And, likewise, contributory negligence on the part of one riding on the front seat of a buggy or wagon driven by another, with whose negligence he was not chargeable, has been held to be shown as a matter of law in the following circumstances:

—where, knowing that a train was approaching, one joined with the driver in testing the danger of attempting to cross the tracks in front of the train, *Colorado & S. R. Co. v. Thomas* (1905) 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316;

—where plaintiff had a better opportunity than the driver for discovering dangers, and, before reaching the first track, discussed the situation with the driver, and they agreed in guessing that everything was all right, and the driver was ready and willing to act upon any information or suggestion from the plaintiff, and the latter instinctively felt that there was a responsibility resting upon him as well as upon the driver, as he knew that they were crossing railroad tracks, and, within 70 feet of the point of collision, he voluntarily assumed the duties of a lookout, and saw the headlight of the engine, which the driver did not appear to have seen, but did not mention the fact to him, or ask him to stop the horses, or to hurry them forward, *Smith v. Maine C. R. Co.* (1895) 87 Me. 339, 32 Atl. 967;

—where plaintiff was in full pos-

session of all her mental faculties, and could have seen the train at any time when within 42 feet of the point of the collision, but did not see it until immediately before the collision, which she did nothing to avoid, *Missouri, K. & T. R. Co. v. Bussey* (1903) 66 Kan. 735, 71 Pac. 261;

—where plaintiff approached the point of collision without paying the least heed to the fact that he was about to cross a railroad track, and neither looked nor listened for approaching trains, although, if he had done so, he would have been warned of the danger in time to have averted the injury, *Southern R. Co. v. Jones* (1916) 118 Va. 685, 88 S. E. 178;

—where plaintiff, whose opportunity for observation was equal, if not superior, to that of the driver, failed to look and listen, on a dark and windy night, for the train, while they were passing over a distance of 90 to 100 feet before reaching the crossing, during which time the train could have been plainly seen, and moved about half a mile, *Hajsek v. Chicago, B. & Q. R. Co.* (1903) 5 Neb. (Unof.) 67, 97 N. W. 327;

—where one, on approaching a railroad crossing in a buggy with the top raised, on a day on which it had been snowing and was very windy, failed to look and listen for trains, or to warn the driver, though possessed of the same knowledge of the road, the crossing, and the environment, and with at least the same, if not better, opportunity of discovering dangers, than the driver, and without any embarrassment in communicating them to him, *Brickell v. New York C. & H. R. R. Co.* (1890) 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449;

—where the railroad crossing was known by plaintiff to be dangerous, and she approached it when a train was in full view, but took no precaution to warn her husband, or to avert the sudden danger, although slight care might have avoided it, *Miller v. Louisville, N. A. & C. R. Co.* (1891) 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339.

One who hires a vehicle and driv-

er, with whom he takes passage, is bound to check or remonstrate with the driver in case the latter attempts to cross a railroad track without stopping or listening for approaching trains, and his representative cannot recover in case he is killed by the driver's attempt to cross the tracks, heedless of an approaching train, when he is in an open carriage and can readily discover the peril of the driver's act. *Illinois C. R. Co. v. McLeod* (1900) 78 Miss. 334, 52 L.R.A. 954, 84 Am. St. Rep. 630, 29 So. 76.

And it was held in *Fogg v. New York, N. H. & H. R. Co.* (1916) 223 Mass. 444, 111 N. E. 960, that the evidence of due care on the part of a woman riding with her husband in an automobile which was struck by a train was insufficient for the consideration of the jury, where there was no evidence that she did anything for her own safety, and there was evidence that, as she neared the railroad crossing, she was looking in a different direction from that from which the train which struck the automobile was approaching.

There is a dictum in *Dixon v. Vicksburg, S. & P. R. Co.* (1916) 139 La. 329, 71 So. 527, to the effect that a passenger having an equal opportunity with the driver to exercise his faculties, and failing to do so, cannot recover damages from a railroad company for injury sustained in a collision between the automobile and a train.

And the failure of a passenger on the rear seat of an automobile to look and listen upon approaching a railroad crossing was held in *Read v. New York C. & H. R. R. Co.* (1908) 123 App. Div. 228, 107 N. Y. Supp. 1068, to be contributory negligence as matter of law, where it appeared that he was a man of thirty-six, in full possession of his faculties, and seated on the side from which the train was approaching, that for a distance of 175 to 200 feet he had an unobstructed view of 2,000 feet of the railroad tracks, that he was acquainted with the locality, that the automobile was proceeding very

slowly, and that any information or a word to the chauffeur would have caused him to stop the automobile and the accident would have been avoided.

And the failure of one in possession of all her faculties, seated in a buggy in such a position that she could have looked for the approach of the train, and, had she looked, would have seen it, to look for approaching trains, upon nearing a railroad crossing, until just before she was struck by the train, renders her guilty of contributory negligence as matter of law. *Pennsylvania Co. v. Stahl* (1912) 34 Ohio C. C. 157.

It was held in *Sackett v. Chicago G. W. R. Co.* (1919) — Iowa, —, 174 N. W. 658, where one riding on the rear seat of a motorcycle was injured at a railroad crossing, that, under the circumstances, plaintiff was as much under the duty of lookout and discovery as was the driver, and that where, being familiar with the crossing and knowing that they were approaching railroad tracks, and that trains might be crossing the street at any time, he did not look for approaching trains, he was guilty of contributory negligence as matter of law.

And the failure of an occupant of a wagon to look and listen for approaching trains when he knows he is approaching a railroad crossing is contributory negligence as matter of law. *Toledo & O. C. R. Co. v. Eather-ton* (1896) 20 Ohio C. C. 297, 11 Ohio C. D. 253.

And the failure of the occupant of a wagon to look and listen before going over a private railroad crossing, when, if he had looked and listened, he must have observed the approaching train which struck the wagon, renders him guilty of contributory negligence as matter of law. *Johnston v. Delano* (1916) 100 Neb. 192, 158 N. W. 1034.

And one who might have seen the danger of a reckless attempt by the driver of the wagon in which she was riding, to cross railroad tracks, and who knew that a train was due about that time, but did not look or

listen, or warn the driver, or ask to get out, is guilty of contributory negligence as a matter of law. *Dean v. Pennsylvania R. Co.* (1889) 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718.

And it was held in *Lake Shore & M. S. R. Co. v. Boyts* (1897) 16 Ind. App. 640, 45 N. E. 812, that one who was injured in a railroad crossing accident while riding in another's cutter was guilty of contributory negligence as matter of law, where he did not look or listen before entering upon the crossing, and did not see the engine which struck the cutter until it was within 1 or 2 feet of it, when he attempted to jump out of the cutter, it appearing that he was familiar with the crossing and its surroundings, that he knew, when approaching the crossing, that a freight train was standing at the station near by, and that, when within 30 feet of the crossing, he had an unobstructed view of the sidetrack upon which the train came which struck the cutter, and he was held negligent, though it further appeared that, in approaching the crossing, he told the driver to look out, as there might be a train.

In the preceding case, where it appeared that the train came from the opposite side to that on which the plaintiff sat, the court, in reference to the duty of a passenger to look in both directions, said: "It is argued that the appellee was under no obligation to look to the south, as he was on the north side of the cutter, and, in support of this, counsel cite *Cincinnati, I. St. L. & C. R. Co. v. Grames* (1893) 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421. But in that case the brother of the appellee, who was driving the team, spoke to the appellee, directing him to keep a watch on the north side while he looked and listened for engines and cars on the south side. The driver and the appellee in that case were making mutual arrangements for their joint protection, while in this case it appears the driver did not look at all, nor did he request the appellee to look. No excuse is given for his failure to

look both ways as he approached the crossing. He was familiar with the crossing and the surroundings, and was bound to use more care than if he had not previously known it. In the case of *Cincinnati, I. St. L. & C. R. Co. v. Grames* (1893) 136 Ind. 39, 34 N. E. 714, it is said: 'In approaching a crossing the law requires that the traveler shall listen for signals, must take notice of the signs put up as warnings, must look attentively up and down the track if the surroundings are such as to admit of this precaution, and he must not attempt to cross in front of a moving train. If he neglects these precautions, and by reason of such negligence is injured, the court will adjudge, as a matter of law, that he has been guilty of contributory negligence.' "

And where a passenger in an automobile, when it is 100 yards from a railroad crossing, looks for a train and does not see any, his failure to look again, and to continue to look until he is over the crossing, is contributory negligence as matter of law. *Virginia & S. W. R. Co. v. Skinner* (1916) 119 Va. 843, 89 S. E. 887.

And in *Fluckey v. Southern R. Co.* (1917) 155 C. C. A. 244, 242 Fed. 468, the court directed a verdict for the defendant upon the ground of contributory negligence, in an action by a woman for personal injury sustained while riding in an automobile with her husband, who, while driving over a railroad crossing, collided with a railroad gasoline motor car, because of his failure to exercise the care of a reasonably prudent man in driving upon the track in front of the approaching car. The court said that the case involved no question of imputing to a passenger the negligence of the driver, because the plaintiff testified that she had assumed the duty of looking out for danger at this crossing, and was undertaking to give any warnings that might be necessary.

One injured when the automobile, in which he was riding in broad daylight with the top down, was struck by a railroad train was held in *Gersman v.* 18 A.L.R.—21.

Atchison, T. & S. F. R. Co. (1921) — Mo. —, 229 S. W. 167, to be guilty of contributory negligence as matter of law, where he had an equal opportunity with the driver to see and the ability to appreciate the danger, and was not, in fact, relying on the driver to protect him from the danger that might be encountered at the railroad crossing, but was himself looking ahead for approaching cars as they came toward the track, but at no time made a suggestion of any kind to the driver as to the precautions that should be taken before attempting to cross the tracks, and acquiesced both in what the driver did and in what he failed to do, and, even when he saw the cars which struck the auto coming towards them, said nothing, where, if he had instantly called to the driver to stop, he would in all probability have avoided injury.

And one riding in a buggy with another, for the mutual pleasure of both, with equal opportunity to see and ability to appreciate the danger of crossing a railroad, and who is in fact looking out for herself, but makes no effort to avoid the danger by looking and listening for approaching trains, is chargeable with contributory negligence as matter of law. *Bush v. Union P. R. Co.* (1901) 62 Kan. 709, 64 Pac. 624.

And it was held in *Erie R. Co. v. Hurlburt* (1915) 137 C. C. A. 477, 221 Fed. 907, that a woman riding with her husband in a buggy, who voluntarily enters upon the task of looking out for her own safety as they approach a railroad crossing, and continually, wholly independent of her husband, uses her eyes and ears to discover an approaching train until the buggy is struck by a train, is responsible for her own personal negligence, and that, where she would have seen the train in time to escape injury if she had looked and listened attentively, her contributory negligence will bar a recovery by her against the railroad company.

A member of an automobile party who had participated in the common dissipation indulged in by the whole party, and knew of the drunken condi-

tion of the driver in ample time before reaching a railroad crossing to have gotten out of the automobile, and thereby have avoided injury sustained when the automobile was driven into the side of a freight train, was guilty of contributory negligence as matter of law. *Kirmse v. Chicago, T. H. & S. E. R. Co.* (1920) — Ind. App. —, 127 N. E. 837.

And in *Cunningham v. Erie R. Co.* (1910) 137 App. Div. 506, 121 N. Y. Supp. 706, where a railroad train struck a buggy the occupants of which were all intoxicated, it was held that if the plaintiff knew, or would have known if he had been sober, that the driver was in such a state as to be incapable of giving the attention to what he was doing which a man of prudent and reasonable intelligence would have given, he was guilty of contributory negligence as matter of law.

Question of fact.

In order to charge conclusively a mere passenger in an automobile with contributory negligence in failing to see an approaching train which strikes the automobile, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general, the primary duty of caring for the safety of a vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware, either that the latter is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or is not taking proper precautions in approaching a place of danger, and, being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety. *Carnegie v. Great Northern R. Co.* (1914) 128 Minn. 14, 150 N. W. 164.

The mere fact that an occupant of an auto truck, killed at an unusually dangerous crossing, knew the condi-

tion of the crossing, and the danger involved in passing over it, does not make him guilty of contributory negligence as a matter of law. *Baker v. Fields* (1921) — Tex. Civ. App. —, 236 S. W. 170.

And it was held in *Zenner v. Great Northern R. Co.* (1916) 135 Minn. 37, 159 N. W. 1087, where a passenger in an automobile was injured upon its collision with a railroad train, that it could not be said that he was negligent as matter of law, where it was not clear that he was in any sense to blame for the accident, or what he could have done to avoid it.

And in *Minneapolis, St. P. & S. Ste. M. R. Co.* (1895) 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102, involving a passenger in a wagon, it was held that the rule that it is negligence per se for one driving a team on a highway not to "look and listen" for trains, when approaching a railroad crossing, is not, as a general rule, applicable to a mere passenger in a vehicle, who has no control over the driver or his management of the team.

It was held in *Chicago, R. I. & G. R. Co. v. Johnson* (1920) — Tex. Civ. App. —, 224 S. W. 277, that it could not be said as a matter of law that a guest in an automobile was guilty of contributory negligence in relying upon the driver to keep a proper lookout for a train at a railroad crossing.

And the failure of a passenger to have the driver either stop the automobile before reaching a railroad crossing, or so slacken its speed as to avoid a collision with a train, cannot be held to be contributory negligence as matter of law, where there is no testimony that the passenger discovered the approach of the train in time to warn the driver of the impending danger. *Ibid.*

And it was held in *Black v. Chicago G. W. R. Co.* (1919) — Iowa, —, 174 N. W. 774, that one who was injured at a railroad crossing, by a collision between the auto truck in which he was riding and a train, was not guilty of contributory negligence as matter of law, where it appeared that, as soon as the truck reached a point where the

track could be seen, he looked and saw the train which struck the truck, but that he did not tell the driver, because he saw that the driver noticed the train at the same time he did.

The question of the contributory negligence of one injured or killed in a collision at a railroad crossing, while riding upon the front seat of an automobile driven by another with whose negligence he was not chargeable, has been held to be one of fact for the jury under the following circumstances:

— where he was unfamiliar with the road, and did not know of the railroad crossing, and at the time of the accident was sitting with his back in the direction from which the train came, in a position enabling him to converse with his friends on the rear seat, and did not see the train until after the driver saw it, *Wanner v. Philadelphia & R. R. Co.* (1918) 261 Pa. 273, 104 Atl. 570. The court said that, in the absence of notice or warning to apprise him of danger, no negligence could be charged to him because of the position in which he was sitting, and that whether he was negligent in failing to discover the presence of the crossing in time to give the driver warning of the approaching train was a question of fact for the jury;

— where one riding with a competent driver, in the open country, with which he was familiar, over flat land, in broad daylight, sat talking with a fellow passenger while they were approaching a railroad crossing, and paid no attention to approaching trains, *Terwilliger v. Long Island R. Co.* (1912) 152 App. Div. 169, 136 N. Y. Supp. 733, affirmed without opinion in (1913) 209 N. Y. 522, 102 N. E. 1114. The court stated that while he could not close his eyes to an obvious or well-known danger, he was not called upon to exercise any act of vigilance to guard against a danger which was not known to him, or which was not likely to befall one situated as he was in the car, and that he had the right to assume that the driver would exercise reasonable care in the operation of the automobile, and that unless he was aware of the railroad crossing, and had reason to

apprehend that the driver would run the automobile into a position of danger, the jury might properly find that he was in the exercise of that reasonable degree of care which an ordinarily prudent man would exercise under like circumstances, by merely sitting still in his seat and talking with a fellow passenger;

— where the passenger was cautiously looking ahead when approaching a railroad crossing with which he was not very familiar, and was the first to discover a train approaching, and gave immediate alarm which the driver heeded by instantly turning the automobile to one side, but not in time to avoid a collision, *Eline v. Western Maryland R. Co.* (1918) 262 Pa. 33, 104 Atl. 857;

— where an experienced chauffeur was demonstrating an auto truck to plaintiff, who failed to keep a lookout and warn the driver of an approaching train, or to interfere with the management of the truck, and the accident occurred under circumstances in which a reasonably competent, vigilant driver needed no assistance, and would in the long run be better off if left alone, *Southern P. Co. v. Wright* (1918) 160 C. C. A. 339, 248 Fed. 261.

And the negligence of one so riding in a carriage or wagon has likewise been held to be for the jury in the following circumstances:

— where he did not know that the driver was incompetent, or was not keeping a proper lookout for trains when approaching the crossing, notwithstanding the fact that, if plaintiff had exercised the degree of vigilance in "looking and listening" required of one having the control and management of a vehicle, he would have discovered the approaching train in time to have avoided injury, *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1895) 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102;

— where plaintiff did not look for trains, because she saw the driver looking up and down the tracks, and an attempt upon her part to watch for the train, in the situation as it existed, might have interfered with the observations of the driver, *Mittelsdorfer v.*

West Jersey & S. R. Co. (1909) 77 N. J. L. 698, 73 Atl. 538;

— where the plaintiff was riding with his face toward the rear, and another passenger, who was riding in the back of the wagon with his face toward the front, when they were approaching the railroad crossing, saw the approaching train, gave the alarm, and jumped out of the rear of the wagon, and the plaintiff attempted to do likewise, but, when about to jump, the team gave a lurch and caused him to strike the ground between the rails and he was injured. *Illinois Southern R. Co. v. Hamill* (1907) 226 Ill. 88, 80 N. E. 745. It was held that the plaintiff was not guilty of contributory negligence, as matter of law, because he sat with his face toward the rear of the wagon and did not look or listen for approaching trains, and the finding of the jury that the plaintiff was not guilty of contributory negligence was sustained;

— where one riding with the driver on the opposite side from which the train came which struck the wagon, and injured him, failed to look in such direction before the attempt was made to cross the tracks, *Pyle v. Clark* (1897) 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744, 2 Am. Neg. Rep. 100;

— where a woman riding with her husband, was wrapped up, with a hood on her head, to protect her from the cold, and did not look toward the direction from which the train came, or observe whether he was looking, but did occasionally look in the opposite direction, which was the side on which she sat, because she believed that he was a careful driver, and that he was driving carefully at the time, *Finley v. Chicago, M. & St. P. R. Co.* (1898) 71 Minn. 471, 74 N. W. 174;

— where plaintiff sat upon the left of her husband, he being between her and the approaching train which struck the wagon, with her head covered up by a shawl, and a baby in her arms, and another young child to look after, and on the sidetrack at the station, about 1,200 feet distant, was another passenger train bound in the opposite direction, which might have attracted her attention, *Lammers v.*

Great Northern R. Co. (1901) 82 Minn. 120, 84 N. W. 728, 9 Am. Neg. Rep. 322;

— where plaintiff was riding with a young baby in her arms, and seated upon the opposite side from which the train came which struck the carriage, and the accident occurred on a stormy and sleety night, at a railroad crossing with which she was unfamiliar. It was held that it could not be said as matter of law that she was guilty of contributory negligence in failing to look around her husband, the driver, to observe the approach of a train which could only be seen for about 60 feet before the track was reached, *Heater v. Delaware, L. & W. R. Co.* (1904) 90 App. Div. 495, 85 N. Y. Supp. 524;

— where the plaintiff was riding with her husband, the driver, in a funeral procession, and for a space of about 200 feet from the crossing to a point about 100 feet therefrom a passing train could be seen, and the plaintiff looked during the journey through such space, and, during the space of 100 feet immediately adjacent to the railroad tracks, paid attention for passing trains, and when the head of the procession reached the tracks the funeral director descended from the hearse and walked ahead of it across the tracks, and when the carriage in which the plaintiff was riding came to the tracks, the flagman motioned for its driver to proceed, *Peirce v. Jones* (1899) 22 Ind. App. 163, 53 N. E. 431. It was held that it could not be said as matter of law that the plaintiff was bound to try to prevent her husband from obeying the flagman, or to get out of the carriage;

— where plaintiff was a young girl between fourteen and fifteen years of age, and the carriage was stopped at a point about 50 feet from the crossing, where the view was obstructed, and she listened for approaching trains, and immediately prior to going upon the track, within about 15 feet of the rail, leaned forward over the dashboard and looked and listened a second time to ascertain if a train was approaching, *Connor v. Wabash R. Co.* (1910) 149 Mo. App. 675, 129 S. W. 777;

The trial judge submitted the ques-

tion of plaintiff's negligence to the jury, and the appellate court, in *Sherris v. Northern P. R. Co.* (1918) 55 Mont. 189, 175 Pac. 269, upheld the jury's finding that he was guilty of contributory negligence so as to defeat a recovery for damages sustained in a collision between the automobile in which he was riding, and a freight train, where it appeared that the plaintiff sat in the front seat of the automobile by the side of the driver, who drove into the railroad yards at a rate of 6 or 8 miles an hour; that, when it reached track 6, the driver shut off the power and allowed the automobile to drift along in high gear without making any noise; that, as they approached the main line, both he and the driver kept a constant lookout, glancing to the right and left; that the plaintiff could not see a train approaching from the west until he had passed the caboose track; that he heard no noise of any kind; that as they passed this track he glanced to the right, then to the left, and again to the right; that as he glanced to the right the second time he discovered the train coming from the west, at a rate about twice as fast as the automobile was going; and that, when he saw the train, the driver was looking to the left, and that he called to the driver, who at once put on the brake to stop, but the automobile, not having chains upon its wheels, skidded along until it came so near the track that it was struck by the step of the front car, and pushed around until it faced to the east, with the result that plaintiff, in the act of jumping to save himself, was thrown to the ground and injured.

And in *Central of Georgia R. Co. v. Jones* (1915) 195 Ala. 378, 70 So. 729, where a passenger, sitting on the front seat of a wagon with the driver, was injured when the wagon was struck by an engine, it was held that the trial court properly sustained the plaintiff's demurrer to the defendant's plea that plaintiff was guilty of contributory negligence because she could have seen the train approaching in time to have given the driver warning of its approach, or to have requested him to allow her to alight from the wagon, or

for her to have alighted without the wagon having stopped; that she negligently failed to look or listen for the approach of the train; that she negligently failed to give the driver warning of its approach; and that she negligently failed to request the driver to allow her to alight from the wagon, and was unaware of the approach of the train until the horse was upon the track.

And, where one is riding on the single seat of a wagon, which is driven upon a railroad track before an approaching train, her failure to attempt to jump from the wagon while the driver is trying to avoid being struck by the train is not contributory negligence as matter of law. *Fike v. Pere Marquette R. Co.* (1913) 174 Mich. 167, 140 N. W. 592.

The negligence of one riding upon the rear seat of an automobile, driven by another whose negligence was not imputable to the former, has been held to be for the jury under the following circumstances:

— where he made no attempt to ascertain whether or not the railroad track could be crossed in safety, and there was nothing to show the construction of the vehicle, or that he knew of the proximity of the crossing, or could have known of it by the exercise of reasonable care, *Brommer v. Pennsylvania R. Co.* (1910) 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179 Fed. 577, certiorari denied in (1911) 223 U. S. 718, 56 L. ed. 628, 32 Sup. Ct. Rep. 522;

— where she was wrapped up in a heavy cloak, with sacks of vegetables about her, with the curtains of the auto down, and did not look to the right or left, but only looked straight ahead for a train before coming to the crossing, *Glanville v. Chicago, R. I. & P. R. Co.* (1920) — Iowa, —, 180 N. W. 152;

— where a girl of sixteen, riding between two others, failed to look and listen for trains upon approaching a railroad crossing, and the automobile was in charge of a competent chauffeur, with her father, the owner, sitting beside him, and directing the movements of the automobile, which was proceeding very slowly up an

incline towards the track, working its way alongside of a depot, through a crowd of people who were almost touching it upon all sides, *Noakes v. New York C. & H. R. R. Co.* (1907) 121 App. Div. 716, 106 N. Y. Supp. 522, affirmed without opinion in (1909) 195 N. Y. 543, 88 N. E. 1126;

— where the automobile in which the plaintiff was riding was struck by a locomotive, killing both the driver and the passenger, at a railroad crossing at which the view of the occupants of the machine in the direction of the approaching locomotive was intercepted until they reached a point about 50 feet from the crossing, where they stopped and looked up the track, which could be seen for a distance of from 150 to 200 feet, and then proceeded, and within five seconds were struck by the locomotive, which was traveling at the rate of 50 miles an hour, *Drouillard v. Southern Pacific Co.* (1918) 36 Cal. App. 447, 172 Pac. 405. In holding that the plaintiff was not guilty of contributory negligence as matter of law the court said: "What, then, within the interval of four or five seconds, should Drouillard have done to acquit himself in the eyes of the law? The contention of the appellants at the oral argument was that he should have looked up and down the track and discovered the approach of the locomotive, and warned the driver to stop. It may be debatable whether, under the circumstances, he was required to do even this much. It might be plausibly argued that he would be justified in believing that the driver would be apprised of the danger, and would stop his machine before attempting to cross the track. But granting that appellants' contention is not unreasonable,—even conceding that, when he became convinced that the driver did not intend to heed the warning, it was the duty of Drouillard to attempt to leave the machine,—then we must, for the purposes of this appeal, hold that Drouillard did just what appellants contend he should have done. The case would be no different if a witness had testified to such facts. This follows necessarily from the presumption—which is a rule of evidence—that a person takes ordi-

nary care of his own concerns.' Code Civ. Proc. § 1963. Of course, this is a controvertible presumption, but until controverted it is evidence which the jury is bound to accept. . . . Herein there was no evidence that the deceased failed to do what the most stringent rule of ordinary care demands, and therefore there can be no contention that said presumption was overcome;"

— where two passengers were killed when an auto was struck by a train, and the evidence was conflicting as to whether the automobile stopped within a few feet of the railroad track before crossing, or whether it went right across without stopping. *Praught v. Great Northern R. Co.* (1919) 144 Minn. 309, 175 N. W. 998. The court said: "If it be true, as testified to by the engineer, that the automobile came to a full stop when within 8 or 10 feet of the railroad track, and, as the locomotive approached the crossing, suddenly started up and was instantly struck by the engine, it would be almost impossible to say that the passengers, having nothing to do with the driving of the car, could have been guilty of contributory negligence; but if, when the automobile approached the right of way, it slowed down to 8 or 10 miles and proceeded across the track at that rate, then, under the circumstances disclosed by the evidence, the issue of contributory negligence on the part of the passengers became a question for the jury;"

— where one was injured while riding in her employer's automobile, which was struck by a train on the main track of a blind crossing, *Bergert v. Payne* (1921) — C. C. A. —, 274 Fed. 784. It was held that such employee, who had not seen or heard the train, could not be conclusively charged with negligence in not attempting to make her employer stop his automobile within the 8 or 9 feet between a sidetrack and the main track;

— where the plaintiff was in charge of a lunatic, and looked and listened for approaching trains, and gave such attention to his surroundings as could be spared from the man he had in

charge, and observed what the driver was doing, and noticed that he was acting with care in reducing the speed so that apparently the automobile would come to a stop at a place near the tracks, where full view of them could be had, and when the driver, when within a few feet of the tracks, imprudently decided to go onto the crossing, it was too late for the plaintiff to check or warn him, or to escape the danger, *Wachsmith v. Baltimore & O. R. Co.* (1912) 233 Pa. 456, 82 Atl. 755, Ann. Cas. 1913B, 679;

—where a woman was riding with her daughter-in-law, with her husband and son in the front seat, the husband driving, and she failed to call her husband's attention to the conditions, and request him to exercise reasonable care, *Denton v. Missouri, K. & T. R. Co.* (1916) 97 Kan. 498, 155 Pac. 812. The court said: "Why should the plaintiff have called her husband's attention to the conditions, and exhorted him to use due care? She had confidence in his ability as a driver. The conditions were just as obvious to him as to her. He could see and hear all she could see and hear. He was responsible for the operation of the automobile, not she, and she had no reason to doubt that he was exercising his faculties with diligence. Besides this, there was another observer in the front seat with the driver, who was in fact familiar with the crossing. His safety and his wife's safety were at stake, and there is no evidence of any fact indicating to the plaintiff that her son was not exercising his faculties of observation with diligence. Why ought the plaintiff to have arrogated to herself control over the automobile, and commanded it to stop? The finding is that she saw a track beyond the obstructions to her vision, and knew engines and cars were likely to pass over it at any time. There is no finding, and no evidence, that from her place in the back seat she could see this track was so close to the one on which the coal car stood that the automobile would be in danger before her husband on the front seat could see toward the north. Her opportunities of observation were not equal to those of her husband. She knew his

ability as a driver and trusted him, and what is more, she had the right to trust him. In the case of *Williams v. Withington* (1913) 88 Kan. 809, 129 Pac. 1148, it was said: 'Common sense would dictate that, when a wife goes riding with her children in a rig driven by her husband, she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her, under the circumstances shown here, to impugn her husband's ability to drive, and assume the prerogative to dictate to him the manner of driving.' This doctrine applies to the case of a wife riding in an automobile driven by her husband, unless she should know him to be incompetent or under some disability;"

—where plaintiff, when the automobile was about 100 feet from the crossing, heard a noise which seemed to him the noise of an approaching train, and called to the chauffeur to stop, and the next thing he knew the automobile, which was going about 15 or 20 miles an hour, was in collision with the train, *Vocca v. Pennsylvania R. Co.* (1917) 259 Pa. 42, 102 Atl. 283;

—where plaintiff's husband and an experienced chauffeur were sitting on the front seat, and the latter stopped the automobile and looked and listened at a point 146 feet from the railroad crossing, but failed to discover an approaching train, which sounded no whistle and rang no bell, *Lehigh Valley R. Co. v. Emens* (1916) 145 C. C. A. 522, 231 Fed. 636, writ of certiorari denied without opinion in 242 U. S. 627, 61 L. ed. 535. It was held not to be contributory negligence as a matter of law for her not to insist on the husband or chauffeur doing more than they actually did, when what the chauffeur did had been held not to be, as matter of law, contributory negligence.

It is not contributory negligence for a passenger on the rear seat of a closed automobile, when approaching a railroad crossing, to be asleep, or reading a book, or engrossed in talk with another than the driver, or in deep thought, as ordinary experience shows that such is not infrequently the conduct of the ordinarily prudent

person when riding as a guest on the rear seat of an automobile. *Weidlich v. New York, N. H. & H. R. Co.* (1919) 93 Conn. 438, 106 Atl. 323.

And in *Broussard v. Louisiana Western R. Co.* (1916) 140 La. 518, 73 So. 606, 13 N. C. C. A. 910, where a recovery was had for the death of a passenger in an automobile struck by a train, it was unsuccessfully contended by the defendant that the plaintiff's intestate should have observed the crossing and warned the chauffeur, and that because of his failure to do so there should be no recovery—citing, in support of such contention, the case of *Dixon v. Vicksburg, S. & P. R. Co.* (1916) 139 La. 329, 71 So. 527, *supra*, under "Matter of law," this subdivision; but the court distinguished that case upon the ground that in the case at bar the plaintiff's intestate was not on the front seat, and said that it is a question whether it is good law in any case.

The negligence of one riding upon the rear seat of a wagon or carriage driven by another, with whose negligence he was not chargeable, has been held to a question of fact in the following circumstances:

—where the plaintiff was sitting facing the side of the wagon away from the direction from which the train came, and, when they reached a point several hundred feet from the crossing, warned the driver to look out for the cars, and looked and listened at that point, and did not hear or see the train approaching, and where the view was obstructed until they reached a point about 60 or 75 feet from the crossing, and, in going that distance, she looked two or three times in the direction from which the train came, and did not see it, and the only way the plaintiff could have seen the approaching train was by turning almost squarely around and looking directly behind her, *Lewin v. Lehigh Valley R. Co.* (1899) 41 App. Div. 89, 58 N. Y. Supp. 113. It was held that, considering the way she was seated in the wagon, and the facts that she was holding a young child in her lap, that she had warned the driver, who was a competent one, that they were approaching a railroad crossing,

and that she looked in the direction from which the train came several times, while going the 50 or 75 feet after passing the point where the view was obstructed, it could not be said, as a matter of law, that she was guilty of negligence in not turning her body clear around in such a way as to enable her to see the approaching train;

—where a girl of nineteen, riding in a carriage driven by her brother-in-law, did not advise him with respect to the management of the team, on approaching a railroad crossing where obstructions prevented a view of the track from a greater distance than about 15 feet, although she was familiar with the surroundings and he was not, *Angell v. Chicago, R. I. & P. R. Co.* (1916) 97 Kan. 688, 156 Pac. 763, rehearing denied in (1916) 98 Kan. 268, 157 Pac. 1196.

It was held in *Collins v. Hustis* (1920) — N. H. —, 111 Atl. 286, that the plaintiff, who was riding in an automobile with a competent, skilful driver, and was injured by a train striking the automobile from the opposite side from that upon which she was sitting, was not guilty of contributory negligence as matter of law, the court saying that, if some duty rests upon a passenger in an automobile approaching a crossing to look for approaching trains, it does not conclusively appear that she did not perform that duty, that no train was approaching from her side of the automobile, and if she looked down the tracks, she saw none, and that, even if she knew the train was approaching and understood the driver's purpose to pass in front of it, it does not conclusively appear that she could have taken the control from him and stopped the car, and that reasonable men might conclude that it was the part of prudence, in the emergency, for her not to interfere with the operation of the machine.

And in *Lyon v. Phillips* (1917) — Tex. Civ. App. —, 196 S. W. 995, where it was held that the negligence of the plaintiff was a question for the jury, the court said that want of ordinary care on the part of the deceased, riding with another as his mere guest,

would be measured by whether he failed in his duty to keep a lookout and to warn his companion operating the automobile when he discovered the approach of the train; that there was no direct evidence indicating the precautions taken by the deceased; that the circumstances arising out of the physical facts immediately preceding the collision alone spoke upon the question of contributory negligence of the deceased; and that those circumstances did not speak with sufficient weight to conclusively determine the question as a matter of law. It did not conclusively appear that the driver and the deceased were aware of the approach of the train at a time before they reached a storehouse along the highway, which was 93 feet from the tracks, but it did appear that the headlight of the engine shone directly upon them as they came out from behind the storehouse, and that this fact would go to show that they knew that the train was approaching the crossing; and it further appeared that the automobile, at the speed at which it was going, could have been stopped before it reached the tracks.

In an action for injuries to a passenger in an automobile struck by a freight train, the question of his contributory negligence was held to be for the jury, in *Robinson v. Oregon-Washington R. & Nav. Co.* (1918) 90 Or. 490, 176 Pac. 594, the court saying: "Although even a guest, as he [plaintiff] neared the railway crossing it was his duty to look and listen according to his opportunity. If, with knowledge of the situation, but without protest or warning, he acquiesces in the negligence of the driver going into the danger by which he is injured, he adopts that negligence as his own. It is not imputed to him *nolens volens*, but, on the other hand, he assumes it. The duty to look from where he can see, and to listen from where he can hear, is incumbent upon him as well as upon the driver, where they have equal chance, and if he does nothing to carry out this direction of the law he is negligent on his own account."

And it was held in *Carbaugh v. Philadelphia & R. R. Co.* (1918) 252 Pa. 25, 104 Atl. 860, that a passenger

in an automobile could not be held guilty of contributory negligence upon the ground that because of her failure to look and listen for approaching trains, she joined with the driver in testing a danger which would have been apparent to her had she exercised due care, where it appeared that the driver stopped, looked, and listened before crossing the tracks, and that no train at the time was in sight or hearing, and that, therefore, there was no manifest danger to test. The court further held that, assuming that the passenger saw, or was bound to see, the approaching train when it rounded a curve in the tracks, and that the driver also saw it, there was neither occasion nor necessity for interference by the passenger in the operation of the car, and to have done so might only have served to increase the danger.

The contributory negligence of the plaintiff was held in *Hines v. Wilson* (1920) — Tex. Civ. App. —, 225 S. W. 275, a question for the jury. It appeared in this case that the plaintiff, before entering upon the crossing, the automobile having slowed up and almost stopped, looked and listened for approaching trains.

And it was held in *Cleveland, C. C. & St. L. R. Co. v. Dukeman* (1906) 180 Ill. App. 105, where both the driver and the passenger in a buggy were killed by a railroad train, that under all the circumstances disclosed by the evidence, some of which tended to show that the passenger looked before the attempt was made to cross the track, the question of the decedent's contributory negligence was a question for the jury.

In *McAdoo v. State* (1920) 136 Md. 452, 111 Atl. 476, where an occupant of an automobile truck was killed when it was struck by a locomotive, the law as to the contributory negligence of the plaintiff was held to be correctly presented by an instruction as follows: "It was the duty of all the persons in the automobile, mentioned in the evidence, to look and listen carefully for the approach of a train after the automobile started over the crossing, even although the jury may find that the watchman lifted the gate

for them to cross; and if the jury find from the evidence that the train or locomotive which struck the automobile in which the deceased was riding could have been seen by the deceased in time to have warned the driver of the automobile of the train's approach, in time for the said driver of the automobile to have stopped the automobile before reaching the track on which the train was approaching, and that the deceased did not do so, or attempt to do so, then the verdict of the jury must be for the defendant." It was held, however, in this case, that, upon the evidence, the question of the plaintiff's contributory negligence was not a question of law, but one of fact to be determined by the jury.

And it was held in *Pittsburgh, C. C. & St. L. R. Co. v. Kephert* (1916) 61 Ind. App. 621, 112 N. E. 251, that the question of the plaintiff's contributory negligence was for the jury, where it appeared that he was sitting on the side of the auto from which the train came, that, as the auto approached the crossing, the flagman signaled for it to stop to let a train go by, that, as the rear end of the train was going past the crossing, the flagman signaled for the auto to go ahead, and that before going upon the crossing the plaintiff looked both ways, and did not see or hear any train, and, when the front end of the auto was on the first rail, the plaintiff saw the engine coming from the opposite direction and holloed, "Look out!" and the auto was immediately struck.

It was held in *Griffin v. Hustis* (1919) — *Mass.* —, 125 N. E. 387, where a passenger in an automobile was injured because the driver, in order to avoid a collision with a freight train, turned the auto off the road and ran it into a pole, that the issue of the personal care of the plaintiff was for the jury, where it appeared that, when the automobile came almost to a stop between 75 and 100 feet from the crossing, the plaintiff looked to the right and the left to see if there was any train coming, and did not see or hear anything to indicate the approach of one, and that when they had gone about 50 feet farther he

again looked to the right, saw the engine, and holloed to the chauffeur that there was a train coming, the court saying that, considering that the train was moving more than 40 feet a second, that the plaintiff's view of the track was so limited, and that he had a right to rely somewhat on the skill and care of the chauffeur, his negligence was for the jury.

And in *Louisville & N. R. Co. v. Scott* (1919) 184 Ky. 319, 211 S. W. 747, where a passenger on a motor truck was killed when it collided with a fast train, it was held that the plaintiff's intestate, who had looked and listened for approaching trains, was not guilty of contributory negligence as matter of law because he failed to stop and listen before crossing the tracks. The court said in this case that Kentucky had not adopted the "Stop, look, and listen" doctrine. And it was further held in this case that the fact that the plaintiff's intestate was an employee of the railroad company and presumptively knew of the time of the arrival of the train which produced the injury did not make him chargeable with contributory negligence as matter of law, the court saying that, conceding that the fact that the employment gave him more accurate information of the time of the running of the train, and therefore imposed upon him a correspondingly greater duty to discover the approach of it to the crossing, the question of his negligence was one for the determination of the jury.

And the court in this case overruled the contention that the failure of the decedent to observe that a semaphore, located some distance to one side of the crossing, indicated that a train was within the block, made him guilty of contributory negligence as matter of law, and, in this connection, said: "In answer to this it may be said that there is some evidence to show that decedent could not have seen the semaphore before he was in immediate danger, nor is it in proof, except by inference, that the semaphore on the particular occasion indicated that the train was within the block. Furthermore, the position of the semaphore would not indicate that a train was

approaching the crossing. The only fact which the semaphore would positively establish was that a train was in the block, but whether it was running, and, if so, in what direction, or upon what track, or whether it was standing still, would not be indicated. So that, if it were in proof that the decedent saw and observed the indication made by the semaphore, we think it was then a question for the jury to say whether, in the exercise of ordinary care for his own safety, he should have stopped the truck before entering upon the track."

A passenger in a sleigh approaching a railroad crossing at night, who does not know of the immediate proximity of the crossing, and does not hear, although he is listening, the signals of the approaching train, cannot be said to be guilty of contributory negligence, as a matter of law, because he does not request the driver to stop and look and listen to ascertain whether a train is approaching. *Wilson v. New York, N. H. & H. R. Co.* (1894) 18 R. I. 598, 29 Atl. 300.

And it was held in *Senft v. Western Maryland R. Co.* (1914) 246 Pa. 446, 92 Atl. 553, that a woman riding with her husband in a motor car, which was struck by an engine at a grade crossing, was not guilty of contributory negligence as matter of law, where it appeared that, when the automobile was 40 feet from the railroad tracks, she told him to look out for a train, that he threw out the clutch, and, while his car was drifting on an upgrade, rose from his seat to obtain a better view, looked at his watch to learn whether a train was due, and remarked to her that the train had passed, resumed his seat, and, when within 20 feet of the track, threw the clutch in, and his car ran in front of an engine, the plaintiff having continued all the time to look and listen for a train, and first seeing it when within 10 feet of the track. The court said that whether, in the few seconds after she saw he was going on the crossing,—she having testified that when the clutch was thrown out she expected he would stop his car,—more could have been required of her, was

not a question that could have been withdrawn from the jury.

The failure of a guest in an automobile struck by a train to warn the driver, upon approaching a crossing, of the danger of approaching trains, does not render the passenger guilty of contributory negligence as matter of law, where, upon approaching the railroad track, the speed of the automobile was checked, and the passenger saw the driver stooping over with his hand on the lever, accompanied by a movement indicating to the passenger an intention on the part of the driver of stopping the automobile before going upon the tracks. *Beck v. Director General* (1920) 268 Pa. 571, 112 Atl. 34.

And in *Toledo & O. C. R. Co. v. Fippin* (1910) 32 Ohio C. C. 755, affirmed without opinion in (1912) 86 Ohio St. 334, 99 N. E. 1134, an action for the death of a woman as a result of a collision between a train and the wagon in which she was riding with her husband, where it appeared that his sight and hearing were good, and he was an experienced driver, using his own horses with which he was familiar, and she had no knowledge of the situation superior to his, it was held that she had a right to trust in her husband as the head of the family, and rely upon his judgment and skill as a driver, and that he would heed all apparent warnings and avoid all apparent dangers, and where, as soon as she realized that a collision with the train was imminent, she left her seat and prepared to jump from the wagon, a finding that she was free from contributory negligence was justified.

It was held in *Baltimore & O. R. Co. v. State* (1918) 133 Md. 219, 104 Atl. 465, that the negligence of a passenger in an automobile which was struck by a railroad train was a question for the jury, where, shortly before reaching a crossing, the automobile was stopped, and the plaintiff looked in both directions, and listened for approaching trains, and that it was not negligence as matter of law for him to fail to warn the driver to stop again just before crossing the tracks, since he may have thought that the driver was

going to stop at such point, and, after reaching it, there was no time for him to warn the driver before the engine struck the automobile.

And in *Hoag v. New York C. & H. R. R. Co.* (1888) 111 N. Y. 199, 18 N. E. 648, where both the husband and the wife were killed while riding across a railroad track in a wagon, and there was no evidence as to the manner of the accident, it was held that the contributory negligence was a question for the jury. The court said: "The strong probability is that she did see the train, and her husband did also, and that he, for some reason, undertook to cross in its front, miscalculating, perhaps, its distance and speed and his opportunity. She was not bound to suspect that purpose until she saw it being executed. Before that, she might reasonably expect him to stop and wait. When she saw that he was about to make the attempt they must have been very close to the track. She was not bound to jump from the wagon. That might seem to her as dangerous as to sit still. She could not be required to seize the reins, or interfere with the driver. That is almost always dangerous and imprudent. She might have begged her husband to stop, and we do not know that she did not; but if she did not, and sat silent, it does not follow, as matter of law, that she was negligent. Her husband seems to have been ordinarily a careful man. Having his wife with him, one would think, would make him more so. He stopped twice before he crossed the freight tracks. She was hardly blamable, when both saw the coming train, for thinking and expecting that he would stop again. When she saw that, instead of stopping, he meant to cross, she should have spoken, perhaps; but she may have been so near the engine as to have scarcely had time, or so paralyzed with fright at the impending danger as to have lost her judgment and prudence for the moment. The degree of care to be exercised varies with circumstances and emergencies. If the deceased was silent, it does not follow, as matter of law, that she was negligent. . . . Whether the surrounding circumstances sufficiently show

that the deceased was not in fault were questions which, we think, should have gone to the jury."

It was held in *Hines v. Johnson* (1920) — C. C. A. —, 264 Fed. 465, where a passenger was killed when a freight train ran into the automobile in which he was riding, that the passenger was not guilty of contributory negligence as matter of law, but that his freedom from contributory negligence was a question for the jury, and, in this connection, the court said: "It is said that Johnson was negligent because he was familiar with the crossing, had opportunity to observe the train moving, knew the speed of the machine, and that, although he gave no warning, he must have seen the string of box cars in ample time to have given warning to the driver, and thus the collision might have been avoided. Granting that upon the trial of the facts there was force in such an argument, the difficulty with it now is that it is built upon inferences which plaintiff in error draws from the testimony, but which are entirely at variance with those which the jury must have made, and which are by no means unreasonable."

And it was held in *Birmingham Southern R. Co. v. Harrison* (1919) 203 Ala. 284, 82 So. 534, where an automobile passenger was killed in a railroad crossing accident, that the trial court properly sustained a demurrer to defendant's plea alleging contributory negligence in plaintiff's failure to warn the driver of the automobile of the approach of the train, or in failing to make protest to the driver, or to make such other effort as he reasonably could have made to avoid being carried onto the tracks.

A passenger in an automobile struck by a train is not guilty of contributory negligence as matter of law, but his negligence is a question for the jury, where he saw the train at the earliest point at which it could have been seen, which was when the train was 200 feet away and the auto 20 feet from the crossing, and gave warning to the driver, but the driver was then unable to avoid the collision. *Hurt v. Yazoo & M. Valley R. Co.* (1918) 140 Tenn. 623, 205 S. W. 437.

And assuming that deceased, when the automobile which he occupied as a passenger or guest reached a point 30 feet distant from the railroad crossing, traveling at a speed of only 4 miles an hour, saw, 300 feet away and approaching at a high rate of speed, the train which struck the automobile, it cannot be said as a matter of law that his failure to interfere with the driver's operation of the car, rather than to rely upon the latter's judgment in escaping the threatened danger, or his failure to leave the car, constituted contributory negligence, but the question of his contributory negligence was one of fact for the jury. *Carpenter v. Atchison, T. & S. F. R. Co.* (1921) — Cal. App. —, 195 Pac. 1073.

It was held in *Sherwood v. New York C. & H. R. R. Co.* (1907) 120 App. Div. 639, 105 N. Y. Supp. 547, that plaintiff, who was killed in a collision between the automobile in which he was riding and a train, was not guilty of contributory negligence as matter of law, where it appeared that he was a boy of sixteen years, without any knowledge as to automobiles, that the machine was driven by an older person who he knew was familiar with its operation, and was fully able to manage and control it, and that a carriage directly in front of him was making the crossing. In regard to his duty to jump from the machine, the court said that, while that might have been the best thing for him to have done, in the emergency, he was not required to choose at his peril what ultimately would prove the safer course, but was only called upon to use his best care and judgment as to the situation presented.

Where the automobile in which a passenger is riding comes almost to a standstill before crossing a railroad, and the passenger looks up and down the tracks for approaching trains, and, just as the automobile starts to cross the tracks, the flagman appears, and cries, "Stop! jump!" and the passenger immediately starts to get out of the automobile, and, with one foot upon the ground, and one foot upon the running board, is struck by a train backing noiselessly, and without a light or anyone upon it to give warn-

ing, it was held that such passenger was not guilty of contributory negligence as matter of law, and that all that could be required of her was to look and listen, and to warn the driver of approaching danger. *Parker v. Seaboard Air Line R. Co.* (1921) — N. C. —, 106 S. E. 755.

And where employees of a railroad company placed a hand car in a public road near the railroad tracks at a public crossing, and buckets and coats were hanging upon the car, and, in driving a mule hitched to a buggy in which the plaintiff was riding as the guest of the owner and driver, it was necessary, in order to go over the crossing, that the mule be driven past the car and within a few feet of it, and the wind rattled the buckets and waved the coats on the car, thereby frightening the mule, and causing it to run away and upset the buggy and injure the plaintiff, and where, on the trial of an action for damages on account of the injury, it appeared that the driver saw the car, and the buckets and clothes thereon, when he was about 30 feet away, and that the mule stopped when about 6 feet from the car, and was looking at it and trembling, and the driver urged the mule on until it ran away and upset the buggy, it was for the jury to say whether the plaintiff had a reasonable opportunity to get safely out of the buggy after the mule showed symptoms of fright, and before it ran away, and whether his failure to do so amounted to a want of ordinary care on his part for his own safety. *Central of Georgia R. Co. v. Reid* (1919) 23 Ga. App. 694, 99 S. E. 235.

The fact that a passenger in an auto stage, who was sitting on the door of the machine with his feet on the inside thereof because of its crowded condition, upon observing the freight train, which struck the stage, moving toward the crossing, immediately jumped to the center of the machine and took hold of the back of the front seat, did not make him guilty of contributory negligence as matter of law, but his negligence was a question for the jury. *Ellis v. Central California Traction Co.* (1918) 87 Cal. App. 390, 174 Pac. 407.

And it was held in *Chicago, R. I. & G. R. Co. v. Wentzel* (1919) — *Tex. Civ. App.* —, 214 S. W. 710, that it was a question for the jury whether a passenger in a crowded jitney struck by a train was guilty of contributory negligence, the court saying that if a person of ordinary care would not have become a passenger in a five-passenger automobile occupied by eleven persons in violation of a city ordinance, and would not have committed herself to the care and custody of the driver so violating such ordinance, or would not have remained in the automobile while approaching the railroad crossing under the circumstances, or would have discovered the approach of the train with which the automobile collided, then such want of care would make the plaintiff guilty of contributory negligence.

And the fact that the plaintiff, one of a party of six who engaged the owner of an automobile to take them for a trip, violated the act which provides that no person shall employ or hire as a chauffeur any person not specially licensed, is some evidence of contributory negligence upon his part, but it cannot be ruled that such negligence directly contributed to his injuries so as to preclude him, as matter of law, from recovering from the railroad company for injuries sustained by him because the driver of the auto, in order to avoid an imminent collision with a freight train, turned off the road and ran into a pole. *Griffin v. Hustis* (1919) — *Mass.* —, 125 N. E. 387.

b. Interurban railroads.

Matter of law.

A mature person who attempts to cross an interurban railroad track without looking for approaching cars, or taking any precautions for his own safety, relying completely upon the driver of the automobile in which he is riding to take the necessary steps for their safety, is guilty of contributory negligence as matter of law, and cannot recover damages for injuries sustained in a collision with a car, when, by looking, he could have seen the approaching car in time to have warned the driver of the danger.

KIRBY v. KANSAS CITY, K. V. & W. R. Co. (reported herewith) ante, 299. In this case the court said: "When he saw the defendant's car approaching, he did undertake to protect himself by jumping out of the automobile, doing that contrary to the request of the driver that he remain. Probably that appeared to the plaintiff as the safest thing to do. That was not contributory negligence on his part."

And it was held in *Cable v. Spokane & I. E. R. Co.* (1908) 50 Wash. 619, 23 L.R.A.(N.S.) 1224, 97 Pac. 744, that a passenger of years of discretion, in crossing an interurban electric railway, is subject to the rule of "stop, look, and listen," and, in the absence of a showing that she endeavored to stop the horse, or to have the driver do so, or to do anything for her protection equivalent thereto, and, in the absence of any evidence tending to show a purpose, intention, or attempt on her part to take any such precaution, or that she was prevented, or, without fault on her part, induced not to do so, she cannot escape the operation of the rule making her guilty of contributory negligence as matter of law.

A member of a party taking a pleasure ride in an automobile, who is injured when the auto runs into the side of an electric train while passing over a grade crossing, cannot recover, because of her contributory negligence, where, although she knew they were approaching a crossing, and, being upon the front seat, was in a position to observe and warn the driver of danger, she did not look for approaching trains, and only saw the train when they struck it. *Hall v. West Jersey & S. R. Co.* (1917) 156 C. C. A. 532, 244 Fed. 104, 16 N. C. C. A. 110.

And the failure of a passenger in an automobile stalled on an interurban railroad track to get out of the automobile before it was struck by a car is contributory negligence as matter of law, where there was ample opportunity for her to do so, and this is so, even though she thought that the driver, who was trying to start the automobile, would succeed and drive it out of danger before it would be

struck by the car. *Krouse v. Southern Michigan R. Co.* (1921) — Mich. —, 183 N. W. 768.

But in *McDonald v. Mesaba R. Co.* (1917) 137 Minn. 275, 163 N. W. 298, where a passenger in an auto bus was injured when it collided with an electric trolley car, it was held that the evidence did not sustain a finding of negligence on the part of the plaintiff, or justify the submission of her negligence to the jury, where the plaintiff was not negligent in taking passage in the bus, and was not wanting in care in what she did or failed to do at the precise moment of the collision, was sitting inside of a closed bus which made it difficult and impracticable for her to maintain a lookout, and had no reason for mistrusting the skill or diligence of the driver, and there was no apparent need of her supervising the conduct of the driver, or disturbing him with suggestions or warnings, and she had no notice of impending danger.

Question of fact.

In *Bradley v. Interurban R. Co.* (1921) — Iowa, —, 183 N. W. 493, where a passenger in an automobile was injured in a collision with an interurban car, it was held that such a passenger is not necessarily guilty of contributory negligence, as matter of law, if he fails to see an impending danger in time to interfere and prevent it, and that ordinarily it is a question for the jury what constitutes reasonable care in such an emergency.

The contributory negligence of one injured by a collision between an interurban car and the automobile in which he was riding, and which was driven by another whose negligence was not imputable to him, has been held to be a question of fact in the following circumstances:

—where plaintiff was riding as a passive guest in the rear seat of an automobile which had the top up and the doors closed, *Marion & B. Trac-tion Co. v. Reese* (1919) — Ind. App. —, 124 N. E. 500; *Marion & B. Trac-tion Co. v. Umphress* (1920) — Ind. App. —, 127 N. E. 568;

—where plaintiff had no acquaint-ance with the crossing, or its sur-

roundings, and did not know of its existence until just as the car reached the track, and was riding in the mid-dle of the car, so that his view to the front was necessarily obscured by the driver and another person sitting in front, and he discovered the crossing as he approached it closely, and al-most simultaneously caught sight of the interurban car, and immediately gave an outcry, *Bradley v. Interurban R. Co.* (1921) — Iowa, —, 183 N. W. 493;

—where plaintiff, on approaching the crossing, looked in both directions for approaching cars, and the car which struck the auto was not in sight when the auto stalled upon the tracks, and about half a minute later, while the plaintiff was endeavoring to unfasten the curtains and open the door of the automobile to get out, the interurban car struck the automo-bile, *Fontana v. Ft. Dodge, D. M. & S. R. Co.* (1917) 180 Iowa, 1183, 162 N. W. 777;

—where plaintiff was a grand-mother, and was holding a six-weeks-old baby in her arms, and sitting be-tween two other women in the rear seat of an automobile owned and op-erated by her husband, who had been driving a car for ten or twelve years, and who, she thought, was a perfect-ly capable driver, *Corn v. Kansas City, C. C. & St. J. R. Co.* (1920) — Mo. —, 228 S. W. 78.

It was held in *Indiana Union Trac-tion Co. v. Love* (1912) 180 Ind. 442, 99 N. E. 1005, that whether a pas-senger was negligent in remaining in the automobile, and not jumping therefrom as it proceeded to cross a railroad track in front of an ap-proaching interurban car, was a ques-tion for the jury under the rule that one in a position of peril not created by his own negligence has a right to make a choice of means to be used to avoid peril, and is not held to a strict accountability if he takes an unwise course. It was unsuccessfully contended in this case that the trial court erred in overruling a demurrer to the complaint upon the ground that contributory negligence was affirma-tively shown by the allegations of

the complaint, which alleged that the plaintiff, as they approached the crossing, looked and listened for approaching cars; that she did not see or hear any until just before the auto went upon the tracks, and that she, together with the other guests in the automobile, then called to the driver to stop the machine, but that he continued to go upon the tracks; that, after this car had passed, the driver turned on the power and started the automobile, and the plaintiff looked and listened for approaching cars upon both tracks, but saw or heard none until just as the driver started the automobile, when she saw a car coming from the opposite direction, the view in which direction had before been obstructed, and called to the driver, endeavoring to have him stop the automobile before going upon the second track; that it was impossible for the plaintiff to jump from the machine at the time without being threatened with instant death, and that she remained in the automobile when it went upon the second track and was struck.

And where a jury, in answer to special questions, found that the plaintiff could have seen the approaching interurban car; which struck the automobile, at 132 feet, and at 82 feet from the crossing, in time to warn the driver, but answered, "Can't say," and "Doubtful," in response to similar questions as to her range of vision at 15 feet, 25 feet, and 30 feet from the crossing, such findings, construed together, do not establish her contributory negligence as a matter of law, and a general verdict, which is consistent with such findings, must stand. *Schaefer v. Arkansas Valley Interurban R. Co.* (1919) 104 Kan. 394, 179 Pac. 323, rehearing denied in (1919) 104 Kan. 740, 181 Pac. 118. In this case the court said: "Was the deceased guilty of contributory negligence? Ordinarily, that, too, is a jury question. The court cannot say as a matter of law that because the deceased could have seen the trolley car while she was 132 feet from the crossing, and while she was 82 feet from the cross-

ing, and failed to warn the driver, she was guilty of contributory negligence. Nor does the fact that she could have seen the trolley car at 11 feet from the track, and that the Ford car could have been stopped in 4 feet, make out a case of contributory negligence against the woman. It would take some slight interval of time, after getting within 11 feet of the track, to see the car, to recognize the danger, to determine what to do, to warn the driver, for the driver to realize the urgency of immediate action, and for him to stop the car. A jury could fairly conclude that there was insufficient time for such quick sequence of perception, thought, speech, and action."

In *United R. & Electric Co. v. Crain* (1914) 123 Md. 332, 91 Atl. 405, 10 N. C. C. A. 571, where a passenger in an automobile was injured when it collided with an interurban car, it was held that there was evidence tending to show a want of due care upon his part which should have been submitted to the jury, and that an instruction that there was no evidence legally sufficient to show any negligence upon his part was error, where it appeared that just before the accident the driver told the passengers in the automobile that there was a crossing along there somewhere, but that he did not know just where, and it appeared that there was a line of telegraph poles marking the railroad at its crossing over the highway, which could have been seen by the plaintiff in the automobile some distance from the crossing.

And in holding the contributory negligence of a passenger in an automobile struck by an interurban car to be a question for the jury, the court, in *Stem v. Nashville Interurban R. Co.* (1919) 142 Tenn. 494, 221 S. W. 192, said: "It is shown in the evidence here that at the time of, and immediately prior to, the collision, the deceased was exercising no care to ascertain the existence of the railway track or the approach of the car. This would, nothing else appearing, preclude any right of recovery by her administrator. There is, however,

evidence in the record tending to show that, on account of obstructions along the route traversed by the automobile, to have looked and listened would not have warned her of peril. To look and listen for cars at crossings is a positive, fixed duty, when by such precautions they may be seen or heard, and in such cases a failure of observance will bar recovery. Where, however, in exceptional cases, because of conditions not created by, or under the control of, a traveler, these precautions would not apprise one of danger, their exercise may be excused."

And it was held in *Montague v. Salt Lake & U. R. Co.* (1918) 52 Utah, 368, 174 Pac. 871, that the question of the contributory negligence of a young girl under seventeen years of age, who was injured in a collision between the automobile in which she was riding and an interurban train at a public crossing, was for the jury, the court saying: "While it is true that it taxes one's credulity somewhat to believe that one riding in the front seat of an automobile, as plaintiff was, with every opportunity to see and hear what was going on around her, neither heard the whistle or noise of the train as it approached the crossing, nor saw the headlight from the train the moment the automobile passed into the open space after passing the barn or stable, . . . yet when her age, her lack of experience, the duty imposed on her by law, and all the other facts and circumstances are considered, the question of whether her conduct and inaction constituted negligence is not so positive and clear that all reasonable men must necessarily arrive at the same conclusion. . . . The question is not so free from doubt as to justify the court to declare her guilty of such negligence, as a matter of law, as will bar a recovery."

In *Cowan v. Salt Lake & U. R. Co.* (1920) — Utah, —, 189 Pac. 599, where a passenger in an automobile was injured when it was struck at a street crossing by a suburban train, it was held that the negligence of such passenger was a question for the

jury, where it appeared that she was twenty years of age, was riding on the rear seat with two others, with a young man sitting on her lap and another young man sitting on the side door of the automobile, that the owner of the automobile was operating it at such a moderate rate of speed as would not cause the plaintiff to anticipate danger, that the plaintiff had only a casual and imperfect acquaintance with the surroundings, the railroad having only been in operation a short time, and that she was not aware that the automobile was approaching any railroad crossing, and did not keep an outlook for a crossing, and heard no signals or noise of the approaching train, and was not aware of any danger until at the very moment the automobile was struck. In this case the court adopted the rule that leaves it to the jury to determine whether, under the circumstances, a passenger in an automobile is justified in trusting his safety to the care of the driver, and not looking and listening for himself at a railroad crossing. The court refused to follow the doctrine, held by a number of the cases, that all occupants of a vehicle are charged with the absolute duty of keeping a lookout for themselves, and to exercise a constant care for their own safety, and thus may not, to any extent, trust to the care and rely upon the vigilance of the driver. The court stated that the cases which support this doctrine are based upon an entirely different rule, respecting the matter of establishing the plaintiff's negligence, from the one prevailing in the jurisdiction of the case at bar, and said in this connection: "In this state negligence is never presumed, and hence the plaintiff is not required to establish his freedom therefrom. The presumption that he is so is in his favor, and unless he makes his negligence apparent in proving his case the burden is upon the defendant to prove plaintiff's negligence. While we have repeatedly held—and such is the rule in this state—that it is the duty of everyone who is about to cross a railroad to exercise ordinary care and

vigilance for his own safety, and that he is held responsible for his own negligence in that regard, yet we can conceive of no reason why the question of whether a passenger or an invitee riding in a vehicle was guilty of contributory negligence, in view of all the circumstances which would bar a recovery, should not be left to the jury, unless that question is free from substantial doubt."

And in deciding that a passenger in a wagon struck by an electric interurban car was not guilty of contributory negligence as matter of law, but that his contributory negligence was a question for the jury, the court, in *Ilardi v. Central California Traction Co.* (1918) 36 Cal. App. 488, 172 Pac. 763, said: "The question here, then, is whether there was any justification for the implied finding of the jury that the deceased was not culpable in that respect. There is no evidence of any overt or affirmative act of negligence on the part of Ilardi, or that he participated in the negligence of Sansone,—assuming the latter to have been guilty of negligence,—by urging him, with knowledge of the near approach of a train, or with knowledge that he (Sansone) had not looked and listened to ascertain whether there was a train near at hand, to proceed on over the crossing. Nor is there any evidence that Sansone was an incompetent or careless driver, or that Ilardi had any reason to suppose that he was not competent to drive the horse properly, or to believe that Sansone was not doing his duty by looking for approaching trains. It is true, if we accept Sansone's testimony as to that matter, that Ilardi said nothing and did nothing, and looked neither to the north nor south before the horse was started by Sansone over the crossing; but this did not constitute negligence per se, or such acts of omission as to justify the conclusion or declaration, as a matter of law, that he failed to use due care for his own safety, since he was a mere guest of Sansone, riding with the latter by his permission and sufferance, and, having no interest in the plans or purposes for

which Sansone was then using the horse and vehicle, and was without any right or power to exercise any control over the latter in the management of the vehicle. Moreover, the deceased knew that Sansone, having been accustomed for some time to driving over the Vina Vista crossing, knew as fully or as well as he did that trains passed frequently over the railroad track every day, and as there is, as stated, no evidence that Sansone was ordinarily a careless driver, or did not know how to manage a vehicle drawn by a horse, the deceased had the right to assume that Sansone would exercise reasonable care and caution in making the crossing."

III. As to street cars.

In general.

The failure of a passenger in an automobile struck by a street car to use due care to see or hear the approaching car will not prevent a recovery by her, unless such failure contributes to her injury. *Clarke v. Connecticut Co.* (1910) 83 Conn. 219, 76 Atl. 523.

And in *Labrecque v. Donham* (1920) — Mass. —, 127 N. E. 537, where a helper on a motor truck was struck by a street car as he was cranking the truck, which had become stalled on the track, it was held that, if he was intoxicated at the time of the accident, that fact alone would not prevent his recovery, but that if his intoxication contributed to the injury in any degree he could not recover.

Although the fact that one injured while riding in an automobile had employed an unlicensed person to operate it, contrary to the provisions of a statute, will not of itself prevent a recovery by him for injuries received in a collision between the automobile and a street car, it is evidence that the injured person was not in the exercise of due care. *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A. (N.S.) 801, 104 N. E. 487.

A plea that the plaintiff, who, while a passenger in an automobile, was injured by a collision with a street car,

was guilty of contributory negligence in allowing herself to be driven at a high rate of speed along the street, and in taking no steps to secure a reduction of such speed to a safe rate, was held to be defective in *Birmingham R. Light & P. Co. v. Barranco* (1920) 203 Ala. 639, 84 So. 839, because it contained no allegation of the plaintiff's knowledge of the excessive speed and of the dangerous situation.

And it was further held in the preceding case that contributory negligence cannot be predicated of an obligation on the part of a passenger to maintain an outlook, in the absence of special circumstances relating to the driver's incompetency, or known disregard of his duty in that connection, that would serve to impose the duty to maintain a lookout upon the passenger.

It was held in *Vanek v. Chicago City R. Co.* (1918) 210 Ill. App. 148, as stated in the abstract of the decision, that a passenger in an automobile, with which a street car collides, cannot sit inactive when danger is imminent and be regarded as having exercised due care for his own safety.

And in *Clarke v. Connecticut Co.* (1910) 83 Conn. 219, 76 Atl. 523, where a passenger was injured by the collision of the automobile with a street car, it was held that an instruction which permitted her to recover unless she saw the danger in time to warn the driver thereof, and absolved her from the duty of looking and listening for an approaching car, was erroneous because it did not permit the jury to measure her conduct by the standard of reasonable care.

And it was held in *Toledo R. & Light Co. v. Mayers* (1916) 93 Ohio. St. 304, 112 N. E. 1014, where the plaintiff was injured as the result of a collision by a street car and the automobile in which he was riding, as a guest, in the front seat with the driver, that, although plaintiff was required to exercise ordinary care for his own safety, and reasonably to use his faculties of sight and hearing to observe and avoid the dangers inci-

dent to crossing the track, an instruction that he "was not exonerated from any duty at all by reason of the fact that he himself was not driving the machine" was erroneous.

Matter of law.

The failure of one riding, in daylight, on the front seat of a motor vehicle, to see the street car which struck the vehicle, when the street car was within the plain field of his vision for a sufficient period of time to have enabled the driver of the vehicle to have stopped it before the collision, constitutes contributory negligence as matter of law, and the statute creating a presumption of due care upon the part of the person injured did not require the submission of the plaintiff's negligence to the jury. *Pigeon v. Massachusetts North Eastern Street R. Co.* (1918) 230 Mass. 392, 119 N. E. 762.

One injured in a collision with a street car, while riding in an automobile driven by another with whose negligence he is not chargeable, has been held to be guilty of negligence as a matter of law in the following circumstances:

— where plaintiff was sitting on the front seat with the driver, with nothing to obstruct her view as she approached the street intersection at which the collision occurred, in a vicinity with which she was well acquainted, and, although she could have seen the street car coming, she did not look, and did not warn the driver, or object to his attempt to cross the tracks, because she had been with him before over the same route, and never gave it a thought, but relied implicitly upon the driver, and took no precautions to see for herself that a street car was coming, and did not notice the car until the driver called her attention to it when the auto had crossed one rail of the track, *Leapard v. Kansas City R. Co.* (1919) — Mo. App. —, 214 S. W. 268;

— where a woman of mature years failed to look out for approaching cars, on crossing street car tracks, when the automobile was going so slowly that, upon a word of caution from her, it could have been stopped,

and the accident avoided. *Pouch v. Staten Island Midland R. Co.* (1910) 142 App. Div. 16, 126 N. Y. Supp. 738;

—where one riding as a passenger upon the running board of a motor truck failed to look, when, if he had looked; he could have seen the street car approaching in ample time to have stepped off the running board and saved himself from injury, *Gilbert v. Kansas City R. Co.* (1921) — Kan. —, 197 Pac. 872. And it was further held in this case that, as the plaintiff was in a better position than the driver to see approaching cars, he was required to look and listen for an approaching street car as much as the driver, and that, if he had discovered the approaching street car which collided with the auto, it would have been his duty to have warned the driver thereof;

—where plaintiff was familiar with the locality, and sat on the front seat with the driver, and had the same opportunity of seeing the dangers, and the accident occurred in the evening when it was dark, and both the plaintiff and the driver saw the headlight of a car half a mile away, and discussed the matter, and concluded that they had plenty of time to cross the tracks ahead of the car, and, as they approached the tracks, the plaintiff made no request of the driver to stop and let him out of the automobile, and did not object to the attempt to cross the track ahead of the car, and therefore must have consented to test the danger, whatever it might be, *Farquhar v. Webster, M. B. & F. City Street R. Co.* (1912) 50 Pa. Super. Ct. 536;

—where, knowing that the automobile, after passing a street car going in the same direction, was being turned to cross the tracks in the middle of a block, plaintiff, who could have seen the car which struck the automobile coming from the opposite direction, if she had looked, paid no attention whatever, *Carden v. Chicago R. Co.* (1918) 210 Ill. App. 155;

—where a passenger in an automobile which was being raced against a street car, and which crossed in front of it and was struck by it, par-

ticipated in the racing in violation of the speed law, which was the contributing cause of the collision, and knew that the car was following the automobile, and could have seen it as the automobile was directed across the tracks, *Fair v. Union Traction Co.* (1918) 102 Kan. 611, 171 Pac. 649;

—where a passenger in an automobile, stalled at night so close to a street railroad track that a street car could not pass without striking it, saw a street car approaching from behind at a distance of about 700 feet, and called her husband's attention to it, he being the driver of the automobile, but continued in her seat, and, when the street car was 100 feet away, signaled to it to stop, and, although she had plenty of time when she first saw the street car to get out of the automobile, did not do so because she thought the motorman would see the automobile and stop, *Lawrence v. Fitchburg & L. Street R. Co.* (1909) 201 Mass. 489, 87 N. E. 898;

—where the machinery of an automobile got out of order, causing it to stop on one of the tracks of a street railroad company, upon a foggy and very dark night, and, after nearly an hour's effort to push the automobile off the track, the chauffeur, remembering that a car was about due, went back along the track some distance for the purpose of stopping it, but, after making all proper efforts to do so, failed, and during this time the plaintiff got out of the automobile, but went back into it, although she knew it was still upon the street railway tracks, and was injured when the automobile was struck by the car, *Coleman v. Pittsburgh, H. B. & N. C. Street R. Co.* (1916) 251 Pa. 498, 96 Atl. 1051.

It was held in *Dunlap v. Philadelphia Rapid Transit Co.* (1915) 248 Pa. 180, 93 Atl. 873, that the plaintiff, injured when the automobile in which he was riding collided with a street car, was guilty of contributory negligence as matter of law, where it appeared that he, though familiar with the neighborhood, and though seeing the car tracks and being aware that a car might pass at any moment,

made no effort to see if any car was coming. It further appeared in this case that the plaintiff was riding with the constable, as his deputy, for the purpose of making a distress for rent, and the court said that the plaintiff should be held to a somewhat higher degree of duty than a passenger for hire would be held; that the driver and the plaintiff were engaged in a common purpose, and had a common object in view,—that of transacting business in which both were interested,—and that, while the driver's negligence should not be imputed to the plaintiff, it was incumbent upon the plaintiff to exercise proper care, and not to sit quietly by and fail to see danger that was plainly imminent.

And the same holding was made in *Laudenberger v. Easton Transit Co.* (1918) 261 Pa. 288, 104 Atl. 588, following *Dunlap v. Philadelphia Rapid Transit Co.* (Pa.) *supra*, the court saying that no distinction could be made between the two cases.

And in *Fredericks v. Chicago R. Co.* (1917) 208 Ill. App. 172, where a passenger in the rear seat of an automobile was injured when it was struck by a street car, the court held correct an instruction to the effect that if the plaintiff knew, or, by the exercise of ordinary care and caution, could have known, of the approach of the car, and, notwithstanding, rode upon the street car track and was thereby injured, and that in so doing he failed to exercise ordinary care and caution for his own safety just before and at the time of the alleged accident, which failure approximately contributed to and caused the injury, he was guilty of contributory negligence; and upheld also an instruction to the effect that if the plaintiff, by using his faculties with ordinary and reasonable care, looking out for danger, could have avoided the accident, and if he negligently failed to do so, and such negligence caused or proximately contributed to the injury, the plaintiff could not recover.

One who, seated upon the front seat of a wagon with the driver, in approaching street car tracks, does not look up or down for approaching cars, and pays no attention to the cars, is

guilty of contributory negligence as matter of law. *Caminez v. Brooklyn, Q. C. & S. R. Co.* (1908) 127 App. Div. 138, 111 N. Y. Supp. 384.

And the failure of a person riding upon a wagon to look and listen before crossing street railway tracks was held in *Dummer v. Milwaukee Electric R. & Light Co.* (1901) 108 Wis. 589, 84 N. W. 853, to make him guilty of contributory negligence as matter of law. This holding, the court said, was necessitated by the legal proposition stated in the following words: "Whatever difference of opinion there may be upon the subject as an original proposition, it is now firmly settled as a part of the law of this state that it is the duty of a person approaching the track of an electric street railway, whether he be walking or riding in a vehicle, to look and listen for approaching cars; and that if he fails to do so, and is injured by a car while crossing the track, he is guilty of contributory negligence as matter of law."

And in *Kirschbaum v. Philadelphia Rapid Transit Co.* (1920) 73 Pa. Super. Ct. 536, where one riding upon a wagon which his coemployee was driving saw, at the same time as the driver, a street car approaching about 75 feet away, and did not say or do anything to prevent his fellow employee from driving in front of the approaching car, it was held that the plaintiff was guilty of contributory negligence as matter of law, because he joined with the driver in testing the danger, which was patent to them both.

And it was held in *Anderson v. Metropolitan Street R. Co.* (1899) 30 Misc. 104, 61 N. Y. Supp. 899, that there was no basis for a finding by the jury that the plaintiff was free from contributory negligence, where it appeared that he was a helper, sitting upon the front seat of a wagon which was slowly approaching a street railway crossing, and that, when near the track, he saw a rapidly approaching car about 30 feet away, and did not ask the driver to stop or alter his course, or attempt to jump from the wagon.

In *Kamillowitz v. Cumberland Coun-*

ty Power & Light Co. (1920) 119 Me. 588, 109 Atl. 487, where a passenger in an auto truck was injured when it was struck by a street car when the driver, preparatory to turning around, backed the truck upon, or so near to, the street car tracks that the truck was struck by a passing electric car, it was held that the plaintiff was guilty of contributory negligence as matter of law, because his own testimony indisputably proved that he made no effort whatever to ascertain whether a car was approaching when the course of the truck was changed, and that, had he used the diligence of an ordinarily prudent man for his own safety, he would have discovered the peril and avoided it.

And in *Miller v. Ft. Smith Light & Traction Co.* (1918) 136 Ark. 272, 206 S. W. 329, where a wife, while riding in her husband's automobile, was injured by its collision with a street car, an instruction that, situated as she was on the seat beside the driver, she had no right to rely implicitly upon his care and prudence for her own safety, but it was her duty, if the driver was approaching at a careless rate of speed the street on which the street cars were passing, to attempt to have him check his speed to a safe rate, and that, if she failed to do so and her failure contributed to the collision, she could not recover, was objected to upon the ground that there was no evidence that the plaintiff was on the seat with her husband, the driver, when the automobile collided with the street car, and the court said, in overruling this objection, that, while it was true that there was no direct testimony to that effect, there was evidence from which it could be inferred; and the court further said that the instruction dealt with a phase of the law that was proper to be submitted to the jury under the circumstances, and that this was so without regard to the fact whether the plaintiff was sitting on the front or the back seat of the automobile.

One riding upon a wagon, seated beside the driver, has no right to rely implicitly upon the care and prudence of the driver in approaching street car tracks, but it is his duty, if the driver

is approaching such tracks at a careless rate of speed, to attempt to have him check his speed to a safe rate, and such passenger, if he makes no effort to have the driver diminish the speed, and his failure to do so contributes directly to a collision between the wagon and a street car, cannot recover for his injuries, since he is guilty of contributory negligence as matter of law. *Holden v. Missouri R. Co.* (1903) 177 Mo. 456, 76 S. W. 973.

And the failure of a passenger sitting on the seat with the driver to warn the latter of the approach of a street car which struck the wagon, where the passenger saw the car approaching nearly half a square away, constitutes contributory negligence as matter of law. *Cincinnati Traction Co. v. Sanders* (1909) 32 Ohio C. C. 413.

But a passenger in the rear seat of an automobile is not guilty of contributory negligence because of her failure to jump therefrom upon seeing a rapidly approaching street car about 50 feet away, with which the automobile almost instantly collided, or because of her failure to direct the movements of the driver. *Burke v. Anacostia & P. R. Co.* (1919) 48 App. D. C. 296. In this case the court said: "Plaintiff's own conduct discloses no want of proper care for her safety. What could she have done under the circumstances to protect herself? The law did not require her to jump from the automobile. If she did, her injuries would, in all probability, have been more serious than they were. If she sought to direct her son, her efforts, no doubt, would have been more confusing than otherwise. He was compelled to act on the spur of the moment, and it would have been impossible for her to have influenced his action for her safety under the circumstances. Besides, it is a matter of common knowledge among those familiar with the handling of automobiles in motion that 'driving from the back seat' is extremely dangerous. We can perceive nothing in the evidence on which the jury could have predicated negligence on plaintiff's part, and therefore we think the court

erred in submitting the question to the jury."

A passenger is not guilty of a want of ordinary care in taking no active steps to prevent the driver from crossing the tracks in front of a street car, where the driver, confronted with the same conditions, is held to be in the exercise of due care in so crossing. *Lindquist v. Duluth Street R. Co.* (1921) — Wis. —, 184 N. W. 690.

And in *Rogers v. Portland R. Light & P. Co.* (1913) 66 Or. 244, 184 Pac. 9, where a passenger in an automobile was injured as a result of its collision with a street car at a street intersection, the court, in reference to the plaintiff's contributory negligence, said: "There was absolutely nothing in the testimony to justify any instruction as to plaintiff's contributory negligence. She had no control or authority over the driver, but was merely a guest, and, as any woman under the same circumstances would have done, she relied upon her escort to look out for her safety. She was not charged with the duty of looking out for possible dangers. If a possible danger was called to her attention, and she realized it, it was her duty to call the attention of her escort to it; and this she did. When she saw a car coming she called his attention to it. Had she assumed the task of looking out for cars, the case might have been different; but such duty had not been committed to her, and she had not assumed it. There is nothing to indicate that she acted differently from any other woman under the same circumstances."

And in *Hunter v. Saskatoon* (1919) 12 Sask. L. R. 354, 48 D. L. R. 68, where a passenger occupied the front seat of an automobile in order to show the driver the way to his house, and was injured when the automobile struck a street car, it was held that the jury were not justified in finding that he was guilty of contributory negligence in that he failed to warn the driver that he was approaching a street car line, since, as the passenger was under no obligation to point out to the driver dangers on the route which would be apparent to any rea-

sonably careful driver, the failure of the passenger to warn the driver that he was approaching a street car line could not constitute contributory negligence; and the court directed that the judgment below in favor of the defendant should be set aside, and judgment entered for the plaintiff. The court said: "The jury found the deceased negligent in that he omitted to warn the driver that he was approaching a street car line. It is frankly admitted that he gave no such warning. Was there any duty on his part so to do? In my opinion there was not. Where one person undertakes to show the way to another, his obligation is, *prima facie*, limited to directing him along what streets he should proceed and what turnings he should take. He is not ordinarily under obligation to point out obstacles or dangers on the route which would be apparent to any reasonably careful driver. Of course, if a man intrusts himself to the control of a driver who, to his knowledge, is blind or incompetent, he cannot, if he is injured as a result of such blindness or incompetence, be heard to say that he did not contribute to his own injury. But here the driver of the automobile was competent; he had possession of all his faculties; he could have avoided the accident had he been looking ahead. The deceased was, in my opinion, entitled to assume that in driving the automobile he would use due care."

And where a passenger in a buggy driven along a highway parallel with the street railroad tracks and at a safe distance therefrom, sits in the buggy without fear, and apparently without thought, of any danger in so driving along the highway, and is thrown out and injured upon the buggy being upset, when the horse nearest to the tracks is crowded over by the other horse, upon its becoming suddenly frightened, so as to be struck by a street car approaching from the rear, such passenger is, as matter of law, not guilty of contributory negligence, and the question of her negligence should not be submitted to the jury. *Atwood v. Utah Light & R. Co.* (1914) 44 Utah, 366, 140 Pac. 137.

Question of fact.

The mere failure of a guest to look and listen for approaching cars before the vehicle in which he is riding is driven across street railway tracks by one with whose negligence he was not chargeable has been held not to constitute contributory negligence, as a matter of law, upon the part of such guest, in the following circumstances:

— where a woman was riding on the front seat of a motor truck with her husband, *Colorado Springs & Interurban R. Co. v. Cohun* (1919) 66 Colo. 149, 180 Pac. 307. The court said: "Was plaintiff herself guilty of negligence? She took no care, did not look, and did not see the car at all, though she might have done so, and it is insisted that she ought to have looked and listened, and warned her husband. It was her duty to exercise that kind and degree of care that a person of ordinary prudence would exercise under like circumstances, and the court, in instructions 13 and 14, so instructed the jury. The questions, then, for decision, concerning her contributory negligence, were: First, how a woman of ordinary prudence would behave, situated as plaintiff was. Second, Did plaintiff so behave? These questions are ordinarily for the jury, and the courts cannot interfere unless the jury's answer is so manifestly wrong as not reasonably to be the subject of dispute. Since plaintiff's negligence, if any, was failure to look or listen, and since her conduct in this respect is undisputed, the jury by their verdict for plaintiff necessarily decided that a woman of ordinary prudence in like circumstances would not have looked or listened. We are now asked to say that the verdict was wrong because her conduct was negligent as a matter of law, which would be equivalent to saying that a woman of ordinary prudence, under the same circumstances, would have looked or listened, and that that proposition is so manifest as not reasonably to be a subject of dispute. This we cannot say;"

— where one riding in a wagon, with his back toward the approaching car which struck the wagon at a street intersection, did not do anything to

stop the team, and the evidence was conflicting as to the speed of the car and how far it was from the team at the time the motorman discovered them on the track, *Chickasha Street R. Co. v. Marshall* (1914) 43 Okla. 192, 141 Pac. 1172;

— where a boy of fifteen, a helper upon a grocery delivery wagon, was riding rapidly down a short runway from a livery stable to the street, but had never been at the livery stable before, and had no means of knowing that the driver would proceed rapidly down the runway, and the distance was so short that he had no opportunity either to warn the driver, or to save himself from the collision with the street car, *Ebert v. Metropolitan Street R. Co.* (1913) 174 Mo. App. 45, 160 S. W. 84. The court held applicable to the case the doctrine that if a person riding with another has no ground to suspect incompetency or to anticipate negligence on the part of the driver, and the impending danger is so sudden, or of such a character, as not to require or permit any act on the part of the passenger for his own safety, he may recover;

— where a woman was riding in a one-seated sleigh, with her husband, who was an experienced and competent driver and was familiar with the running of the street cars over the route on which the collision occurred, and she relied entirely upon his watchfulness, *Denis v. Lewiston, B. & B. Street R. Co.* (1908) 104 Me. 39, 70 Atl. 1047. It was held in this case that the jury did not commit manifest error in finding that the plaintiff was not chargeable with contributory negligence, and a verdict in her favor was sustained;

— where the plaintiff was injured while riding in a carriage with his brother, whom he knew to be a skilful and experienced driver, who had for many years been traveling the street of the accident in a vehicle similar to that in which the accident happened, and he saw his brother check his horse as they approached the street crossing, and lean forward beyond the side curtains of the carriage, and look and listen, and then proceed to make the crossing, and from the position in

which plaintiff sat he could not have seen the car through the small light in the curtain of the carriage, and, even if he had been warned of the approach of the street car, could not have escaped from the carriage in time to save himself, *United R. & Electric Co. v. Biedler* (1904) 98 Md. 564, 56 Atl. 813, 15 Am. Neg. Rep. 338;

— where the driver looked and saw no street car approaching, and his view was much better than that of the plaintiff, who sat in the rear seat of the auto, and whose view was necessarily obstructed, *Moody v. Milwaukee Electric R. & Light Co.* (1920) 173 Wis. 65, 180 N. W. 266. The court held that her failure to look, if she did not look, could not be said, as a matter of law, to have proximately contributed to the accident and injury.

It was held in *Wosika v. St. Paul City R. Co.* (1900) 80 Minn. 364, 88 N. W. 386, 8 Am. Neg. Rep. 72, that the negligence of a passenger sitting upon the rear seat of a wagon which was struck by a street car, although she did not look for approaching cars as the team turned upon the track, is a question for the jury, under the doctrine of *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1895) 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102, under "Question of fact," *supra*, II. a.

And it was held in *Zalotuchin v. Metropolitan Street R. Co.* (1907) 127 Mo. App. 577, 106 S. W. 548, that a girl not over sixteen years of age, seated on a box placed behind the seat of a wagon, driven by her stepfather, with her face towards the rear, was not guilty of contributory negligence as matter of law, so as to prevent her recovery for damages from the collision of the wagon with a street car, under the rule that, if a person riding in a vehicle knows that the driver is negligent and takes no precaution to guard against injuries, he cannot recover, the court saying: "Whether plaintiff looked while the vehicle was in a place of safety, saw the car approaching, and failed to warn her stepfather, or did not look at all in the direction from which the car approached until she had reached a dangerous position, her conduct would

have been a subject for the jury to classify. . . . On account of her minority, her actions should not be measured in law by the standard to be applied to persons of mature years. As a general rule, the characterization of the conduct of a minor is regarded as an issue for the triers of fact to solve, and we perceive no reason for making of the present case an exception to that rule. The acts of plaintiff were not so glaringly negligent as to compel us to say that reasonable minds could not differ with respect to them. Considering her position in the wagon and the further fact that, being a mere child, she naturally would rely greatly on the watchfulness and discretion of her mother and stepfather, whose opportunities to judge of the risk involved in attempting the crossing were better than her own, it is a fair inference to say that she acted in a manner to be expected of a person of her age and apparent intelligence."

And in *Indianapolis Street R. Co. v. Johnson* (1904) 163 Ind. 518, 72 N. E. 571, where a woman riding in a buggy with her husband was injured when the buggy, which was traveling partly on the street car tracks, was run into by a street car from the rear, it was held that it could not be said, as a matter of law, that she was guilty of contributory negligence, where it appeared that, while they were passing along the street prior to the accident, she did not look to the rear to discover whether a car was approaching from that direction, and that she made no effort, after the buggy turned into the street on which the street car tracks were located, to ascertain the location of the car coming from the rear, but that she heard it approaching, and gave her husband some warning to the effect that they were in danger by reason of its approach.

It was contended in *Pine Bluff Co. v. Whitlaw* (1921) 147 Ark. 152, 227 S. W. 13, that the plaintiff was guilty of such contributory negligence as would defeat a recovery by her, because the evidence showed that she could have seen the street car approaching in time to have notified the driver of the danger therefrom, and it

was her duty to have done so, but the court held that her contributory negligence was for the jury, because there was evidence that she had known the driver for many years, and considered him a careful driver, and that he was accustomed to driving about the streets of the town, where he must, of necessity, have frequently crossed the street car tracks, and she testified that she did not see the street car until the automobile gave a jerk when the driver increased the speed in order to cross the track ahead of it.

And it was held in the case of *Fujise v. Los Angeles R. Co.* (1909) 12 Cal. App. 207, 107 Pac. 317, that it could not be said as a matter of law that the failure of the deceased to look to ascertain the position of the street car before turning across the tracks was contributory negligence, where the street car approached and overtook the express wagon upon which she was riding from the rear, and struck it, causing her death. The court said in this connection that the deceased must be presumed from her residence in another place to have been less familiar with the congested condition of the business streets of the city where the accident happened, and of the effect thereof, than a public express driver, and that in the absence of some unusual peril, apparent to her and not to him, or to which they were equal strangers, it would be presumed that she pursued the safer plan in letting the driver take care of his own horse.

In *Salisbury v. Boston Elev. R. Co.* (1921) — Mass. —, 132 N. E. 239, where one riding in an automobile was injured when it was struck by a street car at a street intersection, it was held that the contributory negligence of the passenger was a question for the jury, where it appeared that he was seated with the driver on the side opposite from that in which the car that struck the automobile came, that, when 50 feet from the crossing, he looked in the direction in which the car came, and no car was in sight, that the accident occurred within five seconds thereafter, and that he did not see the car until the auto was upon the tracks. It was strongly argued

that the plaintiff should have looked again when he reached the curb line of the street intersection, but the court said that that was a question for the jury to determine as a question of fact, and further said that the plaintiff might well trust something to the expectation that the driver would act with due regard for their safety, and might assume that an electric car would not approach an intersecting street at the rapid speed at which it was going, without giving any warning of its approach.

One riding in a buggy which was struck by a street car cannot be said to be guilty of contributory negligence as matter of law where, upon the driver's stopping the horse at the nearest track, the passenger looked and listened for approaching cars, and saw or heard none, and the driver then proceeded to walk the horse across the tracks. *Stussy v. Kansas City R. Co.* (1921) — Mo. App. —, 228 S. W. 531.

And in *Byerley v. Metropolitan Street R. Co.* (1913) 172 Mo. App. 470, 158 S. W. 413, where a woman riding upon the front seat of an automobile, with her husband driving, was injured when it was struck by a street car, it was held that plaintiff, having looked, as the automobile turned to cross the tracks, toward the direction from which the car came, and not seeing it, could not be charged with contributory negligence as matter of law because she did not keep her eyes in that direction, but allowed the automobile to start across while she looked in the opposite direction for a moment, and where it appeared that when she looked again in the first direction the street car, because of its excessive speed, struck the automobile before it could be stopped, although it was stopped within its own length. The court said that it did not mean that, if plaintiff saw, or should have seen, the street car coming, and undertook to cross in front of it, miscalculating its distance and speed and the time it would take to cross with the automobile, she could recover.

One injured when a street car struck the rear end of a delivery sled upon which he was riding cannot be said

to have been guilty of contributory negligence as matter of law, where it appeared that he saw the street car as soon as there was any necessity of observation, that he thought that there was sufficient time to pass over the tracks before the car came to the crossing, and that this belief was one which a reasonably prudent man might have entertained, and that the horse was driven in a reasonable manner, and not suddenly upon the tracks in front of the approaching street car. *Bombard v. Worcester Consol. Street R. Co.* (1919) 234 Mass. 1, 124 N. E. 434.

And in *Davis v. City Light & Traction Co.* (1920) 204 Mo. App. 174, 222 S. W. 884, when the automobile in which the plaintiff was riding reached a street intersection, the driver saw a street car coming, and undertook to stop, but, because of something wrong with the engine, was unable to do so, and the street car collided with the automobile, and it was held that the plaintiff, though he did not look in the direction of the street car until a moment before the collision, was not guilty of such contributory negligence as would defeat an action for his injury, because his negligence did not contribute to the injury, the court saying in this connection: "If plaintiff had been on the lookout and had seen the car approaching, he could have done but two things—one to have warned the driver, and the other to have jumped out. Warning the driver would have been wholly useless, since the latter was aware of the car, and was using his every endeavor to stop, but failed without fault of anyone, if the evidence in his behalf is to be believed. His failure to open the door of the auto and jump out was not such an omission, in the circumstances, as to constitute negligence, as a matter of law. The top of the auto was up. Plaintiff was sixty-eight years old, and consequently not so agile as a younger person. But more than that, if he had observed the driver at all, he saw he was trying to stop."

And it was held in *Bailey v. Worcester Consol. Street R. Co.* (1917) 228 Mass. 477, 117 N. E. 824, 18 N. C. C. A. 62, a case of a collision between an

automobile and a street car, that the due care of the plaintiff was plainly for the jury, regardless of a statutory presumption of due care in his favor, where he did all that reasonably could be expected of an invited guest in the way of looking out for his own safety.

The contributory negligence of one injured by a collision with a street car, while riding in an automobile driven by another whose negligence was not imputable to him, has been held to be a question of fact under the following circumstances:

— where plaintiff was seated upon the left side of the driver,—the side from which the street car approached,—with a clear view of the street car track for more than half a mile from a point 35 feet from the track until the automobile reached the track, and they were alone in the automobile and not at the time engaged in conversation, and there was disputed evidence to the effect that the automobile was going at a speed of not more than from 4 to 6 miles an hour, and that the motorman sounded his gong as he approached the crossing, and that the plaintiff looked and listened for the approaching car, *Clarke v. Connecticut Co.* (1910) 83 Conn. 219, 76 Atl. 523;

— where plaintiff, a young girl of fourteen, just prior to reaching the tracks, suggested to the driver to be careful as they were approaching a street railroad, whereupon he reduced the speed of the automobile, and she looked and listened for the approach of cars, but could not see the car which struck the automobile, because of an abrupt curve of the tracks, of which curve she was unaware, *Turney v. United R. Co.* (1911) 155 Mo. App. 513, 135 S. W. 93;

— where plaintiff occupied the rear seat of the automobile, which stopped on approaching a street car track, in order to let a street car go by, and after the car went by the plaintiff looked and saw no car coming, although she could see far enough to have observed the car in ample time to have avoided the accident, if it had not been going at an excessive rate of speed, *Ziegler v. United R. Co.* (1920) — Mo. App. — 220 S. W. 1016;

— where the plaintiff was well acquainted with the general character of the crossing, the location of the track, and the trolley time schedule, and, when they were drawing near, looked for cars, and saw the car at the first possible moment, when the automobile was about 30 feet and the car at least 70 feet from the place of collision, and the plaintiff at once made an outcry, exclaiming "Oh, the car!" and this was all she did to avoid the accident, *MINNICH v. EASTON TRANSIT CO.* (reported herewith) ante, 296;

— where a passenger in an automobile was injured when it was struck on a narrow bridge as the driver attempted to pass a street car, which he was following, by turning out in the direction required by statute, and in the only direction in which the width of the bridge afforded room for him to pass, and the passenger failed to warn him against doing so, *Chadbourn v. Springfield Street R. Co.* (1908) 199 Mass. 574, 85 N. E. 737;

— where plaintiff heard the car coming very fast as the automobile was about to cross the tracks, but made no attempt to notify the driver of such fact, *Christison v. St. Paul City R. Co.* (1917) 138 Minn. 456, 165 N. W. 273;

— where the automobile was being driven by a competent chauffeur, and plaintiff was seated on the rear seat with the side curtains up, and with her host and hostess on either side of her, and other occupants of the car in front of her, and had never driven on the street on which the accident happened, and was not acquainted with that part of the city, and did not know where she was, or that she was approaching a street car track, and where her failure to warn the driver could have no effect, since he saw the car before she did, and knew of its presence, but was not aware of its excessive speed, and when the plaintiff saw the car it was only a few feet away and too late for her to do anything, *Beall v. Kansas City R. Co.* (1920) — Mo. App. —, 228 S. W. 834. It was held that under these circumstances the court could not apply to the plaintiff the rule that if one who is riding in an automobile

is where he can see the danger, or is aware of it, and therefore has opportunity to do something to avert it, either by warning the driver or otherwise, he must act, and if he takes no precautions whatever he will be guilty of contributory negligence;

— where plaintiff was a passenger in an inclosed public taxicab, with no means of communication with the driver, and did not know of his intention to back upon street car tracks, and thereby place her in danger of collision, *Kackley v. Central Illinois Traction Co.* (1916) 201 Ill. App. 164;

— where plaintiff was riding in a disabled automobile which was being towed by an auto truck, *McLaughlin v. Pittsburgh R. Co.* (1916) 252 Pa. 32, 97 Atl. 107. The court said: "Was it in accordance with the dictates of common prudence for plaintiff to remain in a disabled automobile, while it was being towed by a rope through the traffic of a public highway? Did she exercise reasonable care for her own safety in committing herself, under the circumstances, to the care of a strange driver, with whom, owing to the distance at which he sat, and the noise of the machinery, it was difficult to communicate? Were the conditions under which she rode of such a character as to constitute a patent danger which she voluntarily joined in testing? Had she knowledge of the danger involved in turning across the tracks in front of the street car, and time in which to make protest against the action of the driver in turning into danger, or was the danger not so apparent, or so serious, as to call upon her to exercise her own judgment in any way for her own protection? These were matters for the jury to decide, upon their view of what was required of plaintiff in the exercise of prudence and reasonable care for her own safety, under the circumstances shown by the evidence;"

— where a salesman was delivering goods to customers upon a motor truck, and was seated upon the driver's seat, and saw the street car approaching before the truck had entered the danger zone, and could

have insisted upon its being stopped before reaching the crossing, or could have requested the driver to slow down and avoid reaching the point where a collision was possible, but was engaged at the time in covering the goods with tarpaulin, and, as soon as he observed the danger after the driver had jumped from the truck, he caught hold of the steering wheel and endeavored to turn the automobile to avoid a collision with the street car, *Stoker v. Tri-City R. Co.* (1917) 182 Iowa, 1090, L.R.A. 1918F, 515, 165 N. W. 30;

—where the automobile, after following a street car, turned onto the other track and ran parallel with the car for a distance until the driver, upon seeing a car approaching on the track upon which he was running, drove in front of the first car, and, after proceeding for a short distance, was run into by it, and plaintiff said or did nothing, except that, in response to an inquiry of the driver beside whom he sat as to whether the track upon which he was going to turn in order to avoid the car he was following was clear, looked, and said that it was, and that there was not a car or anything in sight, *Wilson v. Puget Sound Electric R. Co.* (1909) 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50. The court said: "No negligent act of the deceased, either of omission or commission, is disclosed by the evidence. He did nothing and said nothing except to answer a question asked him by the driver. It is a well-known fact that an automobile is an intricate machine, and one which requires skill to operate. The deceased had a right to assume that the driver was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position. If the machine was running at 12 or 15 miles an hour, as testified by the driver, and the car at 8 miles an hour, as testified by the motorman, when the driver started to go onto the west track, the act would not have appeared hazardous to a reasonable man. If, however, the south-bound car was traveling at a speed of 40 miles an hour, and the north-bound

car at 30 miles an hour, the situation was serious when the north-bound car was observed, and it would not appear, to one who is not skilled in the operation of a machine, how any advice from a passenger to the driver under such circumstances could aid the latter in any way. It would seem that any interference, or attempted assistance, on the part of the passenger, would have tended to disconcert rather than to aid the driver;"

—where plaintiff remained in an automobile standing on the street car tracks on the side of the street to allow passengers to alight, after she saw a street car approaching from the rear, until it was too late to escape injury, where another passenger of the automobile had gone back to stop the street car, *Fitch v. Bay State Street R. Co.* (1921) 237 Mass. 65, 15 A.L.R. 234, 129 N. E. 423;

—where the automobile was stalled upon a street car track within full view of an approaching car about a block away, and plaintiff, who saw the car which the driver of the automobile had gone back to flag, failed to jump from the automobile until the street car had come within 12 feet of it, when she realized that the car was not going to stop, *Hensley v. Kansas City R. Co.* (1919) — Mo. App. —, 214 S. W. 287;

—where the plaintiff was one of four persons sitting on a single seat of an automobile, three of such persons sitting on the seat, and the fourth passenger sitting partly on the lap of the plaintiff and partly on the side of the automobile, *Washington, B. & A. R. Co. v. State* (1920) 136 Md. 103, 111 Atl. 164. It was held that the fact that there were four persons on the one seat in the position described did not constitute contributory negligence, as a matter of law, on the part of the plaintiff, the court saying: "By reason of the position she occupied, it may have been more difficult for her to see whether there was anything in the way, or any car coming, as they approached the crossing. As she was on the left side (the one from which the car came), she probably had a better opportunity

to see whether one was coming than the driver had, unless Jockel obstructed her view, when sitting partly on her lap and partly on the side of the automobile. Whether she thus voluntarily put herself in a position that prevented her from seeing or hearing an approaching car, or which interfered with the driver's view, as soon as he might have otherwise seen it, or interfered with his management of the car, were questions to be considered by the jury;"

— where a passenger in an automobile was injured in a collision between it and two street cars passing in opposite directions, *Speer v. Southwest Missouri R. Co.* (1915) 190 Mo. App. 328, 177 S. W. 329.

While, if a passenger in an automobile is aware that the driver is carelessly rushing into danger, it may be incumbent upon her to take proper steps for her own safety, a passenger cannot be said to be, as matter of law, negligent in failing to call the attention of the chauffeur to the danger of the situation, where it appears that she is a stranger in the place and does not know that the road crosses a railroad track, and is not aware of the approaching car. *Thompson v. Los Angeles & S. D. B. R. Co.* (1913) 165 Cal. 748, 134 Pac. 709. It was further held in this case that the evidence was not such as to compel the conclusion that the chauffeur was manifestly incompetent and inattentive to his duties to such a degree as would throw upon the plaintiff any greater obligation of watchfulness than that which would otherwise have been incurred, and that, on the point of the chauffeur's apparent competency, it might fairly be said that the jury might, on the evidence, have found either way.

And in *Peabody v. Haverhill, G. & D. Street R. Co.* (1908) 200 Mass. 277, 85 N. E. 1051, where the plaintiff was riding in a buggy, it was held that the jury had a right to find that she was herself in the exercise of proper care, where it appeared that she was being driven by her son, a young man of about twenty years, that she had no reason to anticipate negligence on his

part, and there was evidence that at a suitable place she leaned forward and looked in the direction from which a street car would come, and saw none, and that the jury might find that her failure to see or hear the street car which struck the buggy did not show negligence on her part, because of the obstructions to her view and of the noise of a brook which ran across the street, and because no bell was rung, or other signal given from the car itself, and it was not the regular time for it to pass.

Upon the question of the contributory negligence of a guest in a private carriage, who was injured by collision with a street car, evidence is admissible to show that the driver was habitually careless, and that the guest had knowledge of that fact. *Bresee v. Los Angeles Traction Co.* (1906) 149 Cal. 131, 5 L.R.A.(N.S.) 1059, 85 Pac. 152. The court said in this connection: "The character and habits of the driver of the carriage with respect to similar dangers, if known to the plaintiff, would naturally have some effect on her own conduct, on the particular occasion, in keeping a lookout for the danger herself, in giving him warning, and in enjoining on him a prudent course; and, in order to enable the jury to determine whether or not she exercised ordinary care in that respect, it was proper to give evidence of such character and habits, coupled with proof of knowledge thereof on her part."

And a passenger in a tallyho coach is not guilty of contributory negligence in failing to warn the driver of danger, or in not leaping from the coach, where she was riding on the rear seat four seats back of the driver, and did not apprehend any unusual danger until the street car was so near as to have rendered unavailing any warning she might have given the driver, and where the seat on which she was riding was elevated about 7 feet above the ground, so that any attempt by her to leap from her perch might, and probably would, have been more disastrous to her than to retain her position. *Denver City*

Tramway Co. v. Norton (1905) 73 C. C. A. 1, 141 Fed. 599.

And a finding of a jury that a passenger in an automobile was not guilty of contributory negligence in failing to tell the driver to stop, or to caution him before going upon a street railroad track, should not be set aside, where the driver is competent, and the situation of known peril just before the collision came upon all the occupants of the automobile quickly and unexpectedly, nor should such finding be set aside because of the passenger's failure to step or jump from the automobile just before it was driven upon the track, or at the time the front wheels were on the track, where, in doing so, the passenger would have placed himself in a position of greater danger,—that is, upon the ground between the car rails,—with the possibility of falling immediately in the path of the oncoming electric street car. *Hermann v. Rhode Island Co.* (1914) 36 R. I. 447, 90 Atl. 813.

In *Nichols v. Pacific Electric R. Co.* (1918) 178 Cal. 630, 174 Pac. 319, where the street car company claimed that the plaintiff was guilty of contributory negligence in riding in the automobile while it was being driven at a dangerous speed, without herself taking any precautions to ascertain whether or not the car was approaching, it was held that the question as to whether or not the plaintiff exercised ordinary care upon approaching the tracks was a question for the jury, the plaintiff having testified that the speed of the automobile was not excessive, and that her first knowledge of the danger of a collision was the fact of the collision.

And it was held in *Farrar v. Metropolitan Street R. Co.* (1913) 249 Mo. 210, 155 S. W. 439, 4 N. C. C. A. 377, where one of a number of ladies taking a hay ride in a wagon, who sat upon the side of the wagon with her feet over the side, upon the side of the wagon toward the street car tracks, had her foot crushed between the wagon and a street car which came from behind, it was held that the fact that she remained so seated

upon the side of the wagon, as it was driven along, on or near the street car tracks, did not make her guilty of contributory negligence as matter of law, but that her negligence was a question for the jury.

It was held in *Malone v. Kansas City R. Co.* (1921) — Mo. App. —, 232 S. W. 782, that a fireman on a motor fire truck which collided with a street car was not guilty of contributory negligence as matter of law, upon the ground that he knew that there was going to be a collision and made no effort to save himself or avoid the danger, but stood at his post and continued to sound the siren in accordance with his duty, and upon the ground that he could not rely upon the driver of the truck, where it appeared that the plaintiff saw the street car when he was 75 feet from the crossing, the car being at that time about 100 feet away, and that he saw the street car slowing down, and, assuming that it would stop as its duty was under the city ordinance, took his eyes off the car, and continued to sound the siren, and that he did not see the car any more until the truck swerved to the east in an endeavor to avoid the collision, and the plaintiff was thrown under the car and injured.

And in *Birmingham R. & Electric Co. v. Baker* (1902) 132 Ala. 507, 31 So. 618, where a fireman on a hose cart was injured by a collision thereof with a street car, it was held that it was not contributory negligence as matter of law for a fireman, while riding to a fire on a hose cart, to stand on his feet and be in the act of putting on his coat, where it appears that the firemen, when starting to a fire, would not have time to put on their coats, and, to avoid getting wet and to be in readiness for service when they arrive at the fire, they put them on while on the way, which they are allowed to do.

Where, while a buggy is crossing street car tracks with a car approaching in the distance, the horse slips down on the track, and, while she is endeavoring to regain her feet, the street car strikes one of the rear

wheels of the buggy and a passenger is injured, he is not guilty of contributory negligence, as matter of law, in not jumping from the buggy when he saw the car approaching, but his negligence is a question for the jury. *Edwards v. Foote* (1901) 129 Mich. 121, 88 N. W. 404.

And in *Oddie v. Mendenhall* (1901) 84 Minn. 58, 86 N. W. 881, 10 Am. Neg. Rep. 297, where a passenger in a buggy was injured by being thrown therefrom upon its being struck by a street car which approached from behind while the buggy was standing at the curb, and frightened the horse by its noise, the horse in its fright, during the absence of the driver, backing the carriage upon the track, it was held that the plaintiff was not guilty of contributory negligence as matter of law, in remaining in the carriage after the driver had left it, or in failing to jump out after the horse became fractious, but that her negligence was a question of fact for the jury.

And in *Walsh v. Altoona & L. B. Electric R. Co.* (1911) 282 Pa. 479, 81 Atl. 551, where a passenger in a wagon, in order to avoid the danger of an imminent collision between the wagon and a street car at a sharp curve of the track at a street intersection, jumped out of the wagon and injured her ankle, it was held that the question whether she exercised the care of a prudent person in permitting the driver to attempt the crossing under the circumstances was for the jury. The court said that the test of contributory negligence was whether she joined in testing a patent danger or in violating a fixed rule of law. It appeared that the driver was careful and competent, that the crossing was not in itself dangerous, and only made so by the approach of an unexpected or unheralded car running not oftener than every twenty minutes, and the court stated that there was no obvious or imminent danger in a passenger permitting a capable driver to make the crossing. It was also held that the question whether she was guilty of negligence in leaping from the wagon

under the circumstances was likewise for the jury.

In *Trumbower v. Lehigh Valley Transit Co.* (1912) 285 Pa. 397, 84 Atl. 403, where the plaintiff, while seated on the front seat of a carriage, was injured when it was struck by a car approaching from the direction in which the carriage was going, just as it was turning out of the street car tracks into an opening in the snow banks along the highway, which prevented the road from being used except in the street car tracks, it was held that while a passenger, if he voluntarily goes into a patent danger which he could have avoided, or joins the driver in testing such a danger, cannot recover, that the danger in driving in the street car tracks was not so manifest that the plaintiff could be said to have been negligent as matter of law.

And in *Pla y Hernandez v. San Juan Light & Transit Co.* (1908) 4 Porto Rico Fed. Rep. 138, where a passenger in an automobile was injured when it was struck by a street car, the case was submitted to the jury, which found a verdict for the plaintiff.

And in *Brown v. Chicago City R. Co.* (1910) 153 Ill. App. 242, where one riding on a wagon was injured upon its collision with a street car, it was held that, upon the evidence in the case, the question whether he was in the exercise of reasonable care for his own safety was a question for the jury.

IV. In collisions with vehicles.

Collisions between two automobiles.

In an action for injuries to a guest in an automobile upon its collision with another automobile, the court, in *Elling v. Blake-McFall Co.* (1917) 85 Or. 91, 166 Pac. 57, upheld an instruction as follows: "The plaintiff in this case was required to exercise reasonable care; that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being

careless, or to caution him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and, if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so."

And in *Carter v. Brown* (1918) 136 Ark. 23, 206 S. W. 71, where a passenger in an automobile was injured when it collided with another automobile, it was held that it was the duty of a guest to exercise ordinary care for his own safety, and that where the exercise of such care would have avoided the danger and resultant injury, and the failure to do so contributed to the injury, the guest was guilty of contributory negligence.

And a passenger in an automobile, injured upon its collision with a taxicab, cannot be held to be guilty of contributory negligence as matter of law, because she rode, immediately before the collision occurred, at a speed of from 15 to 20 miles an hour for several blocks, without protesting, where by statute a speed of more than 10 miles an hour was made unreasonable and negligent. *Holland v. Yellow Cab Co.* (1920) 144 Minn. 475, 175 N. W. 536.

In the case of *Parmenter v. McDougall* (1916) 172 Cal. 306, 156 Pac. 460, a judgment for plaintiff, injured in the collision of a motorcycle with an auto, was reversed because of the error of the trial court in withdrawing from the consideration of the jury the question of the plaintiff's contributory negligence in failing to request the driver of the motorcycle on which plaintiff was riding to moderate his speed in approaching an obstructed or blind street intersection, and, in this connection, the court said: "The passenger is bound to exercise ordinary care for his own safety, and . . . whether or not he exercised such care is a question of fact. Unless the evidence is all one way, this 18 A.L.R.—23.

question must be submitted to the jury. We entertain no doubt that the evidence in the case at bar was such that the jury might have found against the plaintiff on the issue of his contributory negligence."

And where an occupant of an automobile was injured when it collided with another automobile at a street intersection, the automobile in which the plaintiff was riding having, about a block back, increased its speed to overtake an automobile which had passed it, it cannot be said that the plaintiff was guilty of contributory negligence as matter of law, merely because he sat still in the automobile until the collision occurred, and did not insist or demand that the automobile be stopped, or that he be allowed to get out, since the speeding up took place so close to the point of collision that there was little or no time for the plaintiff to take further steps to secure his safety, if it was incumbent upon him to do so in order to escape the charge of negligence on account of remaining quiet in the automobile after having objected to the increase of speed. *Rappaport v. Roberts* (1918) — Mo. App. —, 203 S. W. 676. The court said that the question of contributory negligence depended solely, in this case, upon whether the plaintiff instigated the increase of speed by suggesting it to the driver, or whether it was against his advice and over his objection (upon which point the evidence was conflicting), and not upon the fact that he thereafter sat still and made no other or more effective or insistent objection in the short space of time before the collision.

A policeman clothed with authority to enforce speed laws, who makes no effort to control the speed of an automobile in which he is riding as a guest, is, where such automobile is driven at an unlawful rate of speed, guilty of negligence which will preclude him from recovering damages occasioned by the negligence of the driver of another automobile. *Hubbard v. Bartholomew* (1913) 163 Iowa, 58, 49 L.R.A.(N.S.) 443, 144 N. W. 13.

And where an automobile which had the right of way at a street inter-

section over a motor truck, seen to be approaching about 50 feet away at a rate in excess of the speed limit, proceeded across the street without paying any further attention to the truck, and, after passing the center of the intersection, was struck, although it swerved to avoid collision, by the truck coming diagonally across the street in violation of the traffic laws, the failure of an occupant of the automobile to keep a continuous lookout for the truck after entering upon the intersection was held not to make him guilty of contributory negligence as matter of law, and a finding of the trial court that he was not negligent was not disturbed, in *Simonsen v. L. J. Christopher Co.* (1921) — Cal. —, 200 Pac. 615.

One is negligent in riding in an automobile with knowledge that the chauffeur is drunk, so as to prevent his holding the driver of another automobile liable, because of the speed at which he was driving, for injury to him by the collision between the two cars, if the injury was caused by the act of the driver of the car in which he was riding. *Lynn v. Goodwin* (1915) 170 Cal. 112, L.R.A.1915E, 588, 148 Pac. 927, 9 N. C. C. A. 915.

And in *Wiley v. Young* (1918) 178 Cal. 681, 174 Pac. 316, where one riding in the side car of a motorcycle was injured by its collision with an automobile, it was held that the trial court properly refused an instruction predicated upon the theory that it would be negligence upon the part of the plaintiff to ride with the driver, if she had reason to believe that he was usually careless or negligent in some unspecified particular in the operation of the same, and in this connection the court said: "This is not the law. If the plaintiff knew, or had reason to believe, that Lewis was usually negligent in the operation of his machine, it was her duty to consider that fact in determining what precaution she should have taken for her safety in the event of meeting the defendant's automobile upon the public highway; and the question for the jury to determine under all the facts and circumstances, including the knowledge of the plaintiff, if any, concerning the

driver, Lewis, was whether or not she was guilty of any negligence which proximately contributed to the injury. The only evidence as to plaintiff's knowledge of the driver's habitual negligence, if any, is the inference to be drawn from the fact that plaintiff had ridden as his guest some fifteen times. There was no evidence that he had ever collided with any other machine or obstacle, and hence there was no basis for an instruction so general in its terms, even if otherwise proper."

And in *Littlefield v. Gilman* (1911) 207 Mass. 539, 93 N. E. 809, the appellate court refused to pass upon the question as to whether it was negligence as matter of law for a guest, who was killed by a collision between two automobiles, to ride with an unlicensed chauffeur, since such question was not called to the attention of the court below, and was not within the scope of a requested instruction as to imputing negligence.

Where a guest upon the front seat of an automobile sees a motor truck rapidly approaching on the right, about 75 or 100 feet away, and, raising his hand as a signal that the automobile means to cross, tells the driver to cross in front of the truck at a street intersection, the former is not guilty of contributory negligence as matter of law. *Feigin v. Malbin* (1918) 171 N. Y. Supp. 245.

And where a wife, riding with her husband in an automobile, was injured by its collision with another automobile at a street intersection, when her husband attempted to cross ahead of the other car which had the right of way, the fact that she kept still, although seeing the approaching automobile, did not make her guilty of contributory negligence as matter of law, where she knew that her husband saw the approaching car, and it was not until the instant before the collision that she became aware that he intended to cross ahead of it. *Ward v. Clark* (1919) 189 App. Div. 344, 179 N. Y. Supp. 466. The court said: "She naturally relied upon the judgment of her husband in driving the car. Accidents in driving automobiles are often quite as likely to

happen as to be averted by outcries and unwarranted suggestions and interference with the driver."

It was held in *Kokesh v. Price* (1917) 136 Minn. 304, 161 N. W. 715, 16 N. C. C. A. 1050, that it could not be said as a matter of law that a passenger in an automobile, injured when it collided with another automobile in rounding a corner, was negligent because she did not warn or admonish her husband, who was driving, as to the giving of signals, and as to the speed and manner in which he rounded the corner, where the whole incident covered but a very short space of time, and it did not appear that her husband was not usually careful.

And it cannot be said that a passenger, struck by another automobile, was conclusively guilty of contributory negligence in standing for a few minutes on the street side of the automobile, with his foot on the running board and his hand on the machine, talking with the driver, after it had arrived at the curb in front of the passenger's house, and he had alighted from the automobile and passed around behind it, and looked for a rattle in the machine which they had previously heard, and the court said that, at most, the question of his contributory negligence was one for the jury. *Walden v. Stone* (1920) — Mo. App. —, 223 S. W. 136.

Collision between automobile and other vehicle.

One who, without protest, permits the chauffeur of a hired automobile to drive at a manifestly dangerous speed on the wrong side of the road, is guilty of contributory negligence so that he cannot recover from the owner of a wagon with which the automobile comes into collision. *Hardie v. Barrett* (1917) 257 Pa. 42, L.R.A.1916F, 444, 101 Atl. 75, 16 N. C. C. A. 485.

And it was held in *Oberholzer v. Hubbell* (1918) 36 Cal. App. 16, 171 Pac. 436, that the fact that a woman who was riding in a buggy driven by her husband, which collided with an automobile to her injury, testified that

there was nothing to obstruct her view of the approach of the defendant's automobile, that she did not look to see whether vehicles were approaching, and that, if she had looked in the direction from which the defendant's automobile approached, she could have seen it and would have stopped, did not show that she was guilty of contributory negligence as a matter of law.

And in *Williams v. Withington* (1913) 88 Kan. 809, 129 Pac. 1148, it was held that it was not contributory negligence as matter of law for a woman, riding on the front seat of a buggy with her husband, with one child sitting on her lap and another beside her to look after, to fail to look, when she could or should have seen the automobile approaching which ran into the buggy and injured her, and that she had the right to rely upon the watchfulness of her husband, who was driving; at least, until she actually saw some danger calling for a warning or advice from her.

And in *Withey v. Fowler Co.* (1914) 164 Iowa, 377, 145 N. W. 923, where a passenger in the rear seat of an auto was injured by the tongue of a truck striking her hand, it was held that she was not guilty of contributory negligence as matter of law, where it appeared that, when she saw the near approach of the truck and realized the danger of collision, she put out her hand, motioning the driver of the truck to hold up, but the forward thrust of the truck caused its tongue to strike the palm of her hand; whether by sheer accident, or because of an instinctive movement on her part to ward off the threatened stroke, was not entirely clear. The court said: "Plaintiff was confronted with a sudden peril. Her effort to attract the driver's attention and avert the collision was a proper one. The thrusting out of her hand was at least a natural movement, even if a futile one, and to lay down the rule that an act so humanly natural in a sudden and alarming emergency is negligence as a matter of law would be to overturn the most fundamental

principles of the law governing recoveries for personal injury."

It is not negligence for one, injured while riding in the back part of a sleigh, by reason of an auto truck skidding against it, to sit with his legs over the side of the sleigh, where such an accident could not ordinarily happen except in case of violation of the traffic law. *Corey v. Hartel Bros.* (1912) — Mich. —, 185 N. W. 748.

One riding as the helper of the driver upon the frame of the left front end of a steam roller, with his legs hanging over the side and his face turned toward the front, is not guilty of contributory negligence so as to defeat his recovery for injuries received by him, by having his legs struck by a motor truck passing too close to the steam roller. *Moreno v. Los Angeles Transfer Co.* (1920) — Cal. App. —, 186 Pac. 800. In this case the court said that the plaintiff was not required, either under the common law or by any statutory enactment, to refrain from occupying a position that could only become a place of danger by reason of the negligence of another; that the Motor Vehicle Act required the defendant's employee, in passing, to keep to the left of the steam roller, and not to turn to the right again until entirely clear thereof; and that the plaintiff was justified in assuming that the defendant's employee would obey the law, and hence he was not negligent in failing to watch to the rear, as contributory negligence cannot be predicated upon an omission to assume that another will violate the law.

A passenger in a carriage will not be presumed to be guilty of contributory negligence by failing to jump therefrom when discovering that the horses are frightened by an approaching automobile. *McIntyre v. Orner* (1906) 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087.

And in *Herdman v. Zwart* (1914) 167 Iowa, 500, 149 N. W. 631, where a woman, riding with her husband in his carriage, was injured when the horse took fright at the defendant's

automobile, an instruction was given to the effect that the plaintiff was required to use ordinary care, the instruction ending with the words, "That is, so far as lay within her power, she was required to exercise the same care as an ordinarily prudent person would be required to exercise under like circumstances," and it was unsuccessfully contended that the expression, "so far as lay within her power," laid the duty of extraordinary care upon the plaintiff, the court saying: "We think that a careful reading of the clause will not bear this interpretation. This clause expressly says that she was required to exercise the same care as any ordinarily prudent person. The particular clause objected to implies a possible excuse for a lower standard of care. Its application is, perhaps, that, if the decedent was under any disability or limitation of body or intellect, it would excuse her from the measure of care required from an ordinary person. There was, perhaps, no occasion for the qualification, but its tendency was favorable rather than prejudicial to the appellant. If the instruction had required her to exercise all the care that 'lay within her power,' a different question would be presented."

V. As to defects or obstructions in highways.

Defects in roadbed.

A passenger on the back seat of an automobile, traveling over a road in apparently good condition, is not bound to pay constant attention to the management of the car, or to keep constant lookout for imperfections in the road. *BRUBAKER v. IOWA COUNTY* (reported herewith) ante, 303.

And the court said in *Warth v. County Ct.* (1912) 71 W. Va. 184, 76 S. E. 420, that ordinarily a passenger riding in a vehicle driven by another is not held to the same degree of care to keep a lookout for dangerous places in the road as is required by the driver, but, if the passenger knows of any existing or approaching danger, whether it be known or unknown to the driver, he is negligent if he fails

to call the driver's attention to it, or to try in some way to avoid it.

And in *Crescent Twp. v. Anderson* (1886) 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379, where one driving a horse and wagon, upon coming to a bridge which was being repaired, drove to one side of the bridge, down into the ravine, and up the other side, and during the passage an occupant of the rear seat was thrown out and injured, it was held that such occupant was guilty of contributory negligence as matter of law, because she could see that the bridge was temporarily closed to prevent travel over it, and that the route around the bridge was not prepared for the passage of vehicles, the ravine, its approaches, its depth and width, being all fully disclosed to view, and she made no request to the driver to take any other route, or that she might get out of the wagon, but voluntarily joined him in testing the danger in crossing the ravine as he did.

And in *Winner v. Oakland Twp.* (1893) 158 Pa. 405, 27 Atl. 1110, 1111, where the occupant of a carriage was injured when it was overturned by reason of the bad condition of the road, it was held that she was guilty of contributory negligence as matter of law, where it appeared that, although they could have taken another road, they took the one which they were told was in bad condition, that when they came to a bad spot in the road the driver got out and examined it, and told the others that, while it was a pretty bad place, he thought he could get over by careful driving, and in making the attempt the injury occurred.

But in *White v. Portland Gas & Coke Co.* (1917) 84 Or. 643, 165 Pac. 1005, where the automobile in which the plaintiff was riding, in turning out to avoid another automobile coming from the opposite direction, ran into the loose earth of a recently filled trench in the highway, causing the wheels to skid, in consequence of which the automobile rolled down an embankment on the side of the road, it was held that it could not be said as a matter of law that the plaintiff

was guilty of contributory negligence in failing to notify the driver, or to call his attention to the danger of going over the embankment in an effort to avoid a collision with another machine.

A passenger on the back seat of an automobile which struck an obstruction in the highway cannot be charged with negligence in failing to see signals along the road warning of danger when there is no evidence that any existed which would warn an ordinarily prudent traveler, or in failing to control the speed of the car when there is nothing to show that he could have formed an intelligent estimate of the rate of speed. *BRUBAKER v. IOWA COUNTY* (reported herewith) ante, 303.

And in *Beach v. Seattle* (1915) 85 Wash. 379, 148 Pac. 39, it appeared that a street stopped at a ravine, and that the arrangement of the lights and the location of another street on the opposite side of the ravine gave the appearance, at night, that the street was continuous over the ravine, and there was no barrier, red light, or any danger signal of any kind to indicate the presence of the ravine, and the automobile in which the plaintiff was riding plunged into it, and it was held that the question of the plaintiff's contributory negligence was one for the jury, where it appeared that she sat on the front seat with the driver, who was competent and careful; that, although the automobile at the time was running at an excessive speed, the plaintiff had no appreciation of its speed, or that it was dangerous; that she had no knowledge of the existence of the ravine, had never been in that part of the city before, and was unfamiliar with the streets; that she could see the lights on the opposite side of the ravine, and that she noticed only a kind of dark spot or shadow in the street, but did not think it indicated any danger; and that, though looking straight ahead, there was nothing to warn her of the existence of the ravine.

A person, who, for the purpose of taking a pleasure drive, enters an au-

tomobile driven by one known to be intoxicated, is guilty of negligence which will prevent his holding the municipality liable for injury due to a defect in the street, which the driver could not avoid because of his condition. *Winston v. Henderson* (Farmers' Bank & T. Co. v. Henderson) (1918) 179 Ky. 220, L.R.A.1918C, 646, 200 S. W. 330.

But in *Sutton v. Chicago* (1915) 195 Ill. App. 261, where a passenger was drowned when the auto in which he was riding ran into an open drawbridge, and into the river, it was held that his contributory negligence was a question of fact for the jury, where it appeared that he was one of a party on a joy ride, in which all had been drinking, including the chauffeur, and that they were all so drunk that they did not even know that they were going away from home when they wanted to go home, by which diversion from the route the accident happened.

A guest who consents to stay in an automobile when the driver attempts to run it after dark, without lights, along a road with which no one in the car is familiar, is so negligent that he cannot hold the one responsible for an unguarded excavation in the road liable for injury caused by the machine falling into it. *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1914) L.R.A.1915B, 953, 183 C. C. A. 9, 216 Fed. 503.

But where, during a trip taken at night, the lights of an automobile fail, and the owner and driver avails himself of the earliest opportunity to improvise or repair an oil lamp attached to the dash, after which the journey is continued, the driver being an experienced driver, and being accompanied and assisted by one who is familiar with the roads, and where the roads are muddy and the automobile is driven slowly, and falls into an unguarded cut, the fact that a guest or passenger continues the journey as a passenger in the rear seat of the car does not make him, as a matter of law, guilty of contributory negligence. *Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1917) 37 N. D. 377, 163 N. W. 824, Ann. Cas. 1918C, 954.

And in *Dillabough v. Okanogan County* (1919) 105 Wash. 609, 178 Pac. 802, where a passenger in an automobile was injured when it struck a partly washed out culvert in the road, it was held that it was not negligence, as a matter of law, to ride in an automobile running on high gear over a muddy and slippery road, even in the nighttime.

A woman who, while riding behind her husband upon a motorcycle, was injured because of a defect in the road, which the husband could not see because of the glare of the headlights of an approaching automobile, cannot be held to be guilty of contributory negligence as matter of law, upon the ground that the seat occupied by her in the rear of her husband was insecure, and that she should have requested her husband to stop the motorcycle, and have dismounted therefrom. *Kuntz v. Walda-meer Co.* (1917) 68 Pa. Super. Ct. 73.

And in *Warth v. County Ct.* (1912) 71 W. Va. 184, 76 S. E. 420, it appeared that the bank of a ditch along the center of the road gave way under the weight of the horse attached to the buggy in which the plaintiff was riding, and precipitated the horse into the ditch, and the plaintiff, on attempting to get out of the buggy, was thrown to the ground and injured, and it was held that the negligence of the plaintiff was a question for the jury, where the evidence showed that the husband was driving very carefully upon the same side of the street that he had passed over only a few hours before, that it was not too dark to see the road and ditch, that he did see it, and was very careful to avoid getting into it, that the road was in constant use, and that others had driven over it the same day safely, the court stating that it could not be said, as matter of law, that the risk was so obviously dangerous that a reasonably prudent person would not have assumed it, or that plaintiff displayed such reckless disregard for safety in attempting to ride by the ditch as to amount to negligence per se. The court further said, in regard to the contention that the plaintiff was guilty of negligence per se in

trying to get out of the buggy when, if she had remained in it, she would not have been hurt, that, if plaintiff was not negligent in assuming the risk of riding by the ditch, she was not negligent in trying to free herself of a dangerous situation in which she found herself because of the defendant's negligence, provided she exercised reasonable precaution in doing so.

And in *Hanson v. Clinton* (1914) 156 Wis. 147, 145 N. W. 646, where a passenger in a buggy was injured when it was tipped over on a rough road with which she was unfamiliar, it was held that the evidence showing that the buggy was being driven slowly, that it was dark, and that the driver could not see the defect which tipped the buggy over, was ample to support a finding of the jury that the plaintiff was not guilty of contributory negligence.

In *Kalland v. Brainerd* (1918) 141 Minn. 119, 169 N. W. 475, where a passenger in a hired automobile was injured because of a defect in a street, the court left the question of contributory negligence to the jury, and it found that the passenger was not negligent.

And it was held in *Jewell v. Rogers Twp.* (1919) 208 Mich. 318, 175 N. W. 151, an action against a township for the death of a passenger in an automobile which ran into a quarry cut across a discontinued highway, that the contributory negligence of the deceased was a question for the jury.

Other defects or obstructions.

It was held in *Vincennes v. Thuis* (1902) 28 Ind. App. 523, 63 N. E. 315, that the rule that it is as much the duty of a passenger in a vehicle, if he have the opportunity to do so, to use reasonable care and judgment to learn of and avoid danger in approaching a railroad crossing, as it is the duty of the driver, is applicable to a passenger in a vehicle who was injured when it struck a hydrant in the street.

And in *Wentworth v. Waterbury* (1916) 90 Vt. 60, 96 Atl. 334, where, upon approaching a curve in the road,

the driver of an automobile discovered, when he was about 16 feet therefrom, a wagon standing diagonally across the road between the guard rails along an embankment over a culvert, and he then applied the brakes and turned to the left, where there was more, though insufficient, room, and brought the automobile practically to a standstill opposite the wagon, when the automobile slipped against the guard rail, which gave way in consequence of its insufficiency, and the automobile was precipitated down the embankment, it was held that a passenger in the automobile was prevented from recovering for his injuries, because it was not possible to say that the case tended to show that such passenger was himself free from contributory negligence, it appearing from his own testimony that he saw the wagon standing diagonally across the road, when the automobile was from 8 to 12 rods away, and did not mention that fact to the driver, or do anything but sit supine and mute beside him on the front seat, while the automobile went forward with unslackened speed. The court said: "If the burden of showing contributory negligence had been on the defendant, we might think that here the question of the plaintiff's contributory negligence was for the jury. But in this state such burden is on a plaintiff, and certainly the plaintiff wholly failed to sustain the burden of showing that he was personally free from contributory negligence, for in the state of the evidence it could not fairly and reasonably be inferred that he was so free."

And it was held in *Whitman v. Fisher* (1904) 98 Me. 575, 57 Atl. 895, that a passenger in a wagon which was overturned by striking a pile of dirt in a street was guilty of contributory negligence as matter of law, the court stating the facts constituting contributory negligence as follows: "The plaintiff was driving with her husband in the evening; he was driving, but they were both upon the same seat of a single-seated wagon. It was

an extremely bright moonlight night without a cloud in the sky to obscure the moonlight; there was practically no more difficulty in avoiding the obstruction in the street than there would have been in the daylight; the horse that was being driven was wholly blind, and had to be entirely guided by the driver; upon this account great care was required, whether driving in the daytime or nighttime, because no reliance whatever could be placed upon the horse; the plaintiff had practically as good an opportunity of observing obstructions in the road as did her husband; she was aware of the fact that the horse was totally blind, and knew that upon this account great care was necessary to avoid obstacles of all kinds."

In *Jefson v. Crosstown Street R. Co.* (1911) 72 Misc. 103, 129 N. Y. Supp. 233, where a passenger was injured when the automobile, while traveling at the rate of 50 or more miles an hour, struck a bundle of newspapers in the highway, it was held that the fact that the defendant created a nuisance in the highway did not make it liable to one who, in a reckless and unreasonable use of the highway, was injured by the nuisance, and that, while it might be that, in an action for damages occasioned by the nuisance, the plaintiff was not obliged to prove an absence of contributory negligence, yet, if it appeared that the recklessness of the injured person was the proximate cause of the injuries, there could be no recovery, and that the mere fact that plaintiff rode in the automobile 1,500 feet in something like twenty seconds, without a remonstrance, or even a suggestion, to the driver that he stop the car or slacken its speed, placed on the plaintiff all the recklessness or contributory negligence needed to sustain a finding of a jury that he was in an unreasonable use of the highway.

And in holding that one who was killed while riding in a buggy with another, when it struck a hydrant in the street, was guilty of such negligence as to preclude a recovery for his death, the court, in the case of

Vincennes v. Thuils (1902) 28 Ind. App. 523, 63 N. E. 315, said: "The decedent was sitting by the side of Dr. Beard (the driver), and had equal opportunity with him to discover and avoid danger. He had equal knowledge, also, with him, that it was very dark, and that they were driving at a rapid, dangerous, and reckless rate of speed, considering the darkness of the night and that the street was unlighted. To travel upon an unimproved street where inanimate objects, if any, in the street, could not be seen on account of darkness, and at such a reckless rate of speed as shown by the evidence, is such negligence itself as will preclude a recovery."

And it was held in *Meenagh v. Buckmaster* (1898) 26 App. Div. 451, 50 N. Y. Supp. 85, where a passenger was thrown from a buggy when it struck rubbish in the street which was plainly visible, and which left an abundance of room in the street to pass around it without contact, that if the driver was intoxicated, or his manner of driving was so heedless or careless that the passenger, in the exercise of ordinary care, would have perceived it, and he failed to do so and to remonstrate with the driver, he was chargeable with contributory negligence as matter of law by continuing to ride with him.

But where an automobile was being driven at a rate in excess of the speed limit just before it came to a pile of brick in the street, to avoid which it was turned and ran into a hole in the street, and, before it could be stopped, the forward wheels struck a street car rail and threw out a passenger, the failure of the passenger to remonstrate with the chauffeur, and request him to drive slower or permit him to alight from the automobile, does not constitute contributory negligence, as a matter of law, upon his part, where it appeared that he sat in the rear seat of the automobile, and that it was dark until the automobile was within 100 feet of the pile of brick. *Gary v. Geisel* (1915) 59 Ind. App. 565, 108 N. E. 876.

A guest, suffering injuries upon the

collision of the automobile, at night, with a black, unlighted bridge girder in the center of the highway, cannot be held guilty of contributory negligence as a matter of law, upon the ground that she permitted, without protest, the driving of the machine in excess of the legal speed limit, and in the center of the road in violation of an ordinance, where the evidence as to the rate of speed of the automobile is conflicting, and such ordinance only applies to the passing of other vehicles. *Boyd v. Kansas City* (1922) — Mo. —, 237 S. W. 1001.

And in *Gaffney v. Dixon* (1910) 157 Ill. App. 589, where a woman, while riding with her husband in his automobile, was injured when it struck an obstruction in the street consisting of a load of sand and gravel, and it appeared that the husband had broken his arm a few months before, and could not completely close the hand of the injured arm, and was not in a condition physically to control the automobile with ordinary care, it was held that to make the wife negligent in riding with him it would not only be necessary that she knew what his physical condition was, but also that she must have known, by the exercise of ordinary care, that, because of such condition, he was unable to manage the automobile with ordinary safety, and the court further held that, even if she had known that, because of his physical condition, he was unable to manage the auto with ordinary safety, she would not be guilty of contributory negligence as matter of law in riding with him, but that it would be for the jury to say whether she was in the exercise of ordinary care for her own safety while riding under the control of a driver who had such physical disability.

And it was held in *Jacks v. Reeves* (1906) 78 Ark. 426, 95 S. W. 781, where a woman riding in the back seat of a buggy was injured by a sagging telephone wire coming into contact with the top of the buggy,

that it was not contributory negligence, as a matter of fact or of law, to permit a fourteen-year-old girl, accompanied by two grown women, to drive a gentle horse along a public highway in broad daylight.

And in *Ferry v. Waukegan* (1917) 205 Ill. App. 109, where a passenger in an automobile without any lights was injured by being thrown out when it struck a pile of material in the street about half an hour after sundown, it was contended that to permit the automobile to proceed without a light, in violation of the law which required the lamps on an automobile to be lit at sunset, was contributory negligence on the part of the passenger, but it was held that it was a question of fact for the jury whether the passenger should have insisted on leaving the car unless the lamps were immediately lighted, it appearing that, about a mile before the place of the accident was reached, the passenger asked the driver if his lamps were lit, and the driver replied he would light them when he reached the end of the street lights, that it was not yet dark, and the street lights were on, and that the passenger was engaged in a conversation with another passenger in the rear seat of the automobile concerning a proposed business trip. It further appeared that it was not clear from the evidence that the failure to have lights on the automobile contributed to the accident, since the automobile was endeavoring to pass a hayrack, going in the same direction, when it was first confronted by the pile of materials, and the driver would not have seen the materials any sooner if his lights had been on.

And in *Logan County v. Bicher* (1918) 98 Ohio St. 432, 121 N. E. 535, a suit for the death of plaintiff's husband, while a guest in an automobile, when it plunged from the road over a creek where there were no barriers, it was held that the question of the decedent's contributory negligence was for the jury. G. V. L.

FRED REITER, Appt.,
v.
GUST GROBER et al., Respts.

Wisconsin Supreme Court — March 8, 1921.

(173 Wis. 493, 181 N. W. 739.)

Negligence — of driver imputed to guest.

1. An invited guest in a private conveyance who has no control over the driver, is not engaged in a joint undertaking with him, is guilty of no negligence himself, and stands in no other relation to him requiring his negligence to be imputed to the guest, is not chargeable with the driver's negligence so as to prevent his holding a stranger liable for an injury negligently inflicted upon him.

[See note on this question beginning on page 365.]

Automobile — liability of owner for accident while he is guest in car.

2. The owner of an automobile who accepts the invitation of his son to accompany him on an expedition of his own in which the son uses the father's car, and who does not interfere

in any way with the management of the machine, is not liable for an injury inflicted by the son in negligently driving the car.

[See 20 R. C. L. 165; see note in 2 A.L.R. 888.]

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County (Gregory, J.) in favor of defendants in an action brought to recover damages for personal injuries sustained in a collision with an automobile alleged to have been caused by defendants' negligence. *Affirmed.*

Statement by Vinje, J.:

Action to recover damages for injuries sustained by plaintiff in being run over by an automobile driven by Harvey Grober. William Grober, his brother, and Gust Grober, his father, the respondents, were also occupants of the automobile. It appears that Gust Grober and William were guests in the automobile, having been invited by Harvey to accompany him on the trip. Much evidence was taken as to who owned the automobile,—the sons Harvey and Edwin, or the father. The trial court found that the sons named owned the machine and entered judgment dismissing the complaint upon the merits as to William Grober and Gust Grober; whereupon plaintiff voluntarily entered a nonsuit against the defendant Harvey Grober, and appealed from the judgment dismissing the case as to Gust and William Grober.

Messrs. William A. Schroeder and H. B. Walmsley for appellant.

Messrs. Bloodgood, Kemper, & Bloodgood, and Emmet Horan, Jr., for defendants and respondents:

In order to establish a right of action against an individual, it must be shown that such individual has been guilty of a breach of duty which is the proximate cause of the injury.

King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37; Hannon v. Van Dyke Co. 154 Wis. 454, 143 N. W. 150; Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126.

An automobile is not inherently dangerous.

Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897.

Plaintiff on his own testimony is guilty of contributory negligence as a matter of law.

Weber v. Swallow, 136 Wis. 46, 116 N. W. 844; Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 237; Water-

molen v. Fox River Electric R. & P. Co. 110 Wis. 153, 85 N. W. 663; Culbertson v. Milwaukee & N. R. Co. 88 Wis. 567, 60 N. W. 998; McCormick v. Hesser, 77 N. J. L. 173, 71 Atl. 55.

Plaintiff failed to show any negligence on the part of any of the defendants and for that reason the learned trial judge was justified in directing the verdict.

Kuchler v. Milwaukee, 165 Wis. 320, 162 N. W. 315.

Vinje, J., delivered the opinion of the court:

We have carefully examined the evidence with reference to the ownership of the automobile, with the result that we think the trial court correctly decided that issue. But, if it did not, the legal questions presented would be the same, for the evidence is undisputed that Harvey Grober was the one primarily interested in making the social visit that was made. He alone received the invitation, and he in turn invited his father and brother to accompany him. This they did as his guests. He drove the machine, and there is no evidence that either the father or the brother interfered in the least with his management of it, or were called upon to do so. A man may be a guest in his own automobile. So, even if the father

Automobile-
liability of
owner for
accident while
he is guest in
car.

owned the machine,
under the evidence
he would have to be
classed as a guest
therein so far as

this trip is concerned. The same is true of the brother, William. As guests, are they liable to plaintiff for the negligence of Harvey, the driver? It is claimed that they are, under the doctrine of *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558. That case held that the driver of a private conveyance is the agent of a person therein to the extent that, if his negligence contributes jointly with that of a third person to an injury received by the occupant, there can be no recovery against the third person, because the negligence of the driver is imputed to the occupant, thus creating contributory negligence barring re-

covery. It is now sought to extend this doctrine so as to make the occupant liable to third persons for the negligence of the driver. That there is a substantial difference between the rule as announced in the *Prideaux Case*, and the claim made by plaintiff, is obvious. A person may well be content to trust his own safety to a driver, and yet not be willing to indemnify third persons who may suffer through his negligence. He may say, So far as I am concerned, his negligence is my negligence, but I do not agree to become responsible to others for his negligence. To extend the doctrine to that degree would make a guest in a private conveyance an insurer of third persons against the negligence of the driver. Instead of being invested with the liabilities of a guest, he would shoulder those of a master.

We not only decline to so extend the rule of *Prideaux v. Mineral Point*, supra, in so far as it imputes the negligence of the driver of a private vehicle to an occupant therein, but we take this occasion to expressly overrule it. We do so now the more readily because no litigant before the court suffers by reason of the repudiation of the doctrine. It had its inception in this state in *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568, decided in 1871, where Dixon, Ch. J., says: "The only questions here are whether there was any want of ordinary care on the part of the plaintiff, or on the part of the person with whom he was riding and who was driving the horse at the time of the injury, which also contributed to the injury, . . . and whether the defect in the bridge was the sole cause of the injury." 29 Wis. 297.

The court held that, since the evidence did not conclusively show such negligence on the part of the driver, a nonsuit was improperly granted. This implied that negligence of the driver would bar recovery as stated in *Prideaux v. Mineral Point*, 43 Wis. 526, 28 Am. Rep. 558. But it was not until the

decision in the latter case that this state became explicitly sponsor for the doctrine that an occupant in a private conveyance who has no control over the driver, who is not engaged with him in a joint undertaking other than traveling with him, and who stands in no blood, marriage, or other relation to him, has the negligence of the driver imputed to him so as to bar a recovery against a third person whose negligence contributed to the injury. The principle there announced has been steadily followed since, either by a reaffirmance thereof or under the rule of *stare decisis*. See *Otis v. Janesville*, 47 Wis. 422, 2 N. W. 783; *Johnson v. Superior Rapid Transit R. Co.* 91 Wis. 233, 64 N. W. 753; *Lockwood v. Belle City Street R. Co.* 92 Wis. 97, 65 N. W. 866, 12 Am. Neg. Cas. 641; *Ritger v. Milwaukee*, 99 Wis. 190, 74 N. W. 815; *Olson v. Luck*, 103 Wis. 33, 79 N. W. 29; *Lightfoot v. Winnebago Traction Co.* 123 Wis. 479, 102 N. W. 30; *Lauson v. Fond du Lac*, 141 Wis. 57, 25 L.R.A. (N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629; *Landry v. Great Northern R. Co.* 152 Wis. 379, 140 N. W. 75; *Hains v. Johnson*, 154 Wis. 648, 143 N. W. 653; *Sommerfeld v. Chicago, M. & St. P. R. Co.* 155 Wis. 102, 143 N. W. 1032; *Kuchler v. Milwaukee Electric R. & Light Co.* 157 Wis. 107, 146 N. W. 1133, Ann. Cas. 1916A, 891; *Puhr v. Chicago & N. W. R. Co.* 171 Wis. 154, 14 A.L.R. 1334, 176 N. W. 767. In the *Kuchler* Case it was applied in all its rigor to a boy ten years old riding with his grandfather. So it must be admitted that there has been no substantial wavering on the question.

In *Lightfoot v. Winnebago Traction Co.* 123 Wis. 479, 102 N. W. 30, Cassoday, Ch. J., said that the rule had been steadily adhered to, and that, if a contrary rule was to prevail, it was for the legislature to say so. Were it a rule of property, we should certainly apply to it the rule of *stare decisis*. But it is not a rule of property. It is a pure judicial

decree relating to liability for negligence, and the court would not for a moment give countenance to an argument that a wrongdoer relied upon it. We are, therefore, at liberty to change the rule in the interests of justice, and to conform to the overwhelming majority rule. See cases cited in note in 8 L.R.A. (N.S.) 597 et seq., and in L.R.A. 1915A, 763, supplementing it, and also 20 R. C. L. 158 et seq., and cases cited in note 13; *id.*, 163; *Whittaker's Smith*, Neg. 2d Am. ed. 1896, p. 508; 1 *Shearm. & Redf. Neg.* 6th ed. §§ 65a et seq.; 1 *Thomp. Neg.* §§ 499 et seq.; *Buswell*, Personal Injuries, § 105; *Beach*, Contrib. Neg. 2d ed. § 110; 1 *Beven*, Neg. 2d ed. pp. 203 et seq.; 29 *Cyc.* 548; dissenting opinion in *Mullen v. Owosso*, 100 Mich. 103, 23 L.R.A. 693, 43 Am. St. Rep. 436, 58 N. W. 663. The above authorities show that only a few states adhere to the imputed negligence rule, and some of them by a divided court.

The doctrine was founded upon the idea that the occupant voluntarily made the driver his agent for the trip by accepting a ride with him; that he trusted his safety to him, and thereby became so identified with him that the driver's negligence became his own. While there is some ethical ground for this idea, it has never received extended judicial approval, and it has been pointed out that it rests upon no sound legal basis, either as to agency or identity; that the driver, as well as the third party, become tort-feasors toward the occupant when he is injured by their joint negligence, and that he can pursue either or both.

The rule has received severe criticism by many text-writers. See 1 *Shearm. & Redf. Neg.* 6th ed. pp. 166 et seq.; 1 *Thomp. Neg.* § 499. Strange to say, in spite of the fact that Chief Justice Ryan pointed out in the *Prideaux* Case that it might not be applicable to a public conveyance, the Wisconsin rule has often

been discussed as though it applied to them. The case of Thorogood v. Bryan, 8 C. B. 115, 137 Eng. Reprint, 452, 18 L. J. C. P. N. S. 336, applied to public conveyances, omnibuses, and it has been generally conceived that, since that case has been discredited by English and American courts (see text-writers cited above), the same discredit has attached to the rule of imputed negligence declared in the Prideaux Case. Our court has never applied the rule to public conveyances and has negatived such application. Landry v. Great Northern R. Co. 152 Wis. 379, 140 N. W. 75; Ellis v. Chicago & N. W. R. Co. 167 Wis. 392, — A.L.R. —, 167 N. W. 1048, 19 N. C. C. A. 142; Bakula v. Schwab, 167 Wis. 546, 168 N. W. 378. This much charity requires to be said in behalf of the doctrine now

to be laid at rest after a vigorous life of fifty years.

When and under what circumstances the occupant may be guilty of contributory negligence, or engaged in a joint undertaking with the driver, or stand in such relation to him that the negligence of the driver may be imputed to him, it is not now necessary to discuss.

Only so much of the Prideaux Case is overruled as imputes the negligence of the driver to an occupant in a private conveyance who has no control over the driver, is not engaged in a joint undertaking with him, is guilty of no negligence himself, and stands in no other relation to him requiring his negligence to be imputed to the occupant.

*Negligence—
of driver
imputed to
guest.*

Judgment affirmed.

ANNOTATION.

Liability of guest for injury to third person due primarily to negligence of driver.

The related question as to care or negligence of one riding in an automobile driven by another as affecting the former's right to recover against a third person is treated in the annotation following Brubaker v. Iowa County, ante, 303.

As stated in the reported case (REITER v. GROBER, ante, 362), a man may be a guest in his own automobile, and therefore cases involving the liability of the owner of an automobile when riding therein at the invitation of another who is driving it are included in the note, but cases which make the liability of the owner turn upon the mere fact of his ownership of the automobile are excluded, as such subject is treated in a note to the case of Zeeb v. Bahnmaier, 2 A.L.R. 888, entitled "Owner's presence in automobile operated by another as affecting former's liability."

Cases in which the husband rides as a guest in his wife's automobile are excluded from the annotation where the husband's liability is based upon

the existence of the relation of husband and wife.

And cases of parents riding as guests of their minor children are also excluded where liability is based upon the relationship of parent and child.

As a general rule, one riding in a vehicle as a guest, without any control over the driver, is not liable for injury to a third person due to the negligence of the driver.

United States.—Garcia v. Georgetti (1909) 4 Porto Rico Fed. Rep. 495.

Arkansas.—Minor v. Mapes (1912) 102 Ark. 351, 39 L.R.A.(N.S.) 214, 144 S. W. 219.

Georgia.—Adamson v. McEwen (1913) 12 Ga. App. 508, 77 S. E. 591.

Iowa.—Carpenter v. Campbell Auto-Co. (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1; Crawford v. McElhinney (1915) 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221.

Kansas.—Anthony v. Kiefner (1915) 96 Kan. 194, L.R.A.1915F, 876, 150 Pac. 524, Ann. Cas. 1916E, 264.

Louisiana.—Wilkinson v. Myatt-

Dicks Motor Co. (1915) 136 La. 977, L.R.A.1915E, 439, 68 So. 96.

Michigan.—Hartley v. Miller (1911) 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126.

New York.—Jerome v. Hawley (1911) 147 App. Div. 475, 131 N. Y. Supp. 897.

North Carolina.—Williams v. Blue (1917) 173 N. C. 452, 92 S. E. 270.

Wisconsin.—REITER v. GROBER (reported herewith) ante, 362.

Thus, a mother who accepts the invitation of her son to ride in his automobile merely as his guest, and who has no control over, and takes no part in the management of, the automobile, is not responsible for injuries inflicted upon another by the negligence of her son in driving the car. Anthony v. Kiefner (Kan.) supra.

And the owner of an automobile is not liable, on the theory that it is a dangerous machine, for its negligent use to the injury of a stranger, by one to whom he had loaned it and who was in complete control of its operation, although the owner is, at the time of the accident, present in the machine as a guest. Hartley v. Miller (Mich.) supra.

One cannot be held liable for an injury resulting from the negligence of the driver of an automobile which was being towed, in failing to follow the forward car and causing a rope connecting the machines to throw a bicyclist, where it appears that he had been a passenger in the disabled machine, and merely assisted in tying the machines together, and that at the time of the injury he was riding as an invited guest in the machine which was doing the towing, it appearing that he did not employ, pay, direct, or control the driver of either car. Jerome v. Hawley (N. Y.) supra.

And in Garcia v. Georgetti (4 Porto Rico Fed. Rep. 495) supra, the court, in charging the jury, stated that a person who is merely the invited guest of another in an automobile is not liable to one injured by the negligence of his host or the latter's servant in operating the machine, unless the guest has some control of or takes some part in the negligent direction or management of the car.

One who is invited to become the guest of another on an automobile trip, and who accepts the invitation upon condition that he shall be permitted to pay the hotel expenses of the party at their destination, cannot be held liable for an injury resulting from the negligence of the chauffeur in the operation of the car, where the guest has no interest in the automobile, and exercises no control or management over the chauffeur. Adamson v. McEwen (1913) 12 Ga. App. 508, 77 S. E. 591. The court said in this case: "We deduce from these authorities, as well as from the general principle on the subject, that where one is injured by the negligent conduct of the driver of an automobile, a person who is riding in the automobile simply as an invited guest and who has no control or management of the machine or of the driver, and no interest in the automobile, cannot be held liable for the negligent conduct of the chauffeur; that in riding in the automobile under these circumstances he is not engaged in a common or joint enterprise with the owner or the chauffeur; and the fact that the guest has agreed to pay the expenses of the party after they have arrived at their destination does not alter the legal conclusion to be drawn from the facts above stated."

And in Crawford v. McElhinney (1915) 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221, involving the liability of a husband for injuries to a third person resulting from the negligence of the former's wife in running his automobile, the question whether the husband and wife were engaged in a common enterprise, or whether the husband had control over the car, was submitted to the jury by an instruction approved by the appellate court, which stated, in part, that if the husband and wife were not engaged in a common enterprise, and the husband did not have any control over the use of the car, but was a guest therein, the negligence of his wife could not be imputed to him, and he would not be liable for the injuries caused thereby.

And in McMahan v. White (1906) 30 Pa. Super. Ct. 169, where it was held that the owner of a vehicle who

permitted a guest to drive during a pleasure trip, but who retained the right to control the manner of driving, and the right to take possession of the reins at any moment, was liable for an injury caused by the negligence of the guest driving the vehicle. There is an obiter statement to the effect that if the situation of the parties had been reversed, and the driver had been the owner of the conveyance, and the defendant had been riding in it by his permission or invitation, the defendant would not be liable.

Persons who hire a hack, automobile, or other public conveyance, do not become responsible for the negligence of the driver or chauffeur, if they exercise no control over him further than to indicate the route they wish to travel, or the places to which they wish to go. This doctrine applies to a person who rides in a private vehicle by permission and invitation of the owner. *Wilkinson v. Myatt-Dicks Motor Co.* (1915) 136 La. 977, L.R.A.1915E, 439, 68 So. 96.

And a mother's request, while on a ride as the guest of her son in his automobile, that sometime during the ride he should call at a certain house on an errand of hers, does not make the case one of joint enterprise or indicate that she had either management or control of the car, so as to make her responsible for the negligence of her son in operating the car, which resulted in injury to a third person. *Anthony v. Kiefner* (1915) 96 Kan. 194, L.R.A.1915F, 876, 150 Pac. 524, Ann. Cas. 1916E, 264. The court said that the fact that the owner of an automobile, who has invited a guest to ride with him, takes a particular course at the request of, and for the pleasure or convenience of, the guest, does not indicate management of the automobile, or result in responsibility on the part of the guest for the conduct of the owner and operator.

And a political speaker is not liable for an injury occurring while he is an occupant of a car which was engaged, and whose chauffeur was hired, by members of political committees, although it was put in his charge during a speaking trip so far as directions to the chauffeur as to the route to be

taken were concerned, since this situation did not create the relation of master and servant. *Pease v. Gardner* (1915) 113 Me. 264, 93 Atl. 550. The court said: "It was as if the owner of a car should invite a friend to ride, without the owner accompanying him, and instruct the chauffeur to go wherever the friend might direct. The chauffeur would still remain the servant of the owner, and the friend would still be merely the passenger for whose pleasure or convenience the ride is taken."

If, however, a guest in an automobile undertakes to keep a lookout and fails, or if he has even a slight share in the management of the car, or if the unlawful speed of the car which causes the injury to the third person is made at the guest's instance and request, or if in any way he personally participates in inflicting the injury, he may be held liable for the resulting injury. But the mere fact that a mother, who is sitting by the side of her son in his automobile as his guest, does not protest against his action when he drives his automobile at an excessive rate of speed for the distance of a little more than a city block, in which an injury is inflicted upon a third person, cannot be held as culpable negligence on her part which would make her liable for his negligence and the resulting injury. *Anthony v. Kiefner* (1915) 96 Kan. 194, L.R.A.1915F, 876, 150 Pac. 524, Ann. Cas. 1916E, 264.

But in *Minor v. Mapes* (1912) 102 Ark. 351, 39 L.R.A.(N.S.) 214, 144 S. W. 219, where a man riding with his wife in her automobile, which she was driving, was held answerable for injuries negligently inflicted by her upon a passenger who had just alighted from a street car, under the common-law rule making a husband liable for his wife's torts, the court said: "But aside from the question of the husband's common-law liability for torts of the wife, we are of the opinion that the evidence was sufficient to warrant the jury in finding negligence on the part of appellant. The rule is that where one who rides in a public conveyance, or merely upon the invitation of some third

party, exercises no control over the driver, and is not guilty of any positive act of negligence, the negligence of the driver cannot be imputed to him so as to render him liable for injuries to another person. *St. Louis & S. F. R. Co. v. McFall* (1905) 75 Ark. 30, 69 L.R.A. 217, 86 S. W. 824, 5 Ann. Cas. 161; 1 *Thomp. Neg.* 502; *Little v. Hackett* (1886) 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; *New York, L. E. & W. R. Co. v. Steinbrenner* (1885) 47 N. J. L. 161, 54 Am. Rep. 126, 12 Am. Neg. Cas. 258. This rule cannot, however, be extended so as to afford an avenue for the husband's escape from liability on account of the negligent act of his wife or minor child, with whom he is driving in an automobile or other vehicle. He is presumed to exercise some control over them under those circumstances,—at least, to the extent of preventing an act of negligence which is calculated to result in injury to other persons,—and it is his positive duty to do so. In this instance the husband was sitting beside his wife, who was driving the machine, and whatever danger there was in driving too near the street car was as obvious to him as it was to her. He needed no knowledge or experience in the operation of the machine in order to apprise him of such a danger. To say that the husband was not liable for the negligent act of the wife, committed under those circumstances, would be to

absolve him entirely from any duty to fellow travelers."

One who goes upon a pleasure trip in another's automobile, upon the invitation of the chauffeur, under circumstances which would compel the belief that the chauffeur had taken the automobile without the owner's permission, is liable to the owner, as an accomplice of the chauffeur in his wrong, for damages sustained by the automobile, on the way, from the accident. *Galibert v. Vaillancourt* (1915) *Rap. Jud. Quebec*, 53 C. S. 521.

And in *Apperson v. Lazro* (1909) 44 *Ind. App.* 186, 87 N. E. 97, rehearing denied, without mention of this point, in (1909) 44 *Ind. App.* 195, 88 N. E. 99, it was held that one of two defendants in an action to recover for the negligent operation of an automobile was not entitled to a judgment in his favor notwithstanding a general verdict for the plaintiff, on the theory that answers to interrogatories filed showed that he had nothing to do with the injuries inflicted, but was merely an occupant of the car, it appearing that the complaint in the case alleged that the defendants were in possession and control of the automobile at the time of the injury, and that this was not contradicted by the answers to the interrogatories, since the rule invoked was held to apply only in case of an irreconcilable conflict between the verdict and the answers.

G. V. L.

GEORGE CRAWLEY et al., Plffs. in Err.,
v.
STATE OF GEORGIA.

Georgia Supreme Court — August 12, 1921.

(151 Ga. 818, 108 S. E. 238.)

Juror — qualification — relationship to party.

1. A juror in a criminal case who is related either by consanguinity or affinity within the ninth degree to the prosecutrix, ascertained according to the rules of the civil law, is a disqualified juror. (a) That a juror is related to the prosecutrix in a criminal case within the prohibited degree, unknown to the defendant until after verdict, is a good ground for an

extraordinary motion for new trial. (b) That the juror was unaware of the relationship to the prosecutrix until after verdict will not prevent a new trial.

[See note on this question beginning on page 375.]

Appeal — new trial — sufficiency of notice.

2. When an extraordinary motion for new trial in a criminal case is made in term, upon grounds which were not known to the movant or his counsel before the convening of the court, and the judge entertains the motion, grants a rule nisi thereon, and the solicitor general acknowledges service of the motion and nisi, expressly waving "all other and further service or notice," and is given twenty days' notice of the motion and of the grounds thereof before final hearing, the judgment overruling the motion and denying the new trial will not be affirmed upon the ground that the movant did not give to the opposite party twenty days' notice of his intention to make the motion.

— finding on qualification of juror — review.

3. When in a criminal case, after verdict, either in an original motion or an extraordinary motion for new trial, an attack is made upon a juror upon the ground that he was not impartial, the trial judge occupies the place of a trier, and his finding that the juror is competent will not be reversed unless, under all the facts, the discretion is manifestly abused. (a) The statements of a juror on voir dire may be considered by the trial judge on the hearing of an extraordinary motion for new trial, where the juror died subsequently to the trial and before the making of the motion.

[See 2 R. C. L. 217.]

ERROR to the Superior Court for Union County (Jones, J.) to review a judgment denying an extraordinary motion for new trial after affirmance of a judgment convicting defendants of murder. Reversed.

The facts are stated in the opinion of the court.

Messrs. John A. Sibley and Hughes Spalding, for plaintiffs in error:

A juror related either by consanguinity or affinity within the ninth degree to the prosecutrix is a disqualified juror.

Ledford v. State, 75 Ga. 857; Chitty, Bl. Com. * 206; Smith v. State, 2 Ga. App. 576, 59 S. E. 311.

Prejudice or bias of a juror against the defendants likewise disqualifies a juror, and a new trial should be granted.

Doyal v. State, 73 Ga. 72; Bishop v. State, 9 Ga. 129.

If there was a disqualification the fact that the juror was unaware of the relationship does not remove such disqualification.

Smith v. State, 2 Ga. App. 574, 59 S. E. 311.

If the juror was disqualified within the prohibited degree, such fact, although unknown to the juror, was a good ground for an extraordinary motion for a new trial.

Ibid.

Prejudice and bias of a juror are ground for an extraordinary motion for a new trial.

18 A.L.R.—24.

Doyal v. State and Bishop v. State, supra.

The notice of intention to file motion for a new trial on extraordinary grounds was sufficient.

Brinkley v. Buchanan, 55 Ga. 342; Chandler v. Hammond, 23 Ga. 498.

Messrs. Pat Haralson, T. S. Candler, Howard Thompson, and Joseph G. Collins, for the State:

Notice twenty days before term and before making motion for rule nisi should be given so as to enable the court, on hearing for rule nisi, to pass on the grounds and determine whether stay of proceedings and rule nisi will be granted.

Cleveland v. Chambliss, 64 Ga. 357; Gould v. Johnston, 123 Ga. 765, 51 S. E. 608; Cox v. State, 19 Ga. App. 293, 91 S. E. 422.

The relationship not being within the fourth degree by the canon law would not be cause for new trial even on an ordinary motion for new trial, much less upon an extraordinary motion. Nor would the relationship be close enough to disqualify the juror if shown on his voir dire and while and before he was selected as a juror,

because not within the fourth degree by the canon law.

12 Am. & Eng. Enc. Law, 350; 24 Cyc. 273; Danzey v. State, 126 Ala. 15, 28 So. 697; Arkansas Southern R. Co. v. Loughridge, 65 Ark. 300, 45 S. W. 907; Mono County v. Flanigan, 130 Cal. 105, 62 Pac. 293; People v. Schmitz, 7 Cal. App. 330, 15 L.R.A. (N.S.) 717, 94 Pac. 407, 419; Hudspeth v. Herston, 64 Ind. 133; Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549; Hardy v. Sprowle, 82 Me. 310; Price v. Patrons' & Farmers' Home Protection Co. 77 Mo. App. 236; Kahn v. Reedy, 8 Ohio C. C. 345, 4 Ohio C. D. 284; Parrish v. State, 12 Lea, 656; Texas & P. R. Co. v. Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410; Churchill v. Churchill, 12 Vt. 661; Short v. Mathis, 101 Ga. 287, 28 S. E. 918; Dobbins v. Marietta, 148 Ga. 467, 97 S. E. 439; Olliff v. State, 1 Ga. App. 553, 57 S. E. 941; Parker v. State, 146 Ga. 131, 90 S. E. 859; Roberts v. Roberts, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616; Lyens v. State, 133 Ga. 587, 66 S. E. 792; Campbell v. State, 144 Ga. 224, 87 S. E. 277; Central Georgia Power Co. v. Nolen, 143 Ga. 776, 85 S. E. 945; Central Georgia Power Co. v. Pope, 144 Ga. 130, 86 S. E. 322; Woodbridge v. Raymond, Kirby, 279; State v. Brock, 61 S. C. 141, 39 S. E. 359; Frazier v. Swain, 147 Ga. 654, 95 S. E. 211; Atlantic Coast Line R. Co. v. Mead, 22 Ga. App. 70, 95 S. E. 476.

If the juror does not know of the relationship at all till after the trial he could not possibly have been prejudiced or biased by it, and it is not and cannot be any real cause for new trial.

Brumfield v. State, 102 Miss. 610, 59 So. 849, 921; State v. Congdon, 14 R. I. 459; Senterfeit v. Shealey, 71 S. C. 259, 51 S. W. 142; Cartwright v. State, 12 Lea, 620; Larkin v. Baty, 111 Ala. 303, 18 So. 606; Traviss v. Com. 106 Pa. 597, 5 Am. Crim. Rep. 256; Atkinson v. State, 112 Ga. 411, 37 S. E. 747.

Expression of opinion by jurors before trial, from rumor, does not disqualify even in an ordinary motion for new trial.

Ray v. State, 15 Ga. 233; Wright v. State, 18 Ga. 383; West v. State, 79 Ga. 773, 4 S. E. 325; Moon v. State, 68 Ga. 688; Carter v. State, 106 Ga. 372, 71 Am. St. Rep. 262, 32 S. E. 345, 11 Am. Crim. Rep. 125; Blackman v. State, 80 Ga. 785, 7 S. E. 626; Vann

v. State, 83 Ga. 44, 9 S. E. 945; Hackett v. State, 108 Ga. 40, 33 S. E. 842; Jones v. State, 117 Ga. 710, 44 S. E. 877; Hall v. State, 141 Ga. 7, 80 S. E. 307; Chapman v. State, 148 Ga. 531, 97 S. E. 546; Thompson v. State, 147 Ga. 745, 95 S. E. 292; Williamson v. State, 148 Ga. 267, 84 S. E. 584; Godbee v. State, 141 Ga. 515, 81 S. E. 876; Jefferson v. State, 137 Ga. 382, 73 S. E. 499; Costly v. State, 19 Ga. 614.

Neither of the alleged grounds of motion is a sufficient ground for an extraordinary motion for new trial, and the court below properly refused grant of motion therefor.

Cox v. Hillyer, 65 Ga. 57; Cox v. State, 19 Ga. App. 283, 91 S. E. 422; Norman v. Goode, 121 Ga. 449, 49 S. E. 268; Reed Oil Co. v. Harrison, — Ga. App. —, 105 S. E. 496; White v. Butt, 102 Ga. 552, 27 S. E. 680; Brown v. State, 141 Ga. 783, 82 S. E. 238; Wheeler v. State, 149 Ga. 473, 100 S. E. 568; Malone v. Hopkins, 49 Ga. 221; Rogers v. State, 129 Ga. 589, 59 S. E. 288; Pendergrass v. Duke, 143 Ga. 257, 84 S. E. 447; Frank v. State, 142 Ga. 617, 83 S. E. 233; Rawlins v. Mitchell, 127 Ga. 24, 55 S. E. 958.

Messrs. R. A. Denny, Attorney General, Graham Wright, and W. E. Candler, also for the State.

George, J., delivered the opinion of the court:

George Crawley, Decatur Crawley, Rosa Crawley, and Blain Stewart were jointly indicted and jointly tried at the October term, 1919, of Union superior court, for the offense of murder. The defendants were convicted. George Crawley and Decatur Crawley were sentenced to be hanged, and Rosa Crawley and Blain Stewart were sentenced to life imprisonment in the penitentiary. The defendants made a motion for new trial, which was overruled, and the judgment of the lower court was affirmed by the supreme court on September 30, 1920. A motion for rehearing was filed, and this motion was denied on October 2, 1920. 150 Ga. 586, 104 S. E. 410. Union superior court convened on October 4, 1920, and adjourned on October 9, 1920. On October 9, 1920, and before the adjournment of court, the defendants named above filed an extraordinary motion for new trial, upon the grounds that: (1) One of

the jurors who had rendered the verdict finding them guilty, to wit, Frank H. Spivia, was disqualified by reason of relationship to the prosecutrix, which fact was unknown to the defendants or their counsel; and (2) one of the jurors who rendered the verdict finding them guilty, to wit, Luther Chastain, was disqualified by reason of prejudice and bias against the defendants, which fact was unknown to the defendants or their counsel. On December 7, 1920, the judge of the superior court entered a judgment overruling the extraordinary motion for new trial, and the movants excepted.

1. The Penal Code 1910, § 1091, provides: "In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, twenty days' notice shall be given to the opposite party."

The state contends that the judgment denying the extraordinary motion for new trial should be affirmed, because, if for no other reason, twenty days' notice of movants' intention to move for a new trial upon extraordinary grounds was not given to the solicitor general as required by the Code. The record discloses that the grounds upon which the extraordinary motion was made were not discovered until after the convening of the superior court on October 4, 1920. As stated above, the motion was filed on the last day of the term of the court, to wit, October 9, 1920. The motion for rehearing made in the case was denied by the supreme court only two days before the convening of the October term, 1920, of Union superior court. A motion for new trial based on extraordinary grounds must be filed in term time, either at the term when the case is tried or at some subsequent term. Due diligence required the movants to make their extraordinary motion for new trial promptly on discovery of the grounds. As

stated, the grounds of the motion relied on were discovered by movants and their counsel during the October term, 1920, of Union superior court. It was, therefore, impossible for the movants to give counsel for the state twenty days' notice of their intention to file the extraordinary motion for new trial at the October term. It appears, however, that the trial judge entertained the motion and granted a rule nisi thereon, calling on the solicitor general to show cause on November 23, 1920, why the motion should not be granted. Upon the motion and nisi the solicitor general acknowledged service in the following language: "Service of the within extraordinary motion for new trial, with orders thereon, is hereby acknowledged. Copy waived. All other and further service of notice is hereby waived."

On motion of the solicitor general the hearing was postponed until November 6, 1920, and again postponed until November 9, 1920, on which latter date the court took the motion under advisement, and thereafter, on December 7, 1920, entered a judgment overruling the motion. It will be noted that the opposite party had twenty days' notice of the motion before the final hearing thereon, and that he was fully advised of the grounds of the motion. We are of

the opinion that this was sufficient. Compare *Brinkley v. Buchanan*, 55 Ga. 342. We do not rest the decision of this point upon the doctrine of waiver alone, nor upon the fact that the court granted the nisi notwithstanding the failure of movants to give the solicitor general twenty days' notice of their intention to file the motion for new trial; but we are of the opinion that twenty days' notice of the filing of the extraordinary motion for new trial before final hearing thereon is a sufficient compliance with the requirements of the statute. The decision on this point is made upon all the facts as they appear in the record, and it is

Appeal—new
trial—sufficiency
of notice.

unnecessary to decide whether the refusal of the judge to grant a rule nisi solely upon the ground that movants had failed to give the solicitor general twenty days' notice of their intention to make the extraordinary motion would be erroneous.

2. Considering the grounds of the extraordinary motion in their inverse order, we are of the opinion that the court did not err in overruling the motion upon the second ground thereof. This ground is based upon an affidavit of a witness to the effect that prior to the trial of the case *Luther Chastain*, one of the jurors, had stated that "the Crawley boys and Blain Stewart ought to be hung, and if he got on the jury he would make it hard for them," and upon the affidavit of another witness to the effect that this juror, after the trial of the case, had stated that the verdict rendered in the case was in accordance with his previously fixed opinion. After the trial of the case and before the filing of the extraordinary motion for new trial, the juror died. The state was, therefore, unable to produce an affidavit by the juror; but the state offered certain affidavits detailing facts and circumstances tending to cast suspicion upon the truth of the statements contained in the affidavits offered by the movants, and to disprove this ground of the motion. In addition, the juror had been sworn on the *voir dire*. Being dead at the time of the filing of the extraordinary motion for new trial, it was competent for the court to take into consideration the juror's sworn statement that he had not formed or

—finding on
qualification of
juror—review.

expressed an opinion as to the guilt or innocence of the accused, and that there was no bias or prejudice resting on his mind either for or against the accused. See *Buchanan v. State*, 24 Ga. 282, 286. In view of the counter showing submitted by the state, the case on this point is within the rule announced in *Jefferson v. State*, 137 Ga. 382, 73 S. E. 499; *McNaughton v. State*, 136 Ga. 600, 71 S. E. 1038;

Embry v. State, 138 Ga. 464, 75 S. E. 604.

3. On the first ground of the motion it appears that the prosecutrix, the wife of the deceased, is related to the wife of the juror *Spivia*. Upon this point the evidence submitted by the movants and the state is not in conflict. The wife of the juror is five degrees removed from the common ancestor, and the prosecutrix is four degrees removed from the common ancestor. By the rule of the civil law the juror's wife and the prosecutrix are related in the ninth degree; by the canon law in the fifth degree. The movants and their counsel were unaware of this relationship until the judgment of the trial court overruling the original motion for new trial was heard and affirmed by the supreme court. That the movants and their counsel, by the exercise of due diligence, could not have sooner discovered the relation of the juror to the prosecutrix, is not fairly in dispute. The trial court, in overruling the extraordinary motion, expressly found that neither the movants nor their counsel had waived the alleged disqualification of this juror, and waiver necessarily results either from knowledge of such relationship or from ignorance of such relationship, due to the failure to exercise proper diligence. It appears that the prosecutrix and counsel for the state were also unaware of the relationship until after the verdict; and the affidavit of the juror himself, to the effect that he did not know of the relationship until after the trial, and that even upon notice and inquiry he was unable to ascertain the exact relationship, was offered by the state upon the hearing of the motion. In view of all the facts and circumstances detailed in the affidavits of movants and of their counsel, it must be held that both movants and their counsel exercised due diligence in the premises. There is no statute in this state expressly declaring what degree of relationship will disqualify a juror in a criminal case. Nor is the rule prescribed by

which the degree of relationship is to be determined. In the selection of a juror for the trial of a criminal case the state or the accused may make either of the following objections: "(1) That he is not a citizen, resident in the county. (2) That he is over sixty or under twenty-one years of age. (3) That he is an idiot or lunatic, or intoxicated. (4) That he is so near of kindred to the prosecutor, or the accused, or the deceased, as to disqualify him by law from serving on the jury." Penal Code 1910, § 999.

In *Brown v. State*, 28 Ga. 439 (original motion for new trial), it appeared that one of the jurors was a cousin of the prosecutor, but the degree of the relationship is not stated. It was held that a new trial should be granted "where one of the jury is cousin to the prosecutor, and the fact not known to the accused or his counsel until after his conviction." In *Ledford v. State*, 75 Ga. 856 (original motion for new trial), it was held that a third cousin of the prosecutor in a criminal case is not a qualified juror. In the opinion by Chief Justice Jackson (page 857) it is said: "The juror was disqualified, being a third cousin and within the ninth degree, which fact was unknown to the defendant and his counsel until after the trial."

In *Watkins v. State*, 125 Ga. 143, 144, 53 S. E. 1025, it is said: "The ninth degree of relationship, as that expression was used in *Ledford's Case*, has been construed to mean the ninth degree as calculated by the rules of the civil law, and not of the canon law. *Thomp. Trials*, 53; 17 *Am. & Eng. Enc. Law*, 2d ed. 1124. . . . Sir Edward Coke stated that relationship in any degree was sufficient to disqualify a juror. 1 *Co. Litt.* 157a. But later writers state that the relationship must be within the ninth degree, calculated according to the civil law. 3 *Bl. Com.* 363; 1 *Chitty, Crim. Law*, 541; *Finch's Law*, 401. Such seems to be the view adopted in this state, as indicated in *Ledford's Case*, supra."

In *Roberts v. Roberts*, 115 Ga.

259, 261, 90 *Am. St. Rep.* 108, 41 S. E. 617, it is said: "In *Ledford v. State*, supra, Mr. Chief Justice Jackson says: 'The juror was disqualified, being a third cousin and within the ninth degree.' This statement by the chief justice that relationship within the ninth degree would disqualify, we suppose, meant within the ninth degree as calculated by the rules of the civil law, and not by the rules of the canon law, which are of force in this state in reference to matters of inheritance."

See also *Moody v. Griffin*, 65 Ga. 304; *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

The state insists, however, that upon the point involved, the statements in 75 Ga., and in the other cases cited, are obiter dicta. According to 1 *Chitty, Criminal Law*, 541, a principal challenge will be admitted if the juror is related to either party within the ninth degree, though only by marriage. See 2 *Bishop, New Crim. Proc.* 2d ed. § 901. In *Thompson on Trials*, 2d ed. § 62, it is said that relation by consanguinity and affinity "is reckoned according to the rule of the civil law, as distinguished from that of the canon law, which latter was the English law of descent." Relation is a common-law disqualification, and the statement of the chief justice in *Ledford's Case*, supra, is a recognition of the common-law rule. In *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311, it was held that a juror who was related by affinity to the prosecutor within the ninth degree as determined by the rule of the civil law is a disqualified juror, and that a new trial should be granted upon this ground, upon extraordinary motion. In the opinion, by Judge Russell, attention is called to the fact that the movant contended that the juror was related to the prosecutor in the seventh degree, but that the counter showing submitted by the state authorized the trial judge to find that the juror was related to the prosecutor in the ninth degree only. At page 577 of 2 Ga.

App. it is pointed out that "the degree of relationship to a party which will disqualify a juror is not the same as will disqualify a judge. At common law favor was not presumed in a judge, while originally the presumption as to a juror was that any relationship whatever, either by affinity or consanguinity, would disqualify a juror, this rule being later modified so that the disqualification by reason of kinship extended no further than to include the ninth degree. The limitation of the disqualification of judges to cases where one or more of the parties to the case may be of kin within the fourth degree was the adoption of an arbitrary rule by statute, regardless of the common law, while the rule as to the disqualification of jurors (in the absence of legislation on the subject) is the common law."

It has been held by this court that relation within the fourth degree to either party will disqualify a juror in a civil case. *Roberts v. Roberts*, supra; *Central Georgia Power Co. v. Nolen*, 143 Ga. 776 (2), 85 S. E. 945; *Central Georgia Power Co. v. Pope*, 144 Ga. 130, 86 S. E. 322. The common-law rule, which disqualifies a juror in a case where he is related to one of the parties, is in force in this state, both in civil and criminal cases. Under the statute the judge is disqualified if related to either party within the fourth degree, computed by the canon law. *Short v. Mathis*, 101 Ga. 287, 28 S. E. 918. Under the decisions of this court a juror in a civil case is disqualified if related to either party within the fourth degree, computed by the canon law. Under the common-law rule applied in this state a juror in a criminal case is disqualified if related to the prosecutor by consanguinity or affinity within the ninth degree, computed by the rule of the civil law.

Juror—qualification—relationship to party.

It is insisted by the state that, since the statute (Penal Code, § 999) recognizes the relation of the juror to the prosecutor, the accused, or the deceased, as ground for challenge

for cause, objection to the juror upon this point must be taken before trial. Cases in other jurisdictions support this contention. See 3 Wharton, Crim. Proc. 10th ed. § 1786, and cases cited in note 10. According to these decisions disqualifications not absolute, which are ground for challenge, are not grounds for new trial, unless urged before trial. In *Georgia R. Co. v. Cole*, 73 Ga. 715, it is said: "A jury composed of men who are not lawful men—men whose relationship to the parties renders them incompetent as jurors—cannot render a lawful verdict. If the parties consent to the jurors, or have knowledge of their incompetency, then they will be held to waive the same. It cannot be said that the defendants in error have had their case tried, certainly not legally, and, although the verdict may be in accordance with the facts, and such as a lawful jury should have rendered, yet it is no verdict, and the court did right to set it aside."

In view of the prior decisions of this court, it must be held that a juror related by consanguinity or affinity within the ninth degree, to the prosecutor in a criminal case, is a disqualified juror; and, where such relation is unknown to the accused until after verdict, a new trial will be granted.

But it is finally insisted that the juror himself was unaware of the relation and could not have been influenced thereby, and that any such disqualification, if good ground for granting an ordinary motion, cannot be classed as among the extraordinary grounds recognized by law. In *Ledford v. State*, 75 Ga. 856, it was said: "It would be too dangerous a precedent to allow the juror to assert that he was ignorant of the relationship till after trial, too. The principle on which the law rejects him is that he is not impartial; the same objection lies to his assertion that he was ignorant of the relationship at the time of the trial, after he had assisted in the conviction."

While the reasoning on this point

may not be altogether satisfactory, the exact point was ruled and the policy of the state declared. The ruling has been subsequently followed. *Lyens v. State*, 133 Ga. 587, 600, 66 S. E. 792. The suggestion that the disqualification of a juror in a criminal case on account of relation to the prosecutor cannot be classed as among the extraordinary grounds recognized by law is convincingly disposed of by Judge Russell in *Smith v. State*, supra, as follows: "Counsel argue that 'the question of the relationship of a juror not only ordinarily occurs in the trial of cases, but is of general and constant occurrence. And the motion in this case shows on its face that it did occur in this case and was inquired for.' We will agree with counsel that the inquiry into the subject of the relationship of jurors—questions as to such relationship—is almost a matter of daily occurrence in the courts. But in the opinion that the discovery of disqualification after counsel has called attention to the subject of relationship, and the trial judge has taken the pains to have an investigation in open court touching relationship, and the cautious juror's mind is again indirectly turned to any cause which might bias his judgment by the questions propounded on the voir dire, is a common or ordinary occurrence, we do not concur. We hold such a circumstance to be extraordinary, and the law has long so regarded it; for, contrary to the prevailing rule, it absolutely shuts

its ears to the explanation that the juror was not aware of the relationship and that such relationship did not in any wise affect the verdict. The law will not hear or consider that the presence of the disqualified juror did not hurt the losing party. This ground of motion for new trial is extraordinary in the same sense as the ground mentioned in *Cox v. Hillyer*, 65 Ga. 57, where one is convicted on the testimony of a witness subsequently found guilty of perjury in giving that testimony. It is lamentably true that perjury is not uncommon, but the law justly considers it an extraordinary circumstance that the falsity of testimony which has been credited by a jury and has induced a solemn verdict of guilty should be established."

See also *Harris v. State*, 150 Ga. 680, 104 S. E. 902.

Whether a juror is disqualified on account of bias is a question of fact. Whether a juror is disqualified on account of relationship to the prosecutrix is likewise a question of fact; but the inquiry, in the absence of waiver by the accused, extends only to the existence of the relation, and to the degree thereof. If related to the prosecutrix within the prohibited degree, the law declares the disqualification. We are of the opinion, therefore, that the court erred in refusing the new trial upon this ground of the motion.

Judgment reversed.

All the Justices concur.

ANNOTATION.

Relationship to prosecutor or witness for prosecution as disqualifying juror in criminal case.

The reported case (*CRAWLEY v. STATE*, ante, 368) is in accord with the Georgia rule that a juror related by consanguinity or affinity within the prohibitory degree to the prosecutor or prosecutrix is disqualified from sitting in the case. *Brown v. State* (1859) 28 Ga. 439 (cousins);

Ledford v. State (1885) 75 Ga. 857 (third cousins); *Watkins v. State* (1906) 125 Ga. 143, 53 S. E. 1024; *Smith v. State* (1907) 2 Ga. App. 574, 59 S. E. 311 (related in the fifth degree by canon law and ninth degree by civil law); *Hubbard v. State* (1908) 5 Ga. App. 599, 63 S. E. 588 (third cousins

by affinity); *Harris v. State* (1911) 10 Ga. App. 70, 72 S. E. 516 (first cousins); *Perrett v. State* (1915) 16 Ga. App. 587, 85 S. E. 820; *Merritt v. State* (1921) — Ga. —, 110 S. E. 160 (related to wife of prosecutor in the eighth degree by civil law).

In *Williams v. State* (1919) 23 Ga. App. 518, 98 S. E. 557, however, there is a decision, reported by syllabus alone, to the effect that a juror is not disqualified by the fact that he is related within the prohibitory degree to a witness for the state. The court ignores the decision in *Ledford v. State* (1885) 75 Ga. 857, *supra*, and the other Georgia cases cited herein which have held to the contrary, and cites as authority for its position *Atkinson v. State* (1900) 112 Ga. 411, 37 S. E. 747, reported by syllabus to the effect that the fact that a juror is closely related to one acting as a "partisan" for the state in a criminal prosecution affords no ground of challenging him for cause, and also cites *Atlantic Coast Line R. Co. v. Mead* (1918) 22 Ga. App. 70, 95 S. E. 476, which, in holding that a juror in a civil case was not disqualified by the fact that he was related to the principal witness for defendant, said in the syllabus that there was no law making relationship within the prohibited degree, to a witness, ground for disqualifying a juror.

Such disqualification of the juror not known to defendant or his counsel until after the verdict is ground for a new trial. *Brown v. State* (1859) 28 Ga. 439; *Ledford v. State* (1885) 75 Ga. 857; *CRAWLEY v. STATE* (reported herewith) ante, 368; *Perrett v. State* (1915) 16 Ga. App. 587, 85 S. E. 820; *Smith v. State* (1907) 2 Ga. App. 574, 59 S. E. 311; *Merritt v. State* (1921) — Ga. —, 110 S. E. 160.

Where, however, the relationship is known, the incompetency of the juror is presumed to be waived where objection is not made. *Miller v. State* (1913) 139 Ga. 716, 78 S. E. 181.

In *Brown v. State* (1859) 28 Ga. 439, the rule as to diligence in objecting to a disqualified juror was stated to be that one "must make the objection at the right time if he knows the fact, but if he does not know the fact, or

have special reason to believe it, he is not bound to offend every man on the panel by making random imputations against him."

The fact that the relationship was not known to the juror does not prevent a new trial in Georgia. *Smith v. State* (Ga.) *supra*; *CRAWLEY v. STATE* (reported herewith) ante, 368. But see cases from other states, subsequently cited, in which the juror's ignorance of the relationship is al- luded to as a reason for refusing a new trial.

The law absolutely stops its ears to the explanation that a juror was not aware of the relationship, and that such relationship did not in any wise affect the verdict. The law will not hear or consider that the presence of the disqualified juror did not hurt the losing party. *Smith v. State* (Ga.) *supra*.

A new trial should be granted al- though the evidence authorized the verdict. *Hubbard v. State* (1908) 5 Ga. App. 599, 63 S. E. 588.

But it has been held that it is not such a disqualifying relationship, within the rule announced *supra*, that a juror is the first cousin of a son-in-law of the principal witness. *Avery v. Armour Fertilizer Works* (1916) 17 Ga. App. 458, 87 S. E. 698.

Nor is a juror who was first cousin of the deceased wife of the prosecutor disqualified. *Harnage v. State* (1910) 7 Ga. App. 573, 67 S. E. 694.

And that a juror's great-uncle mar- ried the grandmother of the prosecu- tor will not disqualify such juror, where the prosecutor is not a descend- ant of such marriage. *McDuffie v. State* (1892) 90 Ga. 786, 17 S. E. 105.

That the deceased, childless wife of the prosecutor in a trial for murder was a sister of the wife of one of the jurors is not such a relationship as to disqualify the juror, as, legally speak- ing, there was no relationship. *Gar- ner v. State* (1909) 6 Ga. App. 788, 65 S. E. 342.

And that a juror was married to the widow of the prosecutor's uncle did not disqualify him. *Oneal v. State* (1872) 47 Ga. 229.

Nor is a juror incompetent because

he is a brother-in-law of one who is also a brother-in-law of prosecutor. *Miller v. State* (1913) 139 Ga. 716, 78 S. E. 181.

Other jurisdictions take a view opposed to that of the Georgia courts, as to the effect of the relationship of a juror to a witness. Thus, it has been held that there is no rule of the common law, nor is there a statute, disqualifying a juror on account of his relation to a witness, either by affinity or consanguinity, in any degree. *State v. Hilton* (1911) 87 S. C. 434, 69 S. E. 1077, Ann. Cas. 1912B, 1057.

So, where a defendant has not exhausted his peremptory challenges, he cannot complain because the court refuses to stand aside a juror related to the prosecuting witness. *Ibid.* In this case the witness was related by blood within the sixth degree.

Also it has been held that it is within the discretion of a judge whether he shall set aside a verdict of conviction in a prosecution for seduction because of the fact that a juror was related to the prosecutrix. *State v. Cooke* (1918) 176 N. C. 731, 97 S. E. 171.

And in *Daniels v. State* (1889) 88 Ala. 220, 7 So. 337, it was held that refusal of the court to grant a new trial on the ground that a juror is a relative of one of the witnesses is discretionary and not reviewable on appeal. In this case the motion for new trial was made on the ground that a juror and a witness for the state were first cousins, a fact which was not known when the juror was accepted, and the relationship was not disclosed when counsel made inquiry as to that fact before accepting the jury.

Mere relationship of a juror to a witness for the commonwealth will not disqualify the juror. *Wright v. Com.* (1913) 155 Ky. 750, 160 S. W. 476.

In *Arnold v. State* (1921) — Ark. —, 233 S. W. 818, a prosecution for carnal abuse, it was held that there was no reversible error in the trial court's ruling that a juror was qualified to sit, although he was related to a physician, one of the state's witnesses. The court said that such relationship might affect the juror in

reaching a verdict, where he further stated that he would not give any more credence to the doctor's testimony than he would to any other credible witness, and especially since it appeared that the physician's testimony did not tend to prove any fact connecting accused with the offense charged against him, nor was there any attempt by him to controvert the testimony.

So, the fact that four jurors were related to a witness for the commonwealth in a prosecution for arson (one being an uncle and three being cousins) was held not ground for new trial, where no active participation upon the witness's part is shown in the prosecution, nor was any of his testimony contradicted or attempted to be contradicted, it being merely to the effect that he had, as an insurance agent, placed an insurance policy on the building burned. *Ibid.*

That a juror's wife is a "double third cousin" of prosecuting witness in an assault case will not be ground for new trial, where both the juror and his wife testified that they were not acquainted with such witness, and were totally unaware of such relationship, and consequently could not have been influenced thereby. *Brumfield v. State* (1912) 102 Miss. 610, 59 So. 849, 921.

And a new trial will not be granted because of the relation of a juror to the prosecuting witness (in this case a double uncle by marriage), which fact was unknown to defendant at the time of trial, where no inquiry in regard thereto was made at the time the juror was accepted. *Templeton v. State* (1900) — Tex. Crim. Rep. —, 57 S. W. 831.

Also that the grandfather of the wife of a juror was the brother of the father of complainant, a relationship within the prohibited degree under the Code, and which was not known to defendant or his counsel, or to the district attorney, at the time of the trial, is not ground for arrest of judgment and a new trial in the absence of any proof of actual injury or prejudice to the defendant. *People v. Mack* (1898) 35 App. Div. 114, 13 N. Y. Crim. Rep. 401, 54 N. Y. Supp. 698.

And although a juror is disqualified to serve when he is related to the prosecutor within the sixth degree, computing by the civil law, yet a new trial will not be granted because of the want of general qualifications of the juror propter defectum, and this even though the defendant was ignorant of the fact when the juror was selected, where there appears no evidence of partiality to the prosecutor, or of collusion with him, or of prejudice against the defendant in the selection of the juror; and especially where the fact of relationship was of so little consequence to him that he could not state whether he was related or not, except from rumor or hearsay. *Hamilton v. State* (1898) 101 Tenn. 417, 47 S. W. 695.

Under a Code provision that it is a cause for challenge that a juror is related by "consanguinity or affinity in the ninth degree to the person . . . on whose complaint the prosecution was instituted," a juror who is third cousin of complainant is disqualified. *People v. Clark* (1891) 62 Hun, 84, 10 N. Y. Crim. Rep. 57, 41 N. Y. S. R. 448, 16 N. Y. Supp. 473, 695.

A disqualifying relationship by affinity is not shown by the fact that a juror's uncle is the brother-in-law of the husband of the sister of the

mother of prosecutrix. *Doyle v. Com.* (1902) 100 Va. 808, 40 S. E. 925.

In *King v. State* (1906) 50 Tex. Crim. Rep. 321, 97 S. W. 488, which was an appeal from a judgment convicting the defendant of violating a local option law, the appellant's bill of exceptions raised the question as to the right of two of the jurors to sit in the trial of the case. It appeared from the bill that during the progress of the trial, and after the jury had been impaneled, the defendant, on the cross-examination of the witness, L. N. Gilbreath, showed that there was a vigilance committee in the town of Winnsboro, and that he belonged to the same; that such vigilance committee had hired Howell and Nabors, attorneys, to prosecute this as well as all violations of the local option law; and that J. D. Gilbreath and Aaron Cain, two of the jurors, were related to said L. N. Gilbreath within the third degree, they being uncles to said L. N. Gilbreath. It was further shown that this was the first information that the appellant had of this matter. The appellant then asked that the trial be arrested, and that the said two jurors be excused, which the court refused to do. It was held that the refusal of the trial court to excuse the two jurors was not error. J. H. B.

COLUMBIAN CIRCLE, Interpleader,

v.

ANNA MUDRA et al.

JOSEPH K. KROUPA, Appt.,

v.

SAME.

Illinois Supreme Court—June 22, 1921.

(298 Ill. 599, 132 N. E. 213.)

Insurance — contract for beneficial interest — enforcement.

1. Performance by a beneficiary in a mutual benefit certificate of his agreement to pay the dues in consideration of a beneficial interest in the insurance prevents a change of beneficiary without his consent.

[See note on this question beginning on page 383.]

— change of beneficiary — equitable rights.

2. Equitable rights may be acquired in a beneficiary certificate of insur-

ance which a court of equity will recognize and enforce against an attempt to change the designated beneficiary. [See 14 R. C. L. 1889.]

APPEAL by defendant Kroupa from a decree of the Second Branch of the Appellate Court, First District, affirming a decree of the Superior Court for Cook County (Sullivan, J.) in favor of defendant Anna Mudra, in an interpleader proceeding to determine the proper beneficiaries to a benefit certificate, and the amount to be paid to each. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edward J. Smejkal and Joseph Z. Klenha, for appellant:

Where there has been a change of beneficiary, the burden of proof is upon the first beneficiary to prove such existing equities under a contract as will protect such beneficiary against the change.

Jory v. Supreme Council, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 534; Baker v. Abbott Mfg. Co. 212 Ill. App. 476.

Where the evidence shows that a benefit certificate was given to a designated beneficiary for safe-keeping, such circumstance does not in law deprive the member of the right to change his beneficiary, even though such beneficiary paid the dues and assessments.

Maynard v. Vanderwerker, 76 Hun, 25, 27 N. Y. Supp. 714; Preusser v. Supreme Hive, L. M. W. 123 Wis. 164, 101 N. W. 358; Fisk v. Equitable Aid Union, 7 Sadler, 567, 20 W. N. C. 290, 11 Atl. 84; Beatty's Appeal, 122 Pa. 429, 15 Atl. 861; Cade v. Head Camp, P. J. W. W. 27 Wash. 218, 67 Pac. 603; Grand Lodge, A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68; Supreme Council R. A. v. Tracy, 169 Ill. 123, 48 N. E. 401; Hill v. Hill, 130 Ill. App. 278.

The fact that a beneficiary paid assessments from community property does not deprive the assured of the right to change his beneficiary.

Cade v. Head Camp, P. J. W. W. 27 Wash. 218, 67 Pac. 603; Jory v. Supreme Council, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524.

A society may waive a strict compliance with its by-laws and constitution, and the original beneficiary will not be heard to say that the same were not complied with.

Delaney v. Delaney, 175 Ill. 187, 51 N. E. 961; Gordon v. Gordon, 117 Ill. App. 91; Supreme Conclave, R. A. v.

Cappella, 41 Fed. 1; Grand Lodge, A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68.

Fraud cannot be perpetrated upon a designated beneficiary, where such beneficiary has no vested interest in the certificate under a contract with the assured.

Spengler v. Spengler, 65 N. J. Eq. 176, 55 Atl. 285; McGrew v. McGrew, 93 Ill. App. 76; Cade v. Head Camp, P. J. W. W. 27 Wash. 218, 67 Pac. 603; Hoeft v. Supreme Lodge, K. H. 113 Cal. 96, 33 L.R.A. 174, 45 Pac. 185; Brown v. Grand Lodge, A. O. U. W. 80 Iowa, 287, 20 Am. St. Rep. 420, 45 N. W. 884.

Anna Mudra, the original beneficiary, had not acquired a vested interest in the certificate, and a change of beneficiary was properly made without her consent.

McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; Supreme Council, R. A. v. Tracy, 169 Ill. 123, 48 N. E. 401; Women's Catholic Order of Foresters v. Hill, 191 Ill. App. 629; Order of Columbian Knights v. Matzel, 184 Ill. App. 15; Conner v. Conner, 163 Ill. App. 436.

Messrs. Lighthall, Dankowski, & Carlson, for appellees:

A change of beneficiary must be made in accordance with the by-laws and contract, or it will not be effective.

Freund v. Freund, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; Hodalski v. Hodalski, 181 Ill. App. 158.

Unless the beneficiary named in the second certificate is competent to take, such certificate is void; and in such event the first certificate remains in force.

Royal League v. Shields, 159 Ill. App. 54, affirmed in 251 Ill. 250, 36 L.R.A. (N.S.) 208, 96 N. E. 45.

Where the beneficiary named in a mutual benefit certificate pays dues and assessments thereunder, under an

agreement with the member that in consideration thereof such beneficiary shall receive the benefits payable under the certificate at death of the member, such beneficiary thereby acquires a vested equitable interest in the certificate, which prevents the member from changing the beneficiary without the consent of the original beneficiary.

McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; *Supreme Council, R. A. v. Tracy*, 169 Ill. 123, 48 N. E. 401; *Women's Catholic Order of Foresters v. Hill*, 191 Ill. App. 629; *Order of Columbian Knights v. Matzel*, 184 Ill. App. 15; *Hill v. Hill*, 180 Ill. App. 278.

The fact that the member may have paid some of the dues and assessments does not affect the right of the beneficiary under such agreement, where it was agreed the beneficiary should pay such dues and assessments, or see that the payments were kept up, and the beneficiary paid most of the dues and assessments and saw that they were kept paid up.

Order of Columbian Knights v. Matzel, 184 Ill. App. 15; *Women's Catholic Order of Foresters v. Hill*, 191 Ill. App. 629.

Stone, Ch. J., delivered the opinion of the court:

On March 24, 1899, the order of the Columbian Knights issued a benefit certificate to James Mudra, now deceased, in the sum of \$1,000, payable at his death to Anna Mudra, his wife. Subsequent to the issuing of this certificate, the name of the order was changed to the Columbian Circle. Mudra applied in writing on March 13, 1916, for a new certificate and for a change of beneficiary, stating in his application that the original certificate had been lost, and directing that the benefits be paid as follows: To Anna Mudra, his wife, \$5; Ralph Mudra, a son, \$10; Eddie Mudra, a son, \$10; Joseph Kroupa, a nephew, \$775; John Mudra, a brother, \$100; and Marie Mudra, a sister, \$100. Pursuant to this application a new certificate was issued to him on March 20, 1916. Upon his death, June 29, 1917, appellee, Anna Mudra, claimed the full amount of \$1,000 under the original certificate, and appellant, Joseph Kroupa, claimed

\$775 under the new certificate. The Columbian Circle filed its bill of interpleader in the superior court of Cook county, in which it is admitted that \$1,000 are due, and praying the court to determine the proper beneficiaries and the amount to be paid to each. Answers and replications were filed and the cause was submitted to a master in chancery, who took the evidence and found that the original certificate was canceled by the issuance of the second certificate, and found that the beneficiaries named in the certificate of March 20, 1916, were entitled to the proceeds thus paid into court, in the proportions set forth in the certificate. On exceptions to the master's report the chancellor found that the appellee had an equitable interest in the original certificate, by reason of an agreement that she pay the dues and assessments accruing thereon and her compliance with such agreement, and decreed that the certificate dated March 20, 1916, be held null and void, and the original certificate of March 24, 1899, in full force and effect, and that Anna Mudra was entitled to the entire sum accruing thereon. This decree was, on review, affirmed by the appellate court, and, a certificate of importance being granted, the cause comes here on appeal by Joseph K. Kroupa.

The chancellor and the appellate court found that, at the time of the delivery of the original certificate to James F. Mudra, the assured, he delivered it to the appellee, his wife, telling her, in effect, that she should pay the premiums, and the insurance would be for her benefit; that his wife accepted the policy and agreed to keep up the payments, and that she, or her son James, had possession of the certificate at all times thereafter; that she, or her sons for her, paid the premiums thereafter, with the exception of a few instances when the assured voluntarily paid them himself. The chancellor and the appellate court found that an agreement existed between appellee and the assured by which

appellee obtained an equitable interest in the original certificate, and the second certificate, having been issued without her consent, was unauthorized and in fraud of her rights, and therefore void.

Appellant concedes the rule to be that where the assured, having designated a beneficiary, delivers the policy to her on an agreement that she shall receive the proceeds thereof in consideration of her promise to pay dues or assessments on such policy, and she fulfils such promise, the assured cannot thereafter change the beneficiary; but he contends that the evidence does not show such agreement and the fulfillment thereof. This is the principal contention of appellant, and rests upon questions of fact.

The rule in this state is that while the assured may, in the absence of intervening equities, change at will the beneficiary named in his insurance

Insurance—
change of beneficiary—equitable rights.

policy, equitable rights may be acquired in a beneficiary certificate of insurance, which a

court of equity will recognize and enforce. *Bispham, Eq. 162; Supreme Council, R. A. v. Tracy, 169 Ill. 123, 48 N. E. 401; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861.* If there was an agreement between the assured and appellee that she should receive a beneficial interest in the certificate of insurance upon and by reason of payments by her of the premiums, dues, or assessments, such contract was binding on the assured, and deprived him of the right to change the beneficiary without appellee's consent.

—contract for beneficial interest—enforced—ment.

Two questions of fact, therefore, arise: First, was there an agreement of this character between appellee and the assured? Second, if so, was that agreement complied with on the part of the appellee?

James Mudra, a son, testified that prior to the taking out of the membership in the lodge there was a discussion between appellee and the

deceased, and it was then agreed that in case he took out such certificate she should be made beneficiary. He testified, also, that when the certificate arrived at the home the deceased laid it on the table, and said, "Now, mother, this is yours; you pay the premiums and look after it that these premiums are paid;" and she said, "All right," and took the certificate, and put it away; that thereafter the certificate remained either in the possession of appellee or of witness; that he frequently paid these premiums for his mother, sometimes getting the money for such payments from her, and at other times paying, at her request, out of his own money and thereafter settling with her. He testified that his father never gave him any money to pay the premiums, but at different times advised that the premiums be kept up; that this continued even after the attempted change of beneficiaries. Bohemius Mudra, another son, testified that he had paid premiums for his mother; that his father had said to him that it was up to the mother or the sons to pay the premiums; that if they did not want to do it the policy would lapse. He also testified that after the attempted change of beneficiaries, in March, 1916, his father inquired whether or not the premiums were being paid by appellee. Rudolph Mudra, another son, testified that he was present at the time of the conversation between appellee and the assured regarding the certificate and the payment of the premiums; that after the family had moved to the state of Nebraska, which occurred some years after the taking out of the certificate, he was advised by his father that the premiums should be kept up, and that appellee was present and declared they would be kept up. This witness paid premiums at different times on behalf of his mother, and testified that he got the money from his mother; that he paid on this certificate after the purported change of beneficiaries. Antonie Mraz, a sister of the appellee, testi-

fied that after the purported transfer, in March, 1916, the assured frequently called at her house during the times when he was not living at home, and asked her to send word to appellee to be sure and make payments on the premiums.

Appellee testified that at the time she married the assured she had money of her own; that the two together bought property in the city of Chicago which they afterward sold, and she received as her share the sum of \$1,100 for the property. She testified that she paid the premiums, and was careful to see that they were paid; that she paid them every month; that while he once in a while paid them, such payments by him were wholly voluntary on his part; that she did not request that he do so; that nobody paid them for her at her request; that while her three sons were at home they gave their earnings to her, and continued to do so prior to their marriage, and that, while she sent the premiums by her sons, it was her money that paid them.

Appellee stated in her testimony that her husband gave her the certificate for safe-keeping, and counsel for appellant contend that this proves there was no contract that she should pay the premiums. It is evident from her entire testimony, however, that the expression in her testimony "for safe-keeping," which was given through an interpreter, was not intended in the technical, legal sense that she was simply the bailee of the certificate. There is no doubt, from her testimony and the testimony of her three sons, that all understood that there was an agreement that she should pay the dues or premiums and receive the benefit of this certificate.

Frank B. Vrenak, a witness called by appellant, testified that sometimes the assured paid dues and some of the times the sons paid them. He testified that he did not know the assured before April, 1915, and knew nothing about what payments were made, or by whom, prior to that time.

This is substantially all of the evidence in the record pertaining to the question of the existence of the agreement contended for by appellee. It shows that the certificate at all times has been in the possession of appellee or one of her sons, though a portion of the time the assured was not living at home. It is evident that she considered it her duty to see to the payment of the premiums, and the record discloses that she either furnished the money to do so, or had her sons furnish the money, and that the payments made by the assured, at such times as he did make them, were purely voluntary. It discloses that appellee had a source of income from her sons until they became of age and married; that while the assured, when employed, contributed to the family, he frequently drew from appellee all that he had paid her, in order to settle his personal accounts. The evidence also discloses that, even after the attempted change of beneficiary, the assured frequently reminded members of the family that if appellee would have the benefit of the certificate she must keep up the premiums.

It appears from the testimony of the witness Vrenak, secretary of the local lodge, that the assured told him that his old certificate could not be found, and that he (the witness) issued a new certificate, with change of beneficiary. This statement was not true, since the assured knew the whereabouts of the certificate, and the record discloses that his attempted change of beneficiaries was a fraud upon the equitable rights of the appellee in the certificate of insurance. The evidence discloses that the assured, during the last four years of his life, was in the habit of staying away from home a greater portion of the time, returning for a few days or weeks, and then again leaving; that he was addicted to the use of intoxicating liquors, and in the later years of his life was unable to hold positions as a result of that habit.

We are of the opinion that the

evidence in this case discloses an agreement whereby appellee acquired an equitable interest in the first certificate of insurance in question, and that such agreement is a valid and binding one, and that she made substantial compliance therewith, and, under the rule herein referred to, the assured was without right to change the beneficiary with-

out her consent. It follows, therefore, that the second certificate was null and void, and the insurance is due upon the first certificate issued, in accordance with the terms thereof.

The judgment of the Appellate Court will therefore be affirmed.

Petition for rehearing denied, October 7, 1921.

ANNOTATION.

Right to change beneficiary of mutual benefit certificate as affected by payment of premiums, or other consideration moving from original beneficiary.

- I. General rules, 383.
- II. Application to facts, 384.
- III. Effect of voluntary payment of dues or assessments, 392.

I. General rules.

Where the original beneficiary in a mutual benefit certificate is named pursuant to an agreement, express or implied, that he shall be so named in virtue of some consideration moving from him, it is held by the weight of authority that he acquires a right that cannot be defeated, which will be recognized—at least, on principles of equity—as against a substituted beneficiary having no superior equity, notwithstanding the general rule that the beneficiary of such certificates does not acquire a vested right.

California.—Grimbley v. Harrold (1899) 125 Cal. 24, 78 Am. St. Rep. 19, 57 Pac. 558; Freitas v. Freitas (1916) 31 Cal. App. 16, 159 Pac. 611; Freitas v. Freitas (1916) 31 Cal. App. 19, 159 Pac. 613.

Georgia.—Royal Arcanum v. Riley (1915) 143 Ga. 75, 84 S. E. 428.

Illinois.—Supreme Council, R. A. v. Tracy (1897) 169 Ill. 123, 48 N. E. 401; Kielbassa v. Polish Roman Catholic Union (1908) 141 Ill. App. 297; Gillham v. Estes (1910) 153 Ill. App. 211; McGrew v. McGrew (1901) 190 Ill. 604, 60 N. E. 861; Supreme Council, R. A. v. McKnight (1909) 238 Ill. 349, 87 N. E. 299; Hill v. Hill (1906) 130 Ill. App. 278; Order of Columbian Knights v. Matzel (1913) 184 Ill. App. 15; Women's Catholic Order of Foresters v. Hill (1915) 191 Ill. App. 629;

COLUMBIAN CIRCLE v. MUDRA (reported herewith) ante, 378.

Indiana.—McKeon v. Ehringer (1911) 48 Ind. App. 226, 95 N. E. 604.

Kansas.—Supreme Lodge, K. P. v. Ferrell (1910) 83 Kan. 491, 33 L.R.A. (N.S.) 777, 112 Pac. 155; Savage v. Modern Woodmen (1911) 84 Kan. 63, 33 L.R.A. (N.S.) 773, 113 Pac. 802; Sipe v. Sipe (1918) 102 Kan. 742, L.R.A. 1918E, 1029, 173 Pac. 13.

Kentucky.—Leaf v. Leaf (1891) 92 Ky. 166, 17 S. W. 354, 854.

Massachusetts.—Ryan v. Boston Letter Carriers Mut. Ben. Asso. (1915) 222 Mass. 237, L.R.A. 1916C, 1130, 110 N. E. 281.

Michigan.—Stoekwell v. Sedina (1912) 170 Mich. 476, 136 N. W. 476.

New Jersey.—Spengler v. Spengler (1903) 65 N. J. Eq. 176, 55 Atl. 285.

New York.—Callahan v. Supreme Tent, K. M. (1910) 121 N. Y. Supp. 354; Smith v. National Ben. Soc. (1890) 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197; Stronge v. Supreme Lodge, K. P. (1907) 189 N. Y. 346, 12 L.R.A. (N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 Ann. Cas. 941.

North Carolina.—Pollock v. Household of Ruth (1909) 150 N. C. 211, 63 S. E. 940.

Oregon.—Brett v. Warnick (1904) 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

Pennsylvania.—Re Krause (1897) 28 Pittsb. L. J. N. S. 29; Supreme Lodge, K. L. H. v. Ulanowsky (1914) 246 Pa. 591, 92 Atl. 711.

South Dakota.—Benard v. Grand

Lodge, A. O. U. W. (1900) 13 S. D. 132, 82 N. W. 404.

Texas.—*Eatman v. Eatman* (1911) — Tex. Civ. App. —, 135 S. W. 165.

In *Grand Lodge, A. O. U. W. v. Denzer* (1908) 129 Ky. 202, 110 S. W. 882, where the association was contesting the right of the earlier beneficiary, it was held that a member might change the beneficiary in a certificate issued by a fraternal order, whose laws, which were a part of the contract, gave the member the right to change beneficiaries, and provided in effect that the beneficiary named should not acquire a vested interest prior to the death of the member—notwithstanding that the earlier beneficiary was named under an agreement, known to the order, that he should pay dues and assessments, and that he did pay the same as long as the order would receive them, it having eventually refused to receive further payments by him, in consequence of an attempt by the member to change beneficiaries, and his subsequent withdrawal from the order. It will be observed that, in most of the cases previously cited and subsequently set out, the real controversy was not, as in this case, between the earlier beneficiary and the association, but between earlier and later beneficiaries, over an insurance fund paid into court, the association making no contest.

In *Sabin v. Grand Lodge, A. O. U. W.* (1887) 26 N. Y. Week. Dig. 309, 6 N. Y. S. R. 151, Bradley, J., who wrote the opinion, said that the designation of the original beneficiary for a sufficient consideration had no effect upon the member's right to change the beneficiaries; and that the failure on his part to keep and observe his agreement was merely the breach of a personal undertaking, which did not defeat the operation and legal effect of the power of appointment; and that the original beneficiary could not hold the subsequent beneficiary as trustee of the fund received under the final certificate. This was a controversy between the original and subsequent beneficiary, the order having paid the amount of the certificate into court. The majority in the case concurred in

the result on another ground, without expressing any opinion on the point in question. The position of the learned justice on this point is clearly contrary to the later New York cases.

See *infra*, II., for other cases in which the vested right of the original beneficiary is denied.

II. *Application to facts.*

The principle that the beneficiary designated in a certificate issued by a benefit association may acquire a vested interest therein, by virtue of a contract with the member, was recognized in *Smith v. National Ben. Soc.* (1890) 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197, although the question there involved was whether the acts and declarations of the member were competent to affect or destroy the interest of the beneficiary.

And in *Supreme Council, R. A. v. McKnight* (1909) 238 Ill. 349, 87 N. E. 299, it was held that where a proper beneficiary has been designated, and the beneficiary has advanced the member money upon the faith of the certificate, or paid dues and assessments thereon, the fraudulent charge of the certificate without the knowledge of the beneficiary will not be permitted to defeat the right of the beneficiary named in the original certificate, on the ground that such beneficiary has acquired a beneficial interest which may be enforced in a court of equity.

So, where a certificate upon a husband's life was issued payable to his wife, pursuant to an agreement that she should advance him a certain amount of money, and should be the beneficiary, and the certificate should be turned over to her, and the money was advanced in pursuance of such agreement, the member had no right to change the beneficiary. *Supreme Council, R. A. v. Tracy* (1897) 169 Ill. 123, 48 N. E. 401.

And where a member of a benefit society names his daughter as beneficiary, and agrees with her that, upon his death, she shall receive out of the proceeds of the certificate the amount advanced by her to him, he has no right, after the certificate is delivered and the money paid, to change his

beneficiary. *McGrew v. McGrew* (1901) 190 Ill. 604, 60 N. E. 861.

And in another Illinois case (*Kiobassa v. Polish Roman Catholic Union* (1908) 141 Ill. App. 297), it was held that if it was shown that a wife made a loan to her husband upon his promise that he would procure insurance in a benefit society, payable to her, as security, and he did so, and never paid the loan, she would have equitable rights in the proceeds of the certificate as against one whom the husband subsequently attempted to substitute as beneficiary; but the evidence in this case was held not to show these facts.

And where a woman agreed, in consideration of being made beneficiary in a certificate, to marry the insured, and performed her promise, she was held to have acquired a legal, as well as an equitable, right to the benefit, which was not defeated by a subsequent attempt by the insured, without her consent, to change the beneficiary. *Supreme Lodge, K. L. H. v. Ulanowsky* (1914) 246 Pa. 591, 92 Atl. 711.

And it has been held that a complaint stated a cause of action, which alleged that the plaintiff was induced to marry a man by an antenuptial agreement wherein he promised that if the plaintiff would marry him he would make her the beneficiary of a policy in a benefit society which he held, and that upon their marriage, with the intent of performing the agreement, he caused her to be named as beneficiary in the policy, and delivered it to her, but subsequently secured possession of it without her consent and caused defendants to be named as beneficiaries. *Freitas v. Freitas* (1916) 31 Cal. App. 16, 159 Pac. 611; *Freitas v. Freitas* (1916) 31 Cal. App. 19, 159 Pac. 618.

And where, in part performance of an antenuptial contract, a husband procures a change in a certificate of insurance in which his children were the sole beneficiaries, so as to make his wife an equal beneficiary with the children, and she has fully executed the antenuptial contract on her part, she thereby obtains an equitable interest in the certificate, and he cannot thereafter, without her consent, surrender the certificate, and obtain

the issuance of a new one in which a third party is named as the sole beneficiary, and thus divest her of her interest in the certificate which was procured pursuant to such contract. *Supreme Lodge, K. P. v. Ferrell* (1910) 83 Kan. 491, 33 L.R.A. (N.S.) 777, 112 Pac. 155.

And in *Stronge v. Supreme Lodge, K. P.* (1907) 189 N. Y. 346, 12 L.R.A. (N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 Ann. Cas. 941, it was held that a member of a benefit association who procured a certificate designating a certain person as beneficiary, pursuant to an agreement with her, and upon a consideration moving from her, was precluded as against her from exercising the privilege ordinarily possessed by members of such associations of changing beneficiaries, notwithstanding provisions of the by-laws that the member should have a right to change his beneficiary as often as desired, and making provision for the issuance of a new certificate in case of inability to surrender the original, the court stating that such provisions were not applicable to such a case, but related to those in which there was a voluntary and gratuitous designation.

And where an aunt agreed with her nephew, who was in debt, to furnish or assist him in obtaining money, upon condition that he should secure her by procuring a policy on his life, and he procured a policy in a mutual benefit company payable to his mother if she survived him, and if not, to his aunt, and it was agreed between the insured, his mother, and the aunt that, in the event of his death before the aunt's, his mother should indemnify the aunt, and the latter subsequently furnished the insured with money, it was held that she had a vested interest in the policy to the extent of the indebtedness of the insured to her, accruing under the terms of the agreement, and that an attempt to change the beneficiary without her consent did not defeat her right to sufficient of the proceeds of the insurance to reimburse her; but that, subject to this right, a new beneficiary might be named. *Gillham v. Estes* (1910) 158 Ill. App. 211.

And in *Leaf v. Leaf* (1891) 92 Ky. 166, 17 S. W. 354, 854, it was held that a wife originally designated as beneficiary in a certificate issued to her husband had a superior equity as against an adult child whom the husband subsequently designated as beneficiary to the fund derived from the certificate, and which the society paid into court, where, by her own means and personal labor, and with the original certificate in her possession, she paid the assessments, and, upon a separation of the husband and wife, their property rights were adjusted upon the understanding, express or implied, that she was to have the benefit of the certificate.

And in *Webster v. Welch* (1901) 57 App. Div. 558, 68 N. Y. Supp. 55, where a daughter had paid the assessments on two certificates upon the life of her father until the death of her mother, who was the beneficiary therein, and at that time she agreed with her sister and father that one of the certificates should be made payable to her sister in consideration that she would support the father, and that the other certificate should be payable to herself, it was held that she acquired a vested interest in the certificate issued to her in pursuance of such agreement, and that the sister was estopped from claiming any interest in such certificate under a subsequent designation of herself as beneficiary by her father.

And a member of a beneficial association waives his right to change beneficiaries, where the original beneficiary is designated pursuant to an agreement by the latter to satisfy a debt owed to him by the former, and to pay the premiums on the policy, and board the member when he is out of work, which agreement is carried out so far as the member permits. *Re Krause* (1897) 28 Pittsb. L. J. N. S. (Pa.) 29.

In *Supreme Council, C. B. L. v. Murphy* (1903) 65 N. J. Eq. 60, 55 Atl. 497, a husband whose certificate in a beneficial association had lapsed promised his wife that, if she would get it reinstated and continue the payments, she should have the benefit of the certificate, and, pursuant to such

understanding, she renewed the certificate, taking and keeping possession of the same, and made the payments, and, in the main, supported him for the rest of his life; at the time of the reinstatement of the certificate the by-laws of the association allowed a change of beneficiary only on surrender of the certificate; under a by-law subsequently passed, allowing such change without such surrender in case the certificate is beyond the member's control, the member attempted to make a change in favor of a sister who had made him some slight gratuitous gifts of spending money. It was held on an interpleader by the association, which paid the money into court, that the wife's equity was so strong that it could not be overcome, even if the designation of a new beneficiary was made by the member of his own free will, and was carried out with the technicalities necessary to make the new certificate effectual. The decision, however, does not rest solely upon the ground that the wife was made beneficiary in pursuance of an agreement to that effect, and upon a consideration moving from her, but in part, at least, upon the fact that, at the time of the reinstatement of the certificate under the by-laws of the order, no change of beneficiary could be made without the surrender of the original certificate, and upon the other equities of the case.

In *Delaney v. Delaney* (1897) 70 Ill. App. 130, the court applied the general rule that the beneficiary in a certificate issued by a mutual benefit association acquires no vested right, and that the member may change the beneficiary if he so elects, without discussing the effect upon such right of an agreement between the member and the original beneficiary, although it is stated in the opinion that the certificate was taken out and delivered by the member to his wife in consideration of her past support of him, and of some moneys that she had furnished or loaned to him, and that she paid his initiation fee when he took out the certificate for her benefit, and that she agreed with him to pay all dues or assessments that should be asked of her, there being no evidence that

any subsequent dues or assessments were ever asked from her. The decision was affirmed by the supreme court in (1898) 175 Ill. 187, 51 N. E. 961, without discussing the effect of the agreement between the member and the beneficiary, and, in the statement of facts preceding the opinion of the supreme court, it is stated that the trial court found that the member did not give the certificate to the wife (the original beneficiary), or make any contract with her that she should receive the insurance money mentioned therein, or that he would not change the beneficiary therein. In the opinion of the appellate court in *McGrew v. McGrew* (1901) 93 Ill. App. 76, the *Delaney Case* is distinguished on the ground that the decision rested upon the right in general of a member to change the beneficiary; and that equitable rights of the beneficiary in the certificate sought to be changed were not considered or involved.

In *Sabin v. Phinney* (1892) 134 N. Y. 423, 30 Am. St. Rep. 681, 31 N. E. 1087, a husband took out a certificate payable to his wife, and the same was delivered to her, and, at the same time, the wife took out a certificate in another order, payable to her husband, the same being delivered to him. The husband paid the dues on both memberships until he and his wife separated, at which time she took possession of the certificate issued to her without his consent, and he, without her consent, took the certificate issued to him, and named a new beneficiary. It was held that the wife had no vested right in the husband's certificate which would prevent his designating a new beneficiary, the court remarking that she never paid any expenses incident to the membership of her husband in the society to which he belonged, nor of her membership in the society to which she belonged, and that no pecuniary consideration could be raised in her favor. It appeared in this case that the society did not contest its liability, and had paid the money into court.

In *Ryan v. Boston Letter Carriers' Mut. Ben. Asso.* (1915) 222 Mass. 237, L.R.A.1916C, 1130, 110 N. E. 281, it was held that a change by a man,

without the knowledge or consent of his wife, of the beneficiary in a mutual benefit certificate in which the wife was named as beneficiary, was a breach of his antenuptial contract to take out a certificate in her name in consideration of her marrying him and loaning him money, but it was held that no trust attached to the proceeds of the insurance in the hands of one subsequently named as beneficiary, in favor of the wife, in the absence of anything to show that the substituted beneficiary knew of the rights of the wife, or that he was a mere volunteer.

In *Grand Lodge, A. O. U. W. v. Jones* (1907) 47 Tex. Civ. App. 533, 106 S. W. 184, an injunction was refused to prevent a fraternal benefit association from changing, in accordance with its laws, and at the direction of an assured, the beneficiary in a certificate issued by it, thereby defeating the claim of a creditor who was the beneficiary named in the certificate, as trustee for a son of the assured, under an agreement whereby the creditor was to keep alive the certificate by paying the assessments thereon, and in return therefor to discharge his claim against the insured out of the proceeds thereof. It is to be noted that the laws of the association required the beneficiary to be a member of the family of, or related by blood to, the assured, but the court merely assumed the validity of the certificate without passing upon that question.

In *Malancy v. Malancy* (1917) 165 Wis. 642, 163 N. W. 186, where friends of the insured, who was ill, refused to give him a fund which they had raised to defray his expenses at a sanitarium until he substituted his wife as beneficiary in a certificate which was payable to his mother, it was held that, notwithstanding the change was made under these circumstances, the insured still had power to appoint another beneficiary, it being provided by the by-laws of the society, which were a part of the contract, that a member might change the beneficiary without the consent of the original beneficiary, and that any agreement entered into by a member not to change the beneficiary should be null and void.

In *Dell v. Varnedoe* (1918) 148 Ga. 91, 95 S. E. 977, where the insurer paid the money into court for distribution, it was held that the equities of the claimants should be compared; and where it appeared that the insured agreed with his sister when she loaned him money, to secure insurance for her benefit, and that he did so, and subsequently paid the loan, and sought to have his wife named as beneficiary, it was held that the latter, who had paid the premiums with her own funds under an agreement that she should be named beneficiary, was entitled to the benefit, the court holding that equity could not consider the sister as other than a mere volunteer, with no contractual equity in the proceeds of the policy after the payment of the money loaned, and that, on the facts, the equitable right of the wife to the proceeds could not be questioned.

There is some conflict among the cases whether the payment of assessments by the beneficiary originally designated, in pursuance of an agreement or understanding with the member to that effect, will operate to give the beneficiary a vested right and prevent the member from changing beneficiaries.

In *Brett v. Warnick* (1904) 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061, the court, in effect, approved the rule that where a person becomes a member of a mutual benefit association under an agreement with the beneficiary named in the certificate that the latter shall pay all the assessments, and they are so paid accordingly, the beneficiary thus acquires a vested interest in the certificate so that the member cannot afterwards make another designation without the consent of the beneficiary; and further said that, that being true, there is nothing to hinder the member, with the assent of the beneficiary, from contracting with a third party, whereby the latter may maintain a vested interest in the fund designated in the certificate, provided the contract is not such as the law will not recognize because contrary to public policy.

And in *McKeon v. Ehringer* (1911) 48 Ind. App. 226, 95 N. E. 604, where

the insured agreed with his daughter that in consideration of her being made beneficiary she should pay all the assessments, and she did so, it was held that the insured was estopped from substituting another beneficiary in her place.

So, where a husband took out a benefit certificate payable to his wife upon the understanding that she would help him to pay the assessments if he should be unable to pay them himself, in pursuance of which the wife did pay some of the assessments, she had an equitable interest in the proceeds of such insurance when paid into court by the society, superior to the right of the member's sister, whom he subsequently designated as beneficiary, the latter being a merely voluntary beneficiary, and no equities, in addition to her bare legal right, appearing. *Benard v. Grand Lodge, A. O. U. W.* (1900) 13 S. D. 132, 82 N. W. 404.

And in *Royal Arcanum v. Riley* (1915) 143 Ga. 75, 84 S. E. 428, where an agreement was made between two sons and their father that the sons should pay the assessments in a benefit society in which the father was a member, and that the sons should be named as joint beneficiaries, and the agreement was carried out by the sons, it was held that a vested interest was acquired in the benefits which could not be defeated by an attempt by the father to substitute one of the sons as sole beneficiary.

And in the *Order of Columbian Knights v. Matzel* (1913) 184 Ill. App. 15, in an abstract of the decision, it is stated that a beneficiary acquires a vested right in insurance which equity will protect if he assists in paying the assessments under an agreement by which the proceeds are to be paid to him; and that where a certificate is taken out for the benefit of a person named therein, and delivered to him, in consideration of an agreement by the beneficiary which has been fully performed, the member is not entitled to change the beneficiary without the original beneficiary's consent; and that provisions in the by-laws as to change of beneficiary have no application under such circumstances. And

to the same effect is *Women's Catholic Order of Foresters v. Hill* (1915) 191 Ill. App. 629.

And in *Stockwell v. Sedina* (1912) 170 Mich. 476, 136 N. W. 476, where a married daughter agreed with her father to pay the assessments on his benefit certificate, and it was claimed that the arrangement was carried out, it was held that she acquired a vested interest in the insurance which was her sole property; and the court stated in its discussion that the interest so acquired was one which could not be defeated by the insured, by a change of the beneficiary.

But in another Michigan case, *Modern Brotherhood v. Hudson* (1916) 194 Mich. 124, 160 N. W. 406, it was held that the right of a holder of a benefit certificate to change his beneficiary would not be denied unless it was plain that the beneficiary named in the certificate had, by contract and performance, acquired a vested interest in the certificate and fund, and that the promise of the beneficiary named, to pay the assessments and dues, was not sufficient to create a vested interest in the certificate and fund, and did not limit the right of the insured to change his beneficiary; and where the court found that the beneficiary named not only promised to pay the assessments, but also to take care of the insured in his sickness, and that he failed to perform the latter obligation, which promises the beneficiary claimed that he never made, it was held that equity demanded no more than that the beneficiary be repaid the sums he had expended for assessments, and that the balance be paid to the one whom the insured had attempted to have named as beneficiary after the one first named had failed to perform his agreement.

In *Schiller-Bund v. Knack* (1915) 184 Mich. 95, 150 N. W. 337, where the evidence tended to show that the insured procured a benefit certificate payable to his wife, and handed it to her, telling her that she would have to pay for it, and she paid the assessments for some time, it was held that there was no valid contract between the husband and wife which gave her

a vested interest in the insurance, and prevented the husband, who subsequently obtained a divorce, from substituting his second wife as beneficiary.

In *Masonic Benev. Asso. v. Bunch* (1891) 109 Mo. 560, 19 S. W. 25, it was held that the payment of assessments by the beneficiary would not give him a vested right in the certificate, or prevent the member from substituting a new beneficiary, although the assessments were paid pursuant to an agreement to that effect between the member and beneficiary, before the certificate was taken out. To the same effect is *Grand Lodge, A. O. U. W. v. McFadden* (1908) 213 Mo. 269, 111 S. W. 1172.

In *Supreme Council, R. A. v. Heitzman* (1909) 140 Mo. App. 105, 120 S. W. 628, the court said that the insured may estop himself, in the absence of statute, to change the beneficiary, but that this is far from saying that he has a right to agree not to change which a statute cannot take away. In this case the statute, passed in 1897, declaring that no contract between a member of a fraternal society and his beneficiary that the latter shall pay assessments and dues shall give him a vested right in the benefit, or deprive the member of the right to change beneficiaries, was held to apply to a certificate issued after its passage, under an agreement by which the insured's wife was to pay the dues and assessments, and be designated as beneficiary, although such certificate was issued upon the surrender of a certificate, taken out before the passage of the act, which named other beneficiaries.

In *Grand Lodge, A. O. U. W. v. McFadden* (Mo.) supra, the court said that the Act of 1897 was not retrospective, so as to affect the interest of a beneficiary, if she acquired any, either in law or equity, before the passage of the act. In that case, however, it was held that the beneficiary had not acquired any vested interest, by virtue of agreement or otherwise.

In *Fischer v. Fischer* (1897) 99 Tenn. 629, 42 S. W. 448, the court said that, under the prevailing rule as laid down and recognized by the current of

authority, the member's right to dispose of the insurance exists, notwithstanding that the beneficiary originally named has paid or incurred expenses upon the faith of the provisions in his behalf in the certificate. The court remarked that it was not necessary for it to consider what the rights of the expectant beneficiary may be against the member personally, growing out of such payments made and expenses incurred. In this case a certificate was issued, payable, in certain proportions, to the son and daughter, respectively, of the member, pursuant to an agreement between the three by which the son was to furnish the father with a home and maintenance and pay half his dues to the order, and the daughter was to pay the other half of the dues and furnish the father necessary clothing, in consideration of which each should have the proportion of the proceeds named in the certificate. Subsequently this certificate was surrendered and a new certificate issued without the son's consent, in which the daughter's proportion was increased and the son's proportion diminished. In response to the contention that, the order having paid the fund into court to be distributed as the court might deem proper, it should be distributed between the son and daughter according to their agreement and the terms of the original certificate, the court said that, without intending to hold that a case may not be presented which will call for such action, and where the equities of the parties inter sese in the proceeds may not be adjusted without regard to the terms of the certificate under which the money is paid into court, the son having been unable to carry out his agreement to maintain the father, and having been obliged to abandon the attempt, there was no equity upon his part to have the fund distributed upon any different basis, or in any different manner, than that provided in the final certificate.

It will be observed that in some, at least, of the cases that deny the vested right of the beneficiary, there was no express agreement on the part of the member that the person paying the assessments should remain the benefi-

ciary. It would seem that there can be no question but that such agreement on his part will be effective to prevent his subsequently changing beneficiaries, if the original beneficiary duly pays the assessments in reliance thereon.

In the reported case (*COLUMBIAN CIRCLE v. MUDRA*, ante, 378) it was stated to be the rule in Illinois that, while the insured may, in the absence of intervening equities, change at will the beneficiary named in his insurance policy, equitable rights may be acquired in a beneficiary certificate of insurance which a court of equity will recognize and enforce, and it was held that if there was an agreement between the assured and the beneficiary in a mutual benefit certificate that she should receive a beneficial interest in the certificate by reason of her paying the premiums, and she performed such agreement, the assured could not change the beneficiary without her consent.

And the payment by a wife of assessments on a certificate of insurance on the life of her husband in which she was named as beneficiary, in reliance upon assurances given by him that she was to remain the beneficiary, raises an equity in her favor entitling her to the fund derived from the insurance, as against a subsequent beneficiary appointed by the husband without her consent. *King v. Supreme Council, C. M. B. A.* (1907) 216 Pa. 553, 65 Atl. 1108.

And in *Sipe v. Sipe* (1918) 102 Kan. 742, L.R.A.1918E, 1029, 173 Pac. 13, it was held that a wife who was named as the beneficiary in a certificate held by her husband acquired a vested interest which could not be defeated by his attempt to change the beneficiary, where he promised her, after the issuance of the certificate, that if she would pay the assessments he would never change the beneficiary, and she paid most of the assessments, although a number were paid by her husband's father, who had told her that if she was unable to pay them he would pay them for her.

So, in *Grimbley v. Harrold* (1899) 125 Cal. 24, 73 Am. St. Rep. 19, 57 Pac. 558, the payment of assessments

by the beneficiary, and her agreement to care for the member as long as she was able, in reliance upon an agreement by the member that she should receive the benefit of the certificate, and that he would not change beneficiaries, was held sufficient to prevent a change of beneficiaries.

And where a husband agrees that, if his wife will help to pay the assessments upon a certificate in a mutual benefit association in her favor, he will not change the beneficiary, and in consequence of such agreement she makes a part of the payments thereon, using for the purpose what are in fact the proceeds of her own labor outside of her ordinary household duties, she cannot be displaced as such beneficiary without her consent, notwithstanding the fact that she commingled her earnings with those of her husband as soon as received, keeping no separate account thereof, and then took the money for the assessments from the common fund. *Savage v. Modern Woodmen* (1911) 84 Kan. 63, 38 L.R.A. (N.S.) 773, 113 Pac. 802.

And in *Gaston v. Clabaugh* (1920) 106 Kan. 160, 186 Pac. 1023, where the controversy was between a daughter of the insured, who claimed to have been substituted as beneficiary, and the insured's wife and other children who were designated as the original beneficiaries, there was evidence of an agreement between the latter and the insured that if they would pay the premium the policy would be left without change of beneficiaries, and there was also testimony that the original beneficiaries paid the premiums with the exception of several of the later ones, which they would have paid had they not received word that they had been paid by another, the court allowed a recovery by the original beneficiaries, overruling a demurrer filed by the daughter who claimed to have been substituted, which set up that all the members of the family were living together as a family when the assessments were paid, and that they had no personal earnings that they put into the premiums.

And in *Spengler v. Spengler* (1903) 65 N. J. Eq. 176, 55 Atl. 285, also, it is impliedly recognized that the payment

of assessments by the beneficiary, in reliance upon a valid agreement on the part of the member that the beneficiary should have the certificate absolutely if she would pay the premiums until his death, would prevent a change of beneficiaries. The difficulty in this case was that such agreement, if made at all, was made on Sunday, and was therefore invalid.

It is not clear whether or not the decision in *Maynard v. Vanderwerker* (1893) 30 Abb. N. C. 134, 24 N. Y. Supp. 932, holding that a beneficiary who had paid assessments on the certificate under an agreement with the member to do so acquired a vested right which could not be defeated by a change of beneficiaries, was rendered upon the assumption that the agreement included an express promise not to change beneficiaries. The decision was reversed by the general term in (1894) 76 Hun, 25, 27 N. Y. Supp. 714, upon the ground that the evidence was insufficient to show any agreement between the parties.

In *Clark v. Loftus* (1912) 26 Ont. L. Rep. 204, 21 Ont. Week. Rep. 705, 4 D. L. R. 39, there was held to be no binding agreement shown by the insured with his wife, who was one of the original beneficiaries, that he would not change the beneficiary, although there was evidence that, when he was bankrupt, he told his wife, who had property, that it would be for her interest and that of their children to pay the assessments, and that she did so; and a change of beneficiaries was given effect in the case.

The fact that a husband names his wife as beneficiary, and gives her the certificate with the intent that it shall be hers, and pays the dues thereon with community funds, does not give her such a vested interest therein as to deprive the husband of the power of substituting another beneficiary. *Cade v. Head Camp*, P. J. W. W. (1902) 27 Wash. 218, 67 Pac. 603.

The failure of the beneficiary, without the fault of the member, to perform the agreement on his part to continue to pay the assessments, which constitutes the consideration for his designation as beneficiary, will deprive the beneficiary of any vested

right which he or she might otherwise have in the certificate, and enable the member to designate new beneficiaries as he see fit. *Masonic Mut. Ben. Asso. v. Tolles* (1898) 70 Conn. 537, 40 Atl. 449; *Supreme Lodge, K. L. H. v. Schworm* (1899) 80 Mo. App. 64; *Eatman v. Eatman* (1911) — Tex. Civ. App. —, 135 S. W. 165.

In *Knights of Modern Maccabees v. Sharp* (1910) 163 Mich. 449, 33 L.R.A. (N.S.) 780, 128 N. W. 786, it was held that where a husband and wife mutually insured their lives for the benefit of each other, and further agreed that the survivor would continue the insurance for the benefit of their children, such agreement could not be enforced by the children so as to prevent the survivor from changing the beneficiaries.

The case of *Brown v. Modern Woodmen* (1916) 97 Kan. 665, L.R.A.1916E, 588, 156 Pac. 767, is not strictly within the scope of this annotation, as the question there involved was the right to the benefit of a certificate as between one who had made advances to the insured under an agreement that he should be substituted as beneficiary, which agreement was not fully carried out according to the by-laws, and the sons of the insured, who had never been designated as beneficiaries. It was held in that case that while ordinarily a member of a benefit society has no vested right to the fund, still, by an agreement to change beneficiaries in consideration of funds advanced, he may so bind himself as to preclude his beneficiary or heirs from asserting their claim to the proceeds against a party who advanced large sums on the strength of such agreement, although a complete change of beneficiary was not made in accordance with the constitution and by-laws; and it was held that evidence of the facts in the case should have been received, and the case determined upon equitable considerations.

III. Effect of voluntary payment of dues or assessments.

It appears well settled that the mere voluntary payment of assessments upon a benefit certificate by the bene-

ficiary named therein, without any agreement with the member to do so, will not deprive the latter of the right to change beneficiaries, or entitle the beneficiary originally named, to the insurance fund as against a subsequent beneficiary named by the member in accordance with the rules of the association. *Jory v. Supreme Council, A. L. H.* (1894) 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; *Masonic Mut. Ben. Asso. v. Tolles* (1898) 70 Conn. 537, 40 Atl. 448; *Supreme Lodge, N. E. O. P. v. Hine* (1909) 82 Conn. 315, 73 Atl. 791; *Beckner v. Beckner* (1898) 104 Ga. 219, 30 S. E. 622; *Pike County Mut. L. Ins. Co. v. Berry* (1919) 214 Ill. App. 316; *Leaf v. Leaf* (1889) 12 Ky. L. Rep. 47; *New Era Asso. v. Kuyat* (1916) 191 Mich. 646, 158 N. W. 119; *Grand Lodge, A. O. U. W. v. McGrath* (1903) 133 Mich. 626, 95 N. W. 739; *Supreme Tent, K. M. v. Altmann* (1908) 134 Mo. App. 363, 114 S. W. 1107; *Spengler v. Spengler* (1903) 65 N. J. Eq. 176, 55 Atl. 285; *Fisk v. Equitable Aid Union* (1887) 7 Sadler (Pa.) 567, 20 W. N. C. 290, 11 Atl. 84; *Heasley v. Heasley* (1899) 191 Pa. 539, 43 Atl. 364; *Cade v. Head Camp, P. J. W. W.* (1902) 27 Wash. 218, 67 Pac. 603; *Preusser v. Supreme Hive, L. M. W.* (1904) 123 Wis. 164, 101 N. W. 358.

In *Spengler v. Spengler* (1903) 65 N. J. Eq. 176, 55 Atl. 285, *supra*, the court said, in support of this rule: "She [the original beneficiary] has notice that her husband [a member] may at any time change the beneficiary, and she has no lawful agreement binding him not to do so. If he does what he has a right to do, and what she knows he has a right to do, I do not see how, in a legal sense, she can complain. Her payments are referable to the papers as we find it, and to nothing else." In this case the court held that the original beneficiary was not even entitled to be refunded the premiums that she had paid while she was the beneficiary named in the certificate.

And in *Supreme Council R. A. v. Behrend* (1918) 247 U. S. 394, 62 L. ed. 1182, 1 A.L.R. 966, 38 Sup. Ct. Rep. 522, reversing (1916) 45 App. D. C.

260, it was held that, in the absence of a special provision of law or a rule of the association to the contrary, the naming of a person as beneficiary in a benefit certificate issued by a fraternal benefit association does not confer a vested right upon the beneficiary, but merely an expectancy which may be defeated at any time by the insured's act, although the beneficiary has paid some, or all, of the assessments out of her separate estate, the payments in the case, apparently, being voluntarily made by the beneficiary, without and definite agreement with the insured.

And in *Pike County Mut. L. Ins. Co. v. Berry* (1919) 214 Ill. App. 316, where a benefit certificate was payable to the insured's wife and children, it was held that the wife might recover the amount paid by her for dues prior to her divorce, but that she could not recover those paid thereafter in the interest of her children, as a mere voluntary payment of dues does not give a beneficiary a vested equitable

interest, or any right to the proceeds of the certificates.

And it appears in *New Era Asso. v. Kuyat* (1916) 191 Mich. 646, 158 N. W. 119, where a wife was originally named as sole beneficiary in a certificate, that she paid most of the premiums; but it is not stated that this was under any agreement with the insured, and his change of beneficiary, by which a part of the benefit was given to his sister, was held valid.

In *Tudor v. Tudor* (1891) 11 Ohio Dec. Reprint, 422, however, it was held that where a member stopped paying dues and assessments on a certificate payable to his children, and separated from his wife, when the latter continued to pay them until his death, he had lost his right to change the beneficiaries, and the children were entitled to the fund as against the member's mother, whom he attempted to substitute as beneficiary, although it did not appear that the wife paid the assessments under any agreement with the husband to do so. J. T. W.

HENRY CONGER, Receiver of the Tacoma Meat Company, Appt.,

v.

COUNTY OF PIERCE et al., Respts.

Washington Supreme Court (In Banc)—May 28, 1921.

(— Wash. —, 198 Pac. 377.)

Eminent domain — public improvement — consequential injury.

1. Injury to riparian property by turning the course of a stream against it within the channel, when changing the course of the channel to protect the roads and bridges of the county, is not consequential within the rule that no recovery can be had for consequential injuries from public improvements.

[See note on this question beginning on page 403.]

Waters — straightening of stream — liability for injury.

2. The rule of nonliability of the state for injury to riparian property caused by improving the navigation of a stream is not applicable to improvements to prevent the overflow of the stream to protect the roads and bridges of a county.

— water within river — liability for dealing with flood water.

3. The rule with respect to dealing with flood water out of the banks of a river does not apply to determine the liability of a county for erosion of banks by water within the river, because of the straightening of the channel to prevent overflows.

— protection against floods — change of channel of stream.

4. A private individual cannot so change the course of a stream in his efforts to protect his own property from flood waters that he will flood or erode the property of another.

[See 27 R. C. L. 1095, 1096.]

Constitutional law — damaging property for public use — liability.

5. A county injuring private property by changing the course of a stream to protect its roads and bridges cannot, under a Constitution requiring compensation for taking or damaging property, avoid liability for the injuries on the ground that it is acting as a representative of the state, or is acting for the good of the pub-

(Holcomb, J., dissents.)

lic, or on the theory that the individual must suffer for the public good.

— police power — taking property for public use.

6. The police power is not inconsistent with or antagonistic to the rules of law concerning the taking of private property for public use.

[See 6 R. C. L. 201, 202.]

Waters — straightening stream — protecting roads and bridges — police power.

7. A county in straightening the course of a navigable stream under legislative authority, for the protection of its roads and bridges against floods, is not exercising the police power so as to be protected against liability for injury thereby done to private property.

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County (Clifford, J.) in favor of defendants in an action brought to recover damages for erosion of land, alleged to have been caused by changes and improvements made by them in a certain river. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Davis & Neal, for appellant:

Defendants were liable for injuries sustained by reason of its careless and negligent acts.

Clark v. Lincoln County, 1 Wash. 518, 20 Pac. 576; Redfield v. School Dist. 48 Wash. 85, 92 Pac. 770; Howard v. Tacoma School Dist. 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; Orrock v. South Moran Twp. 97 Wash. 144, 165 Pac. 1096; Nippes v. Mountain View Twp. 100 Wash. 268, 170 Pac. 560; Arishin v. King County, 103 Wash. 176, 173 Pac. 1020; Bullock v. Yakima Valley Transp. Co. 108 Wash. 413, 184 Pac. 641, 187 Pac. 410; Linn v. Walla Walla County, 99 Wash. 224, 169 Pac. 323; Lane v. Spokane Falls & N. R. Co. 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. Rep. 821, 57 Pac. 367; Rounds v. Whatcomb County, 22 Wash. 106, 60 Pac. 139; Einseidler v. Whitman County, 22 Wash. 388, 60 Pac. 1122; Wendel v. Spokane County, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576; Lincoln County v. Fish, 38 Wash. 105, 80 Pac. 435; Neel v. King County, 53 Wash. 490, 102 Pac. 396.

The riparian owner is entitled to have the stream take its natural and usual course by his property, and if

it is diverted and its course and channel changed so as to drive it into the bank and cause erosion, such action on the part of the person causing such diversion renders him liable in damages for injuries sustained.

2 Farnham, Waters, 1904 ed. chap. 489; Kuhn v. Lewis River Boom & Logging Co. 51 Wash. 196, 98 Pac. 655; Judson v. Tide Water Lumber Co. 51 Wash. 164, 98 Pac. 377; Johnson v. Irvine Lumber Co. 75 Wash. 539, 135 Pac. 217; Peterson v. Arland, 79 Wash. 679, 141 Pac. 63; 3 Farnham, Waters, 880a; Valley R. Co. v. Franz, 43 Ohio St. 623, 4 N. E. 88; Ordway v. Canisteo, 66 Hun, 569, 21 N. Y. Supp. 835; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Gerrish v. Clough, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165.

Messrs. J. W. Selden, John A. Sorley, F. D. Nash, Malcolm Douglas, Howard A. Hanson, and Bert C. Ross, for respondents:

So far as the influence of the surface waters upon plaintiff's premises is concerned, there is no legal liability against defendants.

Cass v. Dicks, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113; Harvey v. Northern P. R. Co. 63 Wash. 669, 116 Pac. 464; Wood v. Tacoma, 66 Wash.

(— Wash. —, 198 Pac. 877.)

266, 119 Pac. 859; Miller v. Eastern R. & Lumber Co. 84 Wash. 31, 146 Pac. 171; Morton v. Hines, 112 Wash. 612, 192 Pac. 1016.

The public has the power to regulate and control the action of navigable waters.

Lamb v. Reclamation Dist. 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; Cubbins v. Mississippi River Commission, 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671; Bass v. State, 34 La. Ann. 494; Peart v. Meeker, 45 La. Ann. 421, 12 So. 490; Egan v. Hart, 45 La. Ann. 1358, 14 So. 244; Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 34 L.R.A. 725, 36 S. W. 1041; Hughes v. United States, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019; McCoy v. Plum Bayou Levee Dist. 95 Ark. 345, 29 L.R.A.(N.S.) 396, 129 S. W. 1097; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; Dubose v. Levee Comrs. 11 La. Ann. 165; Hanson v. Lafayette, 18 La. 295; Zenor v. Concordia Parish, 7 La. Ann. 150; Ruch v. New Orleans, 43 La. Ann. 275, 9 So. 473; Hart v. Levee Comrs. 54 Fed. 559; McDaniel v. Cummings, 83 Cal. 515, 8 L.R.A. 575, 28 Pac. 795; DeBaker v. Southern California R. Co. 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; Green v. Swift, 47 Cal. 536; San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 9 A.L.R. 1200, 199 Pac. 554; Alexander v. Milwaukee, 16 Wis. 248; Champlain Stone & Sand Co. v. State, 142 App. Div. 94, 127 N. Y. Supp. 131; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011; Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 57 L. ed. 1083, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232; Scott v. Lattig, 227 U. S. 229, 57 L. ed. 490, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242.

No right of action is created by statute.

Distler v. Dabney, 3 Wash. 203, 28

Pac. 335; Bennett v. Thorne, 36 Wash. 266, 68 L.R.A. 113, 78 Pac. 936; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 338; Riddoch v. State, 68 Wash. 329, 42 L.R.A.(N.S.) 251, 123 Pac. 450, Ann. Cas. 1913E, 1033; Redfield v. School Dist. 48 Wash. 85, 92 Pac. 770; Kirtley v. Spokane County, 20 Wash. 111, 54 Pac. 936; Hoexter v. Judson, 21 Wash. 646, 59 Pac. 498; Howard v. Tacoma School Dist. 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; McCalla v. Multnomah County, 3 Or. 424; Sheridan v. Salem, 14 Or. 328, 12 Pac. 925; Sargent v. Tacoma, 10 Wash. 212, 38 Pac. 1048; Re Fifth Ave. 62 Wash. 218, 113 Pac. 762; Seattle v. McElwain, 75 Wash. 375, 134 Pac. 1089; Thorpe v. Spokane, 78 Wash. 488, 139 Pac. 221; Clute v. North Yakima & Valley R. Co. 62 Wash. 531, 114 Pac. 513; Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 70 L.R.A. 1018, 109 Am. St. Rep. 889, 81 Pac. 840.

Bridges, J., delivered the opinion of the court:

This was an action to recover damages caused by certain erosions, the result, it is alleged, of changes in, and improvements of, the Puyallup river, made by the defendants, which river, in part, forms the boundary line between the defendant counties, and empties into Commencement bay, at or near Tacoma. The complaint alleged, and the plaintiff's testimony tended to show, the following facts:

On December 17, 1917, and for a number of years prior thereto, the Tacoma Meat Company, a corporation, owned a small tract of land bordering on the Puyallup river, near its mouth, on which land it had erected various buildings in which it had carried on a general slaughtering and packing establishment. Within these buildings were considerable quantities of valuable machinery and other personal property. Prior to the making of the improvements hereinafter mentioned, the Puyallup river was a tortuous, navigable stream, which had been in the habit of overflowing its banks during the rainy seasons, and thus doing much damage to the bridges, roads, and other public

property of the defendants. In 1913 the legislature enacted a law which authorized any two counties, under certain circumstances, to jointly improve streams which flowed through both of such counties, or formed the boundary line between them, so as to correct, as far as might be, their habit of overflowing their banks and thereby causing damage. By virtue of this enactment the defendants entered into a contract, under date of January 19, 1914, for the purpose of straightening and deepening the channel of the Puyallup river, and abating the flood tendencies. This contract formed a district within which such improvements should be made, and the plaintiff's property is located in the extreme northwesterly portion of such district.

After entering into the contract, the counties proceeded to make the improvements, and in many places they straightened the stream, and widened and deepened it, and placed various improvements along and upon the banks, with a view of keeping the waters from eroding them. A few hundred feet immediately above the plaintiff's property the river, previous to its improvement, took a wide bend to the southwest, and as the waters so ran they were in the habit of hitting the northeasterly bank at a point slightly up-stream from the plaintiff's property, which act caused the waters to be deflected in such a way that very little, if any, erosion had occurred on the plaintiff's property in many years. In improving the stream the defendants eliminated the bend just mentioned, by causing the channel of the stream to be straightened, and as a result of such straightening, and the placing of concrete blocks on the banks for their protection, the waters of the stream were caused to come forcibly in contact with the bank on which plaintiff's property was situated, and during a high freshet in the winter of 1917, and after the defendants had completed their work of improving the river, there was

such erosion of the plaintiff's lands as to cause its buildings to lose their foundations, and to be floated, together with their contents, out into Commencement bay, or Puget Sound. The particular causes of the erosions are alleged to be the straightening of the channel in such manner as to throw the current of the stream against the river bank at the point of plaintiff's location, the placing of concrete protection on the bank opposite and a little above plaintiff's property in such way as to deflect the waters against the bank of the river where plaintiff's improvements were located, and the failure of the defendants to protect the banks along that part of the stream where plaintiff's property was situated.

When the plaintiff had rested its case, the trial court granted the defendants' motion to take the case from the jury and enter judgment dismissing the action. Later, such judgment was made and entered, and the plaintiff has appealed. Since there was sufficient testimony to carry the case to the jury on the theory that respondents' acts had caused the damages suffered by appellant, we will henceforth speak of the damage as being caused by respondents, realizing, of course, that, at best, it was a question for the jury.

The arguments before this court have taken such a wide and varied range that it seems necessary for us at this time to show what the exact question before us is. In the first place, the appellant is not seeking any damage because its land and property were flooded. As a matter of fact, the waters at the time in question were so high as that all of plaintiff's property was flooded; but plaintiff seeks recovery only for damage done by erosion of his lands. In this way the direct question of damage by flooding is not involved. The testimony tends to show that the erosion was caused by such of the waters as were in the channel of the stream, and that the overflow waters did not cause any

erosion. Again, although this stream is navigable within the improved district, we have concluded

**Waters—
straightening of
stream—liability
for injury.**

that the law applicable to improving navigable streams

in aid of navigation is not directly involved. While the improvements made by the respondents may or may not have improved the stream for navigation, the purpose of the improvement was not in aid of navigation, but to correct the tendency of the stream to overflow its banks. The legislative enactment authorizing the counties to do this work (Laws 1913, p. 156) does not contemplate the improvement of the stream for the purpose of making it more navigable. Its title, which is as follows, quite correctly shows the purpose of the act: "An Act Authorizing Counties to Contract Together for Administrative and Financial Co-operation in the Improvement, Confinement and Protection of Rivers and the Banks, Tributaries and Outlets Thereof, Whose Waters Flowing into or through Such Counties Work Damage by Inundation or Otherwise, Authorizing the Levy of Taxes and the Creation and Disbursement of Special Funds for Such Purposes, Delegating the Power of Eminent Domain in Aid of, and Providing Generally Ways and Means for the Accomplishment of Such Purposes and the Performance of Such Contracts."

The direct question before us is whether a county which straightens and otherwise improves a navigable stream for the purpose of preventing it from overflowing its banks and thereby doing damage to the public property, where such improvements are made by virtue of express authority of the legislature, is liable to a landowner, if because of such improvements, and the manner in which they are made, his property is eroded and washed away. The trial court stated its position, and, as we understand it, that of the respondents, in the following language: "The Puyallup

river, at the point in controversy, is a navigable and tidal stream. The state, in its sovereign right, is owner of the bed and banks and body of the stream, and as such owner may make such changes in the course of the river, and may improve the same by widening or deepening or straightening a channel, or in any other manner it may see fit, and it is not liable to the owner of the shore land for any damage that may result from so doing, either directly or indirectly. It owes no duty to the shore landowner to protect him from resulting damage on account of any improvement the state may make upon its own property in the banks or bed of the stream, and the shore landowner has no right to any protection from the result of the state's acts in dealing with the river channel and the waters flowing therein."

The parties to the action have elaborately discussed the law of out-law, or surface, waters. In our opinion, those questions are not in this case, and to undertake to discuss them would be to create confusion in a question already sufficiently difficult. The appellant is complaining only of the action of those portions of the waters which were within the bed of the stream. It is not complaining of any overflowed, outlaw, or surface waters. Certainly, so long as the waters are confined to the bed and banks of the stream, they cannot be outlaw waters.

It seems certain that, had a private individual or private corporation caused the damage which the appellant alleges, there would be a liability. While a private individual has a right, under certain circumstances, to protect himself against overflow, surface, and outlaw waters, he cannot so change the stream, in an effort

to protect his own property, as that he will thereby flood or erode the property of someone else. It seems to

**—water within
river—liability
for dealing with
flood water.**

**—protection
against floods—
change of
channel of
stream.**

us that the authorities are quite unanimous in this regard. A few of them are as follows: *Judson v. Tide Water Lumber Co.* 51 Wash. 164, 98 Pac. 377; *Johnson v. Irvine Lumber Co.* 75 Wash. 539, 135 Pac. 217; *Valley R. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429; *Freeland v. Pennsylvania R. Co.* 197 Pa. 529, 58 L.R.A. 206, 80 Am. St. Rep. 850, 47 Atl. 745; *Gerish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Bowers v. Mississippi & R. River Boom Co.* 78 Minn. 398, 79 Am. St. Rep. 395, 81 N. W. 208; *Morton v. Oregon Short Line R. Co.* 7 L.R.A. (N.S.) 344 and note (48 Or. 444, 120 Am. St. Rep. 827, 87 Pac. 151, 1046); *Jefferson v. Hicks*, 24 L.R.A. (N.S.) 214 and note (23 Okla. 684, 102 Pac. 79).

But respondents contend that when they improved this river they were acting under direct legislative authority, and that what they did was for the state, and that when the state, either directly or through its appointed agents, acts for the good of the public, it cannot be made to respond for damages which may result to the private individual. They advocate the doctrine that the private individual, under such circumstances, must suffer for the public good. A wilderness of authorities are cited both in support of and against this proposition. It seems to us that a recurrence to certain fundamental principles may assist us in reaching a correct conclusion. One of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties, against the demands and aggressions of the public. No better illustration of the progressive growth of this principle can be found than that contained in our various state constitutions, with reference to the taking of private property for a public use. It has been said that this power is a necessary incident to government, and

was before, and did not grow out of, constitutions. If so, the Federal constitutional provision that private property should not be taken for a public use without compensation being made was but a written expression of a right which already existed, being placed in the Constitution for the purpose of emphasizing the desire to protect the rights of the individual. The national Constitution and the constitutions of the earlier states went no farther than to provide that private property should not be taken for public use without compensation being made. Later constitutions added to these provisions the idea that the compensation must be made before the taking is accomplished. Still later constitutions, including that of the state of Washington, added an additional element, to wit, that private property may not be taken or damaged for the public use without compensation being first made. State Const. art. 1, § 16. It is true that this is not an eminent domain proceeding, but the principles of law involved in the power to take private property for a public use are involved here, because respondents are seeking to justify the damage alleged to have been done by them on the theory that they were acting by virtue of law, and as an arm of the state, and for the use of the state, and for the public good.

Since, therefore, our Constitution expressly forbids the taking or damaging of private property for a public use, except upon just compensation first made, on what theory can respondents be relieved from any damage to appellant's property as a direct result of the improvements which were made in the Puyallup river? Certainly not simply because they were acting as an arm of the state, or alone because they were acting for the good of the public, or simply on the theory that the individual must suffer for the public good. To hold that they would be relieved on

consequential
law-damaging
property for
public use—
liability.

any of these grounds would be entirely to disregard the express provisions of our Constitution. The state itself cannot take or damage private property for a public use, without compensating the owner; nor can it authorize a taking or damaging which is prohibited to it. The only other principle of law under which respondents might be relieved would be the police power of the sovereign, because the only ways known to the law whereby private property may be taken or damaged by the public are by the principles of eminent domain or those of the police power. (If there may be a taking by taxation, that principle does not interest us here.) Indeed, it is the police power theory upon which respondents seem most strongly to rely. It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of constitutions. It is easy to understand the principles upon which the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with or antagonistic to the rules

—police power—
taking property
for public use.

of law concerning the taking of private property for a public use. Because of its elasticity, and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations; and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state, which permits it to prevent all things harmful to the comfort, welfare, and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace, and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general pub-

lic. It does not authorize the taking or damaging of private property in the sense used in the constitutions with reference to taking such property for a public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or, if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public. Lewis on Eminent Domain, § 6, writes of this subject: "Everyone is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this last duty which pertains to the police power of the state, so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and, for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking; an exercise of police power, and not of eminent domain. But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power."

In the case of Askam v. King County, 9 Wash. 1, 36 Pac. 1097, speaking of police power, this court said: "While it is undoubtedly true that in extreme emergencies the rights of private parties as to property must yield to the requirements

of the public, yet to authorize such interference the emergency must be such as to make the action necessary."

The specific question, then, is: Were the respondents in the exercise of the police power in making the improvements they made in the river in question? Our answer must be in the negative.

**Waters—
straightening
stream—pro-
tecting roads
and bridges—
police power.**

The legislative act under which they made the improvement is entirely bare of any expression which would indicate that the legislature considered that public necessity demanded or required the making of the improvement. Section 1, chap. 54, p. 156, Laws 1913, being the act by virtue of which these improvements were made, provides that whenever any river shall flow in part through two counties, or shall form the boundary line between them, ". . . and the waters thereof have in the past been the cause of damage, by inundation or otherwise, to the roads, bridges or other public property situate in or to other public interests of both such counties, or the flow of such waters shall have alternated between the said counties so at one time or times such waters shall have caused damage to one county and at another time or times to the other county, and it shall be deemed by the boards of county commissioners of both counties to be for the public interests of their respective counties that the flow of such waters be definitely confined to a particular channel, situate in whole or in part in either county, . . ." then the counties interested may jointly make the desired improvement. The act provides that the expense of making such improvement shall be raised by an annual tax on all the property in the county, which tax is to be levied and collected as any other county tax. The act nowhere intimates that the counties would be relieved from any damages that may be done to private property; on the contrary, they are authorized to exercise the power

of eminent domain for the purpose of acquiring lands on which the river may be straightened. The contract between the respondents, under which the work was done, directly recognizes that the river in the past has overflowed its banks and thereby damaged the roads, bridges, and other private property of the two counties, and that because thereof litigation between them had arisen, and that the purpose of the contemplated improvement is to settle such pending litigation and make improbable future suits, and to avoid future damage to the roads and bridges of the two counties. It will thus be seen that this improvement was not made to preserve public health, peace, morals, or welfare; it was not done to reclaim large tracts of land which otherwise might have been a waste; the idea of impelling necessity, which seems to be the chief ingredient of the police power, is entirely absent. Respondents cite many cases which they contend support them in their argument of nonliability. While we have carefully read all of them, we cannot here take the space to digest them, nor even cite all of them. The leading ones are *Lamb v. Reclamation Dist.* 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 60 L. ed. 1041, 36 Sup. Ct. Rep. 671; *Bass v. State*, 34 La. Ann. 494; *Hughes v. United States*, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019; *McCoy v. Plum Bayou Levee Dist.* 95 Ark. 345, 29 L.R.A.(N.S.) 396, 129 S. W. 1097; *Bedford v. United States*, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; *Gray v. Reclamation Dist.* 174 Cal. 622, 163 Pac. 1024.

The decisions in some of these cases are based upon constitutional provisions which only prohibit the taking of private property without compensation, and are, therefore,—at least, to that extent,—not in point, in view of our constitutional provision. Others of the cases cited involve improvements made in aid

of navigation, and are not in point or material here. Others of the cited cases arise in instances where the state, or some subdivision of it, has made improvements in streams solely for the purpose of preventing them from overflowing their banks, and by such improvements reclaiming or saving to the state and its people large tracts of land which are essential to the welfare of the public. Of this class, the case of *McCoy v. Plum Bayou Levee Dist.* 95 Ark. 345, 29 L.R.A. (N.S.) 396, 129 S. W. 1097, concerning the Arkansas river, and *Gray v. Reclamation Dist. supra*, concerning the Sacramento river, may be considered leading cases. The last-cited case is, particularly, elaborately considered by the California supreme court. The reclamation district in that case built dikes, levees, and other works purely for the purpose of confining the waters of the Sacramento river within its banks, in order to reclaim very extensive tracts of otherwise valueless lands. Because of such improvements the plaintiff's lands were overflowed and damaged. The court applied the police power to these facts, and held the district was not liable. Without approving or disapproving the conclusion of the court in that case, and in others along the same line, they are easily distinguishable from the case at bar. In those cases there are elements on which the police power is rightly based, but which facts are entirely absent from the case at bar. There the controlling purpose of the improvement was to reclaim and save to the people large tracts of rich lands, which, because of inundation, were worthless. To that extent the public welfare was involved. Here, the controlling purpose was the protection of the roads and bridges of the respondent counties. Neither the state nor the people of the state or counties were interested in the improvement, except in a very indirect way, and as taxpayers.

We are confident that any dam-

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age that may have been done by the respondents cannot be excused under any reasonable interpretation of the law of police power. While no cases exactly in point have been cited or found by us, the following are a few of a great number which, in principle, support our views: *Burroughs v. Grays Harbor Boom Co.* 44 Wash. 630, 87 Pac. 937; *Askam v. King County*, *supra*; *Ordway v. Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Bradburry v. Vandalia Levee & Drainage Dist.* 236 Ill. 36, 19 L.R.A. (N.S.) 991, 86 N. E. 163, 15 Ann. Cas. 904; *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210; *Jefferson v. Hicks*, 23 Okla. 684, 24 L.R.A. (N.S.) 214, 102 Pac. 79; *Lewis, Em. Dom.* §§ 115, 285, 306.

In the case of *Burroughs v. Grays Harbor Boom Co.* *supra*, the facts were that the driving company had built several splash dams for the purpose of creating artificial freshets, in order to assist in the driving of saw logs down the river towards market. The testimony showed that these artificial freshets caused Burroughs's lands to be eroded. The latter, by his action, sought, among other things, to enjoin the creation of artificial freshets because of the damage they did to his lands. Substantially the same argument was made by the driving company in that case as is made by the respondents here. It was there contended that the driving company was a quasi public corporation, directly authorized by legislative act, to create artificial freshets for the public good, and that it could not be held liable for damages caused by them. This court refused to adopt that view, and held that, if the driving company caused Burroughs's lands to be eroded by its artificial freshets, it would be liable therefor in damages. Answering this argument, Judge Dunbar, speaking for the court, said: "This provision of the fundamental law [our constitutional provision with reference to taking of private property for pub-

lic use] was construed by this court, in *Brown v. Seattle*, 5 Wash. 35, 18 L.R.A. 161, 31 Pac. 313, 32 Pac. 214, and in many subsequent cases, to mean just what it said; and it can make no possible difference whether the property abuts on a street or river, or whether the invader of that right is a municipality, an individual, or a boom company. The constitutional guaranty applies equally in both cases."

Why, indeed, on general principles, should not the counties be liable if the damage to appellant is the direct result of the changing of the river channel and the currents of the stream? The counties were protecting themselves and their roads and bridges. May they do this in such a way as to injure private property without becoming liable therefor? Certainly not. They are in no better position than would be an individual who should do exactly the same thing. By the legislative authority they had a right to straighten the stream and change the currents thereof, but that legislative authority did not absolve them from liability for such damages as might directly result from such improvements.

But respondents contend that, in any event, they are not liable here, because the damage to appellant was not the direct result of improvements made by them, but was only what is sometimes termed indirect, or consequential, damages, for which there can be no liability. It is difficult to give any definition showing the difference between a direct and an indirect or consequential damage. This, however, may be easily shown by certain illustrations. Private property may be damaged, and its value lessened, because it is located close to some public building, such as a jail, or hospital, or public hall, yet such damage is purely incidental and not recoverable. The noise consequent on the operation of railroad trains upon a private right of way may depreciate the value of adjoining private property, and be an annoy-

ance to those living in the immediate neighborhood, but such damage is purely consequential and is not recoverable. But the injury to appellant's property, if caused as contended for by it, cannot be considered of this nature. Eminent domain—public improvement—consequential injury.

The alleged erosion of its land, and thereby the destruction of its property, would be the direct result of the act of the respondents in straightening the channels of the river, and thereby changing the currents of the stream. There was testimony tending to show that respondents' engineers must of necessity have known that the improvements which they were making would cause the appellant's property to be eroded, and probably washed away. Under these conditions it cannot be said that the damages are so remote and disconnected with the improvement of the river as to be purely incidental or consequential.

Briefly, we hold that, if the damage in question was caused by the action of respondents in straightening the Puyallup river, and thereby changing its currents, then the appellant is entitled to have its case submitted to a jury. It follows from what we have said that the trial court erred in taking the case from the jury. The judgment dismissing the action is reversed, and the cause remanded for trial.

Parker, Ch. J., and Mackintosh, Fullerton, Main, Tolman, and Mitchell, JJ., concur.

Holcomb, J., dissenting:

The foregoing opinion is an exceedingly able and admirable one, but I am unable to bring myself to concur in it. I agree with the conclusions of the trial judge quoted in the majority opinion.

I am firmly of the opinion that the act under which the work was done by the counties was an act under the police power. The improvements were certainly for the public

welfare. It is assuredly in the interests of public welfare to improve the stream, so as to prevent flooding and destruction of county roads and bridges. If the safety of travel by the public is not the public welfare, it is difficult to conceive what would be.

It is determined that the Puyallup river is a navigable river. As such, its sovereignty is in the state, the state having asserted absolute title and control of the beds, shores, and banks of navigable rivers. It is determined that the work by the counties was lawfully performed, and the counties had previously obtained the necessary rights of way and

made compensation for any damage by reason of such taking and change of the channel of the stream. Therefore, the damage to appellant, if attributable to respondents, is consequent upon a lawful act of respondents, and is *damnum absque injuria*. *Wiel, Water Rights*, § 248; *Dillon, Mun. Corp.* 4th ed. § 995; *Cooley, Const. Lim.* p. 300; *Hill v. Newell*, 86 Wash. 227, 149 Pac. 951; *Schank v. Hines*, 112 Wash. 612, 192 Pac. 1016.

Other authorities could be cited from our own and other courts, but the above citations are sufficient to sustain my view.

I therefore dissent.

ANNOTATION.

May paramount right of public to improve navigability of stream without compensating riparian owner for resulting damage be extended to improvements for purposes not in aid of navigation.

It may be observed that in the majority of the cases cited in the annotation the improvement consisted in a diversion of the water, or an alteration along the shore, which deprived the riparian owner of access, and not in such a change in the channel of the river itself as caused overflow or erosion. The cases are cited not because of their similarity on facts, or because they are necessarily controlled by the same principles, but for the reason that, at least in the discussion of the particular question before the court, they throw light on the subject indicated in the above title and passed upon in the reported case (*CONGER v. PIERCE COUNTY*, ante, 393).

The courts have gone far toward relieving the public from liability for damages to riparian owners on a navigable stream, due to alterations in the stream by or under public authority for the purpose of improving navigation. The theory seems to be that such owners hold their property subject to the paramount right of the government to improve the stream for navigation purposes, and must bear the incidental consequences of the lawful and proper use of a govern-

mental power. This doctrine is well illustrated by the holding in *Gibson v. United States* (1897) 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, which is followed in numerous decisions of the Federal and state courts. In this case, the owner of a valuable farm having a frontage on the Ohio river was unable to use the landing for the shipment of products from and supplies to the farm for the greater part of the gardening season on account of obstruction, except during a high stage of the water which occurred in the winter and spring months, by a dike constructed under authority of an act of Congress to improve navigation in the river. The court, in holding that the claimant could not recover damages from the government, although the value of her land had been greatly reduced, said: "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and, although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the

Federal government by the Constitution. . . . The 5th Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power. . . . Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

And by way of illustration, attention is called to the more recent case of *Tempel v. United States* (1918) 248 U. S. 121, 63 L. ed. 162, 39 Sup. Ct. Rep. 56, where the court, in a suit by a riparian owner to recover the value of property taken by the Federal government by dredging in the Chicago river for the purpose of improving navigation, said: "Under the law of Illinois, neither the United States nor the state owns the lands under a navigable river. Riparian owners own the fee to the middle of the stream . . . subject to the paramount right of the government to use the same and to make improvements therein for purposes of navigation, without the payment of compensation."

On the general rule, it is said in 27 R. C. L. § 242: "It is generally held that riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government to make it. The rule that a state is not liable for consequential injuries in-

flicted on private property by the improvement of the navigation of a river is based on the principle that the improvement is part of the state's governmental duties; that the work which is done towards such improvement is done in the discharge of the governmental powers of the state; that the land of the riparian proprietor within the state is subject to the just exercise of this power; and that, when the state undertakes to exercise its governmental power, the public good is paramount to the consequential injury to land which is incidentally and naturally affected by the improvement."

In view of the doctrine, above indicated, that riparian owners on a navigable stream hold their property subject to the right of the Federal government, or of the states, to make alterations in the stream for the purpose of improving navigation, without awarding compensation where there is not a direct taking of the property, the question arises as to whether this doctrine is limited to cases in which the purpose of the alterations is to improve navigation, or whether the riparian owner may be regarded as holding his property subject to the paramount authority of the public to make alterations or improvements in the stream, without compensation, for other purposes. This question, which seems to have evoked discussion in only a few cases, should not be confused with the question whether, under the particular circumstances, there has been such a taking of the property, distinguished from merely consequential damages, as gives rise to a valid claim for compensation. The latter is an entirely different question from the one under consideration, although it arises in many cases, on facts similar to those in the cases cited in the annotation. Thus, if for some purpose other than improving navigation the riparian owner is cut off from access to the stream, or there is an interference with such access, and the public claim the right to make the alteration or improvement in question without compensation to the riparian owner, such claim may

be asserted on the ground that the public has a paramount right, not only to improve the stream for navigation purposes, but for other purposes, without making compensation; or on the ground that private property is not taken within the meaning of constitutional provisions. The present annotation is concerned only with cases where a claim of nonliability is predicated on the former ground. It should not, therefore, be regarded as covering such questions as whether a riparian owner on a navigable stream has a right to damages for interference with his access to the stream through improvements made by or under public authority (many of these being made, of course, in aid of navigation), or whether water may be diverted from a navigable stream by the public, without a liability for damages to riparian owners injuriously affected. In fact, it should be recognized that the annotation purports to include only those cases which have discussed the question indicated in the above title.

Although, as before indicated, the question under consideration has arisen in only a few cases, the authorities directly, or, at least, by the language of the opinions, support the view that the doctrine which permits the public to improve a navigable stream without compensation to riparian owners injuriously affected,—in other words, the doctrine which subjects such riparian owners to the paramount right of the government in this regard,—does not extend to improvements for other purposes. See *Beidler v. Sanitary Dist.* (1904) 211 Ill. 628, 67 L.R.A. 820, 71 N.E. 1118; *Canal Fund Comrs. v. Kempshall* (1841) 26 Wend. (N. Y.) 404; *Re New York* (1901) 168 N. Y. 134, 56 L.R.A. 500, 61 N.E. 158; *Fulton Light, Heat & P. Co. v. State* (1911) 200 N. Y. 400, 37 L.R.A. (N.S.) 307, 94 N.E. 199; *Pomroy v. Granger* (1894) 18 R. I. 624, 29 Atl. 690; *CONGER v. PIERCE COUNTY* (reported herewith) ante, 393; *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (*Patten Paper Co. v. Kaukauna Water Power Co.*) (1895) 90 Wis. 370, 28 L.R.A. 443, 48 Am. St.

Rep. 937, 61 N. W. 1121, 63 N. W. 1019.

An important case on the question is *CONGER v. PIERCE COUNTY* (reported herewith) ante, 393, in which the court held that the rule of nonliability of the state for injury to riparian property, caused by improving the navigation of a stream, is not applicable to improvements to prevent the overflow of the stream to protect the roads and bridges of a county; and that a county in straightening the course of a navigable stream under legislative authority, for the protection of its roads and bridges against floods, is not exercising the police power so as to be protected against liability for injuries thereby done to private property. It may be noted that it was held, also, that injuries to riparian property by turning the course of a stream against it within the channel, and changing the course of the channel to protect the roads and bridges of the county, is not consequential within the rule that no recovery can be had for consequential injuries from public improvements.

In the *CONGER CASE* the action was to recover damages by erosion, alleged to have been caused by improvements made by the county under legislative authority, in straightening, deepening, and otherwise improving a navigable stream, the controlling purpose being the protection of the roads and bridges of the county. Through the straightening of the channel and the placing of concrete blocks on the banks for their protection, the waters were deflected in such a way as to cause the erosion of the plaintiff's land. There seems little doubt that under the doctrine of the United States Supreme Court cases previously cited, and others of that nature, had the improvement been for the purpose of improving navigation, the county would not have been liable. But the court held that the law applicable to improving navigable streams in aid of navigation was not directly involved, and that the county might, under the circumstances, be held liable.

The rule itself, which places the loss arising from improvements in aid of navigation on the riparian owner, seems a harsh one, and in view of this the limitation of the rule made in the CONGER CASE seems commendable from an equitable point of view.

Although the improvement was not in the stream itself, and, so far as the facts are concerned, the case is merely representative of a class of decisions not included herein, the limitation last referred to, where the improvement is not made in aid of navigation, is supported also by *Re New York* (1901) 168 N. Y. 134, 56 L.R.A. 500, 61 N. E. 158, where an owner of property fronting on the Harlem river, in New York city, sought damages from the city for injury to his riparian rights through the construction by it, under legislative authority, of a speedway along the tideway of the river, thereby depriving him of access to the river. The use of the speedway was limited to the pursuit of pleasure in driving, riding, or walking, and all forms of commercial traffic were rigidly excluded therefrom. It was held that there was no authority in the public for constructing the same, without compensation to the riparian owner for the injury caused thereby, although, if the improvement had been in aid of navigation, the court said, there would have been no right to compensation.

Because of the small amount of judicial discussion on the present question, it seems advisable to refer at some length to the reasoning of the court in *Re New York* (N. Y.) *supra*. It was said: "The appellant herein, while conceding the right of the state or municipality to make improvements for the benefit of navigation without compensation to riparian proprietors for invasion of their private rights, contends that the construction of a speedway, from which are excluded all forms of commercial traffic or intercourse, is not an exercise of that right, and that, therefore, his riparian rights cannot be taken or destroyed without due compensation. . . . The state holds the title in fee in the

tideway, and to the lands under water beyond the same, as trustee for the public in its organized capacity. As such trustee, and in the exercise of its governmental functions, it may improve the tideway, or the adjacent waters, for the benefit of navigation, even to the detriment of abutting upland owners, and without compensation to them. As stated in *Sage v. New York* (1897) 154 N. Y. 70, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, this rule is based upon the principle that, 'when any public authority conveys lands bounded by tidewater, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare.' Does this principle of implied or reserved power extend to any public use of the tideway, or the waters beyond the same, for purposes not related to, or connected with, navigation and commerce? The basis of the theory upon which the trusteeship of the state in our tideways and tidewaters is founded seems to be that there are certain rights of navigation and commerce by water which are common to all, and are, therefore, paramount to the rights of individuals. As was said in *People v. New York & S. I. Ferry Co.* (1877) 68 N. Y. 77: 'The sea and navigable rivers are natural highways, and any obstruction of the common right or exclusive appropriation of their use is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it.' Therefore, the state, which is the public in concrete form, is charged with the duties and vested with the powers essential to the establishment and preservation of these common rights. The very implication of the trust upon which the state holds the tideway and tidewaters speaks of the definite purpose for which it was created. If the state may use the waterways for any purpose whatsoever, then it is no longer a trustee, but an irresponsible autocrat. If it may erect upon our tide-

ways or tidewaters any kind of structure that may be suggested by the whim or caprice of those who happen to be in power, it will be possible to destroy navigation and commerce by the very means designated for their preservation and improvement. . . . If the trusteeship of the state in the tideway exists only for the purposes above enumerated, it would seem to follow that, when, in the exercise of its general right of eminent domain, the state appropriates the tidewater to uses inconsistent with the trust upon which it is held,—that is, to some use not for the benefit of navigation,—compensation should be made to the riparian proprietor whose rights have been abridged or taken away. Any other conclusion would necessarily admit the arbitrary and unlimited powers of the state over its tideways and tidewaters for any and every purpose, whether connected with the subject of navigation or not; and no such admission should find its way into our laws. . . . If these changed conditions are the result of improvements to general navigation, then, as we have seen, the injured upland owner is remediless, for it was simply the exercise by the state of its reserved and paramount power over its tideways and tidewaters. If, on the other hand, such changes are created by the state or municipality, not as trustee for the people of the tideways and tidewaters, not for any improvement of navigable waters or any matter connected therewith, but by the building of a public work which, in its whole length and breadth, is utterly destructive of navigation and commerce, then it would seem to follow that the persons whose property has been taken, or whose easements have been destroyed thereby, are entitled to compensation, under the constitutional guaranty that no private property shall be taken for public use without just compensation."

The distinction which is made in the last case, where the improvement is not for the purpose of navigation, is further shown by reference to the decision in *Sage v. New York* (1897)

154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, in which the court held that a riparian owner's right of ingress and egress to his water front does not include a right to compensation for an interference therewith, caused by the public improvement of the water front for the benefit of navigation.

The court in *Re New York* (1901) 168 N. Y. 134, 56 L.R.A. 500, 61 N. E. 158, *supra*, referred to *Smith v. Rochester* (1883) 92 N. Y. 464, 44 Am. Rep. 393, in support of the distinction above referred to, the latter case denying the right of a municipality, under authority from the state, to draw from a lake, a navigable body of water, a supply of water for the use of its inhabitants, without compensation to riparian owners on a stream flowing from the lake. This particular class of cases, of course, is not covered in the annotation. But the case is cited for the reason that it is referred to in the later New York decision, as holding that the public has an easement in such waters for purposes of travel, as on a highway, which entitles the state to use, regulate, and control the waters for purposes of navigation; but that the right to divert the water for other uses, although public in their nature, can only be acquired by virtue of the sovereign right of eminent domain, and upon making just compensation.

See, however, in this connection, among other cases on possibly similar facts, *Minneapolis Mill Co. v. Water Comrs.* (1894) 56 Minn. 485, 58 N. W. 33, holding that the rights of riparian owners on navigable or public streams of water are subordinate to public uses of such water, and that the navigation of the stream is not the only public use to which such waters may be applied. And it was held that a municipality might, without awarding compensation to a mill owner whose power was injuriously affected, divert the water for purposes of supplying the city with water for domestic use, and that the public nature of the use was not affected by the fact that consumers were charged by the municipality for water used, as a means of paying the cost of maintaining the

plant. The decision is affirmed in (1897) 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157, in which the court held that the appropriation of the waters of a lake for a city water supply, thereby preventing their flowing past a water power in a river, without compensation for the resulting injuries to riparian owners, is a matter of local law, on which the Federal court must follow state decisions.

The limitation of the doctrine that the public may improve the navigation of a stream, without the consent of, and without compensation to, riparian owners who are injuriously affected, is shown in several other cases.

The right of the public to improve navigation without liability for consequential injuries to riparian rights was held in *Beidler v. Sanitary Dist.* (1904) 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118, not to include the right to take the water of a navigable stream to supply an artificial channel or canal. In this case a drainage district, which was a public corporation, by drawing the water of a navigable stream through a drainage ditch, lowered it in the stream and in canals which led from it and were used for dockage purposes. The owners of the lots fronting upon the canals were held to have acquired by prescription the same riparian rights in the water therein as they would have had if the canals had been natural waterways. The court held that, under a constitutional provision that private property should not be taken or damaged for public use without just compensation, damages were recoverable for injuries sustained due to the lowering of the water in the river and canals, which impaired the value of the latter for dockage purposes; and that this liability for damages could not be defeated on the ground that incidentally the public had created a navigable channel, through making the improvements, in that the drainage canal was by statute declared a navigable stream, the case not being within the rule that the public is not liable for injuries to riparian owners in consequence of the improvement of navigation.

The court, also, in *Beidler v. Sanitary Dist.* (Ill.) supra, held that a liability for damages could not be defeated on the ground that the act was an exercise of the police power for the promotion of the public health.

The court in *Beidler v. Sanitary Dist.* (Ill.) supra, said that the primary purpose of the creation of sanitary districts under the statutes was to provide for the preservation of the public health, by improving the facilities for the disposition of sewage, and by supplying pure water; and that the fact that a navigable waterway might be created was a mere incident, and not one of the purposes for which the sanitary district was created. The court also took the view that the superior right of the public to improve navigation without compensation to riparian owners extended only to the right to improve navigation in the stream in question, or in a tributary, and not the right to divert the water for the purpose of making navigable and artificial channels.

And it was held in *Fulton Light, Heat & P. Co. v. State* (1911) 200 N. Y. 400, 37 L.R.A.(N.S.) 307, 94 N. E. 199, that the right of the state to use the bed and waters of a river for the improvement of navigation does not extend to the diverting of the waters from the river to an artificial channel along the bank, constructed not for the improvement of the navigation of the river, but as a separate navigable waterway; and that, if the state attempts to do so, it must make compensation to the riparian owner for the injuries thereby caused him. It was said: "The right of the state to make improvements in the river for the benefit of the public, in facilitating navigation and transportation thereon, must be fully conceded. It may do so without regard to the private ownership of the bed of the river. The proprietary interest of the riparian owner is subordinate to the public easement of passage, and the state may be regarded as the trustee of a special public servitude, as it was termed in *Canal Fund Comrs. v. Kempshall* (1841) 26 Wend. (N. Y.) 404. In the exercise of its authority in that respect, the legislature may direct the

performance of acts by state officers, which tend to promote the public right of passage and transportation, without subjecting the state to liability. When, however, it is not the channel or bed of the river which is to be regulated, and land is taken, and the river waters are diverted for the purpose of constructing and operating some other channel distinct from that of the river, then the limit of the state's authority freely to intrude upon the riparian owner's rights has been reached. . . . The state, by the exercise of its power of eminent domain, could take these claimants' lands and divert from their power-plant properties the water power which operated them, upon making just compensation therefor; but, in my opinion, it had no unlimited right to make use of the river for a public purpose, except as such purpose was related to the improvement of the channel, or bed, of the river itself, for purposes of navigation or transportation."

It was held in *Canal Fund Comrs. v. Kempshall* (N. Y.) *supra*, referred to in the last case, that where, in the construction of an aqueduct across a navigable stream under authority of the state, water was temporarily diverted from the mill of a riparian owner on the stream, the owner was entitled to damages, since his rights were only subject to the rights of the public as to navigation.

Where discharge from a sewer into a navigable river caused large quantities of sand and filth to be deposited in the bed of the river, around and near the piles on which the plaintiff's building was constructed, and in order to provide a settling basin, and to avoid the expense of frequent removals of the deposit, the city caused excavations to be made in the river bed around and near the piles, whereby they were undermined, it was held in *Pomroy v. Granger* (1894) 18 R. I. 624, 29 Atl. 690, that the work did not constitute merely the legitimate dredging which the city might be entitled to do for the improvement of navigation, but that the city was liable for damages.

In *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* (*Patten Paper Co. v. Kaukauna Water Power*

Co.) (1895) 90 Wis. 370, 28 L.R.A. 443, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019, it is said: "The riparian rights of the lower owners of land upon the bank of the stream are property such as cannot be taken by the state even for a public use,—except in aid of navigation,—without compensation to the owner, and cannot be taken at all, or impaired, for a private use. . . . The right of the state to improve the stream as a highway, and for the purpose of aiding its navigation, is superior to the rights of riparian owners. It may take and divert, absolutely and without compensation, so much of the water of the stream as may be required to improve its navigation. But that is the limit of its right." A later appeal in (1896) 93 Wis. 287, 66 N. W. 601, 67 N. W. 432, is reversed on grounds beyond the scope of the annotation, in (1898) 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

Attention is called, also, to *Barney v. Keokuk* (1876) 94 U. S. 324, 24 L. ed. 224, where the title to a marginal street bordering on the Mississippi river, in Iowa, was in the adjacent proprietor, subject to the public easement, and the court held that while the public authorities had the right to use the street for wharves and levees, and to make other improvements thereon, necessary or incidental to navigation, including a packet depot used in connection with shipping, without the consent of the adjacent proprietor and without making compensation to him, they had no right to authorize the erection of a permanent railroad depot along such water front, so as to cut off his riparian rights, without his consent and without compensation.

Although the facts do not bring it within the scope of the annotation, attention is called, also, to *Chenango Bridge Co. v. Paige* (1880) 83 N. Y. 178, 38 Am. Rep. 407, in which the court, referring to a fresh-water stream which has been declared a public highway, and subject to the public easement for purposes of navigation, said: "The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the

purpose of regulating, preserving, and protecting the public easement. Further than that, it has no more power over these fresh-water streams than over other private property. It may make laws for regulating booms, dams, ferries, and bridges only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the Constitution."

In *Lewis on Eminent Domain*, 3d ed. § 84, it is said that any interference with the rights of a riparian owner on a private navigable stream, under legislative sanction, for any purpose not connected with the navigation of the stream, is a taking; and that any interference with the accustomed flow of the stream, in its quantity, quality, or uniformity, to the damage of a riparian proprietor, except for the improvement of navigation, will be actionable.

If the main purpose of the improvement is in aid of navigation, it has been held that the fact that incidentally other purposes may be served does not take the case out of the rule relieving the public from payment of compensation for injuries suffered by riparian owners, from the improvement of navigable streams for purposes of navigation. Thus, in *Home for Aged Women v. Com.* (1909) 202 Mass. 422, 24 L.R.A. (N.S.) 79, 89 N.E. 124, it was held that the fact that a plan for the improvement of a tidal body of water, for the benefit of navigation, included the construction of a public park along a strip formerly occupied by the tidewater in front of riparian property, so as to cut such property off completely from access to the water, did not cause it to exceed the power of the government over the land under the water owned by it, so as to entitle the riparian owner to compensation for the injury thereby caused to his property. The court said: "It is contended by the petitioners that the changes made by the commission were not made for the improvement of navigation, and therefore were not authorized under the rules of law stated above. In the first place, we think it would be too strict a doctrine to hold that the trust for

the public, under which the state holds and controls navigable tidewaters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses in the interest of the public. In *Com. v. Roxbury* (1857) 9 Gray (Mass.) 483; *Shaw, Ch. J.*, in speaking of the seashores and the land under the sea, said of the King 'that he held the same *publici juris*, for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries.' As the state is not only the holder of the title, but the representative of the people, it may exercise the police power over the property, for their good. The rights of individuals, both in their persons and in the use of their property, are subject to the exercise of the police power. The change in the Charles river under these statutes was for the improvement of navigation as well as for other useful purposes. If that was one of the purposes of the legislature, it was enough to warrant the legislation and the action under it, even if such a change in the river could not be authorized for other useful purposes alone without compensation to these petitioners. . . . Connected with the plan, there were doubtless other important considerations, relative to the public health and the public comfort, which properly appealed to the legislature as the representative of the police power. In the interest of safer and more convenient navigation over the flats along the Charles river, and of the public health and comfort, the construction of the dam and the filling of a strip of land outside of the sea wall were treated by the legislature as parts of a single project for the public good. The building of a new wall or embankment, and the taking of the intervening land for a public park, are required by the same statute that directs the construction of the dam, and are natural, if not necessary, incidents of the change in the level of the water. There was a sufficient reason, in the conditions and in the objects to be accomplished, for the exercise of the

paramount power of the legislature over the commonwealth's lands under tidewater."

The annotation does not cover such questions as what is a public use or improvement in aid of navigation. It does not, therefore, include cases such as *Cohn v. Wausau Boom Co.* (1879) 47 Wis. 314, 2 N. W. 546, where a

boom company was held to be a quasi public corporation, or an agent of the state for the improvement of the river, and was held entitled, under legislative authority, to construct a boom for the receiving, assorting, and distributing of logs, without compensation to a riparian owner in front of whose land the boom was constructed. R. E. H.

EPHRAIM LEDERER, Collector of Internal Revenue, Plff. in Err.,
v.
JOHN CADWALADER, JR.

United States Circuit Court of Appeals, Third Circuit — August 18, 1921.

(274 Fed. 753.)

Internal revenue — income tax — fees of executor.

The office of executor of a single estate is not, although held by an attorney at law, a trade or business within the meaning of a statute imposing a tax on the income of a trade or business having no invested capital.

[See note on this question beginning on page 414.]

ERROR to the District Court of the United States for the Eastern District of Pennsylvania (Dickinson, Dist. J.) to review a judgment in favor of plaintiff in a proceeding to recover a tax paid, under protest, on commissions received by him as executor of a certain estate, to defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington, Woolley, and Davis, Circuit Judges.

Messrs. Charles D. McAvoy and T. Henry Walnut for plaintiff in error.

Mr. Thomas Raeburn White for defendant in error.

Davis, Circuit Judge, delivered the opinion of the court:

John Cadwalader, Jr., plaintiff below, was appointed executor and trustee of the estate of Mr. Eckley B. Coxe, who died in 1916. His account, filed in 1917, showed that he received in commissions as executor \$28,974. Ephraim Lederer, collector of internal revenue for the first district of Pennsylvania, imposed an excess profits tax under the Revenue Act of October 3, 1917 (40 Stat. at L. 300, chap. 63, Comp. Stat. §§ 6336½a et seq. Fed. Stat. Anno. Supp.

1918, p. 341), for the calendar year of 1917, of \$1,971.23 on these commissions, which plaintiff paid under protest and for the refund of which he immediately filed a claim, which was rejected. These proceedings were instituted to recover the tax thus paid. The case was tried to a jury, which rendered a verdict in favor of the plaintiff and the defendant is here on writ of error.

The tax was levied under the authority of § 209 of the act (§ 6336½j), which provides "that in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by

section two hundred and one, a tax equivalent to eight per centum of the net income of such trade or business."

This is the only section of the act designed to reach the income derived from a trade, business, or profession in which no capital, or only a nominal capital, is invested. The tax "equivalent to 8 per centum," assessed by this section, is in lieu of the higher tax imposed by § 201, in which capital is invested.

The determination of this case depends upon what is meant by "trade or business," which, as defined by § 200 of the act (§ 6336³a), includes "professions and occupations."

The defendant contends that "trade or business," as used in § 209, comprehends all the activities of an individual of every kind which may be followed and called a trade, business, profession, occupation, or vocation; and the income received from such activity, if engaged in only a single time, is taxable under this section, because such activity may be followed as a vocation or profession. According to this view, it makes no difference whether the income is received from a vocation or avocation, if the activity is such that it may be followed by someone as a trade, business, or profession. If this position is correct the defendant's motion for a nonsuit should have been granted.

The plaintiff tried his case on the theory, which he is seeking to maintain here, that, to be taxable under § 209 of the act, the income, in the case of an individual, must be derived from some activity engaged in with such frequency and to such extent that it may be called *his* trade, business, profession, occupation, or vocation, and that income derived from any activity not so engaged in by an individual is not taxable under this section as "war excess profits tax."

This section has been construed by the Secretary of the Treasury, who is charged with the administration of the act, in article 8 of

Regulation No. 41 in the following language:

" 'Trade' in the Case of Individuals.—In the case of an individual, the terms, 'trade' 'business,' and 'trade or business,' comprehend all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation, including occupations and professions. When such activities constitute a vocation they shall be construed to be a trade or business whether continuously carried on during the taxable year or not, and all the income arising therefrom shall be included in his return for excess profits tax.

"In the following cases the gain or income is not subject to excess profits tax; and the capital from which such gain or income is derived shall not be included in 'invested capital:' (a) Gains or profits from transactions entered into for profit, but which are isolated, incidental, or so infrequent as not to constitute an occupation; and (b) the income from property arising merely from ownership, including interest, rent, and similar income from investments except in those cases in which the management of such investments really constitute a trade or business."

The testimony discloses that the plaintiff is a lawyer and has no other profession. He had nothing to do with the preparation of the will, and never represented the testator professionally. There was no testimony tending to show that the defendant ever held himself out as a person specially qualified to act, or desirous of acting, as executor, and, so far as the testimony shows, this was the first and only time that he ever acted as such. While it may be true, as defendant contends, that an attorney's training and experience qualify him to be a good executor, they may also qualify him to be efficient in many other pursuits which professionally he never touches. The training of men in other professions and occupations may fit them

also to be good executors, but this does not, in our opinion, furnish a ground for taxing income under this section of the act, if it is received by such persons for a single, isolated, avocational activity, requiring no more of those taxed than the record discloses was required of the plaintiff.

The defendant's argument to sustain his position is as follows: Section 206 of the act (§ 6336g) provides that the net income of an individual shall be ascertained and returned "for the taxable year, upon the same basis and in the same manner" as provided in title 1 of the Act of September 8, 1916 (39 Stat. at L. 756, chap. 463), as amended by this act. Section 2 of that act, as amended by § 1200 of this act (§ 6336b [a]), provides that "net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

He therefore concludes that income derived from any source whatever forms the basis of ascertaining and returning excess profits, or additional income, tax of individuals having no invested capital or only a nominal capital, but this conclusion is a non sequitur.

The defendant tries to sustain his position by applying the provision regarding trades and businesses of corporations to the trades, businesses, and professions of individuals. Section 201 (§ 6336b), after setting forth the taxes to be paid by corporations, partnerships, and individuals, provides in the case of corporations and partnerships that

"for the purpose of this title every corporation or partnership . . . shall be deemed to be engaged in business, and all the trades and businesses in which it is engaged shall be treated as a single trade or business, and all its income from whatever source derived shall be deemed to be received from such trade or business."

So, also, defendant says, in the case of individuals having no invested capital, all their trades, businesses, or professions are treated as a single trade, business, or profession, and income from whatever source derived is deemed to be received from that business or profession. Consequently the commissions of the plaintiff, though not received strictly from his profession, are deemed to have been so received, and are therefore subject to the excess profits tax. The provision, however, is expressly limited to corporations and partnerships. But it was meant, defendant argues, to apply to individuals, because "under the provisions of § 206 whereby an individual's net income for the purpose of the act is to be figured in the manner provided in title 1 of the 1916 Act, his income 'derived from any source whatever' is specially made subject to the tax," and it is, therefore, not necessary expressly to make the provisions applicable to individuals. But defendant loses sight of the fact that identically the same language was used as to the basis and manner in which income is to be ascertained and returned in the case of individuals, as in the case of corporations and partnerships. Consequently Congress could not have intended that income derived from any source whatever, whether vocational or avocational, should be deemed to be derived from an individual's profession. If it had so intended, the provision would have expressly included individuals as well as corporations and partnerships.

Section 2 of the Act of 1916, which simply defines income, cannot be made the basis for imposing an ex-

cess profits tax under § 209, as defendant contends. On income, thus defined, a tax must, of course, be paid, and as a matter of fact the defendant did make return of and pay the tax on his commissions, but not as excess profits tax. There is not a word in the statute which says, or even hints, that this additional tax of "8 per centum," "in the case of a trade or business having no invested capital," shall be ascertained and returned or paid on a single avocational activity, on the basis of income as defined in § 2 of the Act of 1916.

The taxes provided for in § 209 are "in addition to taxes under existing law." Sections 201-208 (§ 6336§b-6336§i) provide for taxes on income derived from trades or businesses having invested capital. Section 209 provides for taxes on income from a "trade and business," including professions and occupations "having no invested capital." Section 2 of the Act of 1916 simply defines income, and does nothing more. It does not attempt to declare when a tax on income, thus defined, shall be imposed under § 209. It does not provide a "basis" or "manner" for ascertaining and returning income under § 209 of the

Act of 1917, except in so far as it defines what income is. As a matter of fact, there were no taxes ascertained and returned under the Act of 1916 in the case of a "trade or business having no invested capital."

Taxes on income from a "trade or business" clearly mean taxes on the trade, business, profession, or occupation of the taxpayer himself. This is the plain meaning of the statute, and any other construction distorts the simplicity of the language and requires that we read into the language something it does not contain. A single, isolated activity of the character of the executorship of the plaintiff does not constitute a trade, business, profession, or vocation under the facts of this case. We agree with the Secretary of the Treasury and the learned trial judge in the interpretation of this section.

Internal revenue—Income tax—fees of executor.

The question of whether acting as executor of this estate was the business, occupation, or profession of the plaintiff was correctly submitted to the jury, whose verdict settled the fact in the negative, and the judgment of the District Court will therefore be affirmed.

ANNOTATION.

Commissions as executor, administrator, guardian, etc., as income subject to income tax.

As to income tax in respect of salaries of public officers and employees, see annotation in 11 A.L.R. 532.

Apparently there has been no judicial decision upon the question whether or not commissions received by an executor or other fiduciary, as such, constitute income within the meaning of the Federal Income Tax Acts. And as a matter of fact there would seem to be no question that such commissions are taxable as income, since the law expressly provides that the gross income of a person shall include gains, profits, and income

derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions or vocations. This seems to have been the view taken by the Treasury Department. For instance, it held in T. D. 2135 that, where a trustee's compensation for services for a period of years was not determined until the trust was terminated, the full amount allowed must be returned as income for that year, and not prorated over the period for which the services were rendered. And see *Jackson v. Smietanka* (1921) — C. C. A. —, 272 Fed.

970, wherein it was held that a receiver of a railroad, who had been paid a monthly sum during his term as such, but who at the end of five years, and upon the termination of the receivership, applied for and received additional compensation as a final allowance, must enter as income for that year the whole amount of the additional compensation, rather than prorate it through the five years.

There was an inferential ruling in *United States v. Vanderbilt* (1921) 275 Fed. 109, 545 U. S. Tax Cases, 577, to the effect that the commissions of a fiduciary are taxable income, it having been held that a bequest made to executors and trustees, in lieu of "all compensation or commissions to which they would otherwise be entitled as executors or trustees," were not exempt as "bequests," but were "compensation" for personal services, and as such taxable as income. In reaching this conclusion the court said: "There seems to me no question whatever that these legacies—in part, anyway—are compensation for personal services. Where the testator provided that they should be 'in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees,' he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, these legacies must in themselves be compensation, and since the commissions would certainly have been for 'personal services,' the substitute itself was the same. It is true

that the form of the compensation is a 'bequest,' and a 'bequest' is exempt; hence there is a verbal contradiction between one part of the statute and the other. Yet I cannot doubt that all bequests are not exempt. Suppose, for instance, that a man agreed to leave another a legacy if he would take care of him while he lived. The legacy would be a 'bequest,' but can anyone suppose that it would not be 'compensation' for personal services, which would be taxable?"

A materially different question is presented by the query whether or not commissions of the kind under consideration herein constitute "income" within the meaning of the excess profits tax. This tax, it will be remembered, was directed against profits and income derived from trade or business, so that the question resolves itself into a determination of whether or not the acting as a fiduciary amounts to a trade or business. Upon considering this point, the court in the reported case (*LEDERER v. CADWALADER*, ante, 411), held that an attorney who acted as executor of a single estate, and did not make a business of acting as such, or hold himself out as especially qualified to do so, was not subject to a tax upon commissions received as executor under the provisions of the Excess Profits Tax Act of 1917. But, as is intimated in this case, it would seem that if the taxpayer made a business of acting as a fiduciary, his commissions as such would be subject to the excess profits tax. G. J. C.

WILLIAM J. STRONG, Appt.,

v.

SONKEN-GALAMBA IRON & METAL COMPANY.

Kansas Supreme Court—May 7, 1921.

(109 Kan. 117, 198 Pac. 182.)

Workmen's compensation — refusal to submit to operation.

1. The unreasonable refusal of an injured employee to permit a surgical operation where the danger to life from the operation would be very

Headnotes by MARSHALL, J.

The rule itself, which places the loss arising from improvements in aid of navigation on the riparian owner, seems a harsh one, and in view of this the limitation of the rule made in the CONGER CASE seems commendable from an equitable point of view.

Although the improvement was not in the stream itself, and, so far as the facts are concerned, the case is merely representative of a class of decisions not included herein, the limitation last referred to, where the improvement is not made in aid of navigation, is supported also by *Re New York* (1901) 168 N. Y. 134, 56 L.R.A. 500, 61 N. E. 158, where an owner of property fronting on the Harlem river, in New York city, sought damages from the city for injury to his riparian rights through the construction by it, under legislative authority, of a speedway along the tideway of the river, thereby depriving him of access to the river. The use of the speedway was limited to the pursuit of pleasure in driving, riding, or walking, and all forms of commercial traffic were rigidly excluded therefrom. It was held that there was no authority in the public for constructing the same, without compensation to the riparian owner for the injury caused thereby, although, if the improvement had been in aid of navigation, the court said, there would have been no right to compensation.

Because of the small amount of judicial discussion on the present question, it seems advisable to refer at some length to the reasoning of the court in *Re New York* (N. Y.) supra. It was said: "The appellant herein, while conceding the right of the state or municipality to make improvements for the benefit of navigation without compensation to riparian proprietors for invasion of their private rights, contends that the construction of a speedway, from which are excluded all forms of commercial traffic or intercourse, is not an exercise of that right, and that, therefore, his riparian rights cannot be taken or destroyed without due compensation. . . . The state holds the title in fee in the

tideway, and to the lands under water beyond the same, as trustee for the public in its organized capacity. As such trustee, and in the exercise of its governmental functions, it may improve the tideway, or the adjacent waters, for the benefit of navigation, even to the detriment of abutting upland owners, and without compensation to them. As stated in *Sage v. New York* (1897) 154 N. Y. 70, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, this rule is based upon the principle that, 'when any public authority conveys lands bounded by tidewater, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare.' Does this principle of implied or reserved power extend to any public use of the tideway, or the waters beyond the same, for purposes not related to, or connected with, navigation and commerce? The basis of the theory upon which the trusteeship of the state in our tideways and tidewaters is founded seems to be that there are certain rights of navigation and commerce by water which are common to all, and are, therefore, paramount to the rights of individuals. As was said in *People v. New York & S. I. Ferry Co.* (1877) 68 N. Y. 77: 'The sea and navigable rivers are natural highways, and any obstruction of the common right or exclusive appropriation of their use is injurious to commerce, and, if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying, it.' Therefore, the state, which is the public in concrete form, is charged with the duties and vested with the powers essential to the establishment and preservation of these common rights. The very implication of the trust upon which the state holds the tideway and tidewaters speaks of the definite purpose for which it was created. If the state may use the waterways for any purpose whatsoever, then it is no longer a trustee, but an irresponsible autocrat. If it may erect upon our tide-

ways or tidewaters any kind of structure that may be suggested by the whim or caprice of those who happen to be in power, it will be possible to destroy navigation and commerce by the very means designated for their preservation and improvement. . . . If the trusteeship of the state in the tideway exists only for the purposes above enumerated, it would seem to follow that, when, in the exercise of its general right of eminent domain, the state appropriates the tidewater to uses inconsistent with the trust upon which it is held,—that is, to some use not for the benefit of navigation,—compensation should be made to the riparian proprietor whose rights have been abridged or taken away. Any other conclusion would necessarily admit the arbitrary and unlimited powers of the state over its tideways and tidewaters for any and every purpose, whether connected with the subject of navigation or not; and no such admission should find its way into our laws. . . . If these changed conditions are the result of improvements to general navigation, then, as we have seen, the injured upland owner is remediless, for it was simply the exercise by the state of its reserved and paramount power over its tideways and tidewaters. If, on the other hand, such changes are created by the state or municipality, not as trustee for the people of the tideways and tidewaters, not for any improvement of navigable waters or any matter connected therewith, but by the building of a public work which, in its whole length and breadth, is utterly destructive of navigation and commerce, then it would seem to follow that the persons whose property has been taken, or whose easements have been destroyed thereby, are entitled to compensation, under the constitutional guaranty that no private property shall be taken for public use without just compensation."

The distinction which is made in the last case, where the improvement is not for the purpose of navigation, is further shown by reference to the decision in *Sage v. New York* (1897)

154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, in which the court held that a riparian owner's right of ingress and egress to his water front does not include a right to compensation for an interference therewith, caused by the public improvement of the water front for the benefit of navigation.

The court in *Re New York* (1901) 168 N. Y. 134, 56 L.R.A. 500, 61 N. E. 158, *supra*, referred to *Smith v. Rochester* (1883) 92 N. Y. 464, 44 Am. Rep. 398, in support of the distinction above referred to, the latter case denying the right of a municipality, under authority from the state, to draw from a lake, a navigable body of water, a supply of water for the use of its inhabitants, without compensation to riparian owners on a stream flowing from the lake. This particular class of cases, of course, is not covered in the annotation. But the case is cited for the reason that it is referred to in the later New York decision, as holding that the public has an easement in such waters for purposes of travel, as on a highway, which entitles the state to use, regulate, and control the waters for purposes of navigation; but that the right to divert the water for other uses, although public in their nature, can only be acquired by virtue of the sovereign right of eminent domain, and upon making just compensation.

See, however, in this connection, among other cases on possibly similar facts, *Minneapolis Mill Co. v. Water Comrs.* (1894) 56 Minn. 485, 58 N. W. 33, holding that the rights of riparian owners on navigable or public streams of water are subordinate to public uses of such water, and that the navigation of the stream is not the only public use to which such waters may be applied. And it was held that a municipality might, without awarding compensation to a mill owner whose power was injuriously affected, divert the water for purposes of supplying the city with water for domestic use, and that the public nature of the use was not affected by the fact that consumers were charged by the municipality for water used, as a means of paying the cost of maintaining the

The court concludes, as to matters of law:

"That plaintiff is entitled to judgment against defendant for temporary total disability to date for \$42.60; for partial disability to date, 75 weeks at \$7.50 per week \$552.50; in the aggregate lump sum of \$595.10; also interest on amounts from respective dates when due, in the sum of \$——.

"That the plaintiff should endeavor to effect a cure of his condition by submitting to the operation as tendered by defendant, and, in case of his failure so to do, his compensation shall cease at the end of twenty-five weeks, after May 26, 1920, and during said twenty-five weeks, beginning June 2, 1920, defendant shall pay plaintiff compensation in the sum of \$7.50 per week, in weekly instalments.

"Should plaintiff accept the tendered operation, defendant shall pay, in addition to the operation expenses, compensation weekly in the sum of \$10.60 per week during the time the operation renders plaintiff totally incapacitated, and \$7.50 per week for the remainder of the said twenty-five weeks, after June 2, 1920.

"In case the operation proves successful, the compensation shall cease with said twenty-five weeks; but if plaintiff's disability is not thereby removed, compensation should then become due and payable at the rate of \$7.50 per week for the remainder of the period of eight years as provided by law, either in a lump sum or in payments as the court may determine, and jurisdiction should be retained for the purpose of determining the length of time the operation results in total incapacity, whether or not the plaintiff is restored by the operation, and compensation ceases; if not, whether compensation shall thereafter be paid per week or in a lump sum and any other matters necessary for determination; such jurisdiction to be exercised upon motion of either party upon proper notice.

"That the defendant is not es-

topped from maintaining this proceeding."

Judgment was rendered accordingly, and from that judgment the plaintiff appeals.

The plaintiff gave the following as his reasons for refusing to have the operation performed: "I think I am too old. I am fifty-four years of age. That is one reason; another is that I do not think I could stand it under my present age and condition. A man has to be perfectly healthy to undergo an operation and have it successful. I am not in condition, because I was 'jammed through here' [indicating]. By jammed through here, I mean my ribs was pulled away from my breastbone; and my spine is numb. That happened when I was thrown into the car. Another reason that I do not want to submit to an operation is that there is a chance of a man not living. I heard Dr. Stemen testify and say there was a chance of losing."

1. The principal question presented is, Did the court have power to reduce the amount of compensation that should be paid to the plaintiff if he refused to submit to an operation?

The principle, which the defendant seeks to have applied, has been recognized in actions to recover damages for personal injuries. Note to *Donovan v. New Orleans R. & Light Co.* in 48 L.R.A. (N.S.) 110-113; note in 12 N. C. C. A. 59; 6 *Thomp. Neg.* § 7210. This rule was applied in this state in *Joseph Schlitz Brewing Co. v. Duncan*, 6 Kan. App. 178, 51 Pac. 310, where that court said: "The next allegation of error is that the court withdrew from the jury all evidence as to the probable result of a surgical operation. This we think was error, as the probabilities of a cure of the disability would, to some extent, affect the amount of damages. This should have been allowed to go to the jury and be weighed by them in assessing the amount of the recovery, as should also the probable expense at-

tending such an operation. This is not in mitigation of damages, but is a proper method of showing the actual damages sustained. If the plaintiff could be certainly cured by an operation that was safe and inexpensive, the injury would surely be less serious than one for which there was no hope; and to the degree that the certainty, safety, and inexpensiveness of a cure could be assured, in such a degree would the actual damages decrease." 6 Kan. App. p. 181.

The present proceeding is not an equity case; but two of the oldest principles in equity jurisprudence are that "he who seeks equity must do equity" (21 C. J. 172), and, "he who comes into equity must come with clean hands" (21 C. J. 180). This is but another way of saying that he must do right who seeks to compel another to do right.

In a "Digest of Workmen's Compensation Laws in the United States and Territories, with Annotations, Sixth Edition, Revised to December 1, 1919," published by the Workmen's Compensation Publicity Bureau, is found a tabulated résumé of the statutory provisions contained in the several states of the American Union. This digest shows that in the following states the Workmen's Compensation Laws provide for the reduction, suspension, or rejection of compensation for the unreasonable refusal of an injured employee to accept medical treatment, or to submit to a surgical operation, or for persisting in insanitary practices which retard recovery: Alabama, California, Idaho, Illinois, Indiana, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Porto Rico, Tennessee, Texas, Virginia, and Wyoming. Why were these provisions placed in the Workmen's Compensation Laws of these states? There is but one answer, and that is because their legislatures thought that the principles there enacted into law were right.

In England and Scotland it is held

that if an injured employee unreasonably refuses to submit to an operation he is not entitled to compensation. *Donnelly v. Baird & Co.* [1908] S. C. 536, 45 Scot. L. R. 394, 1 B. W. C. C. 95; *Warncken v. Richard Moreland & Son* [1909] 1 K. B. 184, 78 L. J. K. B. N. S. 332, 100 L. T. N. S. 12, 25 Times L. R. 129, 53 Sol. Jo. 134, 2 B. W. C. C. 350; *Paddington Borough Council v. Stack*, 2 B. W. C. C. 402; *Wheeler, R. & Co. v. Dawson*, 107 L. T. N. S. 339, 5 B. W. C. C. 645; *O'Neill v. John Brown & Co.* [1913] S. C. 653, 50 Scot. L. R. 450, 6 B. W. C. C. 428; *Walsh v. Locke & Co. (Newland)* 110 L. T. N. S. 452, 7 B. W. C. C. 117; *Dolan & Son v. Ward*, 8 B. W. C. C. 514; *Wright v. Sneyd Collieries*, 84 L. J. K. B. N. S. 1332, 113 L. T. N. S. 633, 8 B. W. C. C. 537.

In *Donnelly v. Baird & Co.* 1 B. W. C. C. 95, Lord Justice Clerk used the following language: "I hold it to be the duty of an injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinary manly character would undergo for his own good, in a case where no question of compensation due by another existed." Page 100.

Lord M'Laren said: "I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him." Page 102.

A workman's compensation case in which an injured employee claimed compensation for hernia is *Schiller v. Baltimore & O. R. Co.* 137 Md. 235, 112 Atl. 272, decided December 2, 1920, where the supreme court of Maryland said:

"It was vigorously contended by appellant that one should not, as a

condition precedent to continued compensation during disability, be required to submit to an operation the result of which might be fatal even if such result is so unlikely as to make the danger practically negligible. To support this contention he has cited but three authorities, all being New Jersey cases: *Newbaker v. New York, S. & W. R. Co.* 38 N. J. L. J. 175; *McNally v. Hudson & M. R. Co.* 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185; *Feldman v. Braunstein*, 87 N. J. L. 20, 93 Atl. 679.

"The overwhelming weight of authority is opposed to this view, holding that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily reasonable man would submit to in like circumstances." 137 Md. 246.

In another hernia case arising under the Workmen's Compensation Law of Michigan, *O'Brien v. Albert A. Albrecht Co.* 206 Mich. 101, 6 A.L.R. 1257, 172 N. W. 601, the supreme court of that state used the following language:

"The physician of the company and the one of plaintiff's selection both advised an operation for the hernia. Such operation is not attended with danger to life or health, and it appears to be undisputed that it affords the only reasonable prospect of restoration of plaintiff's capacity to labor at his trade, that of a carpenter. Without it he may be able to labor at such light occupation as the condition of his feet and ankles will permit, but he cannot do heavy lifting, as his trade of carpenter requires. During all the time he has refused, and still persists in his refusal, to submit to the operation advised by his own physician, as well as the one in the employ of defendant. Plaintiff is an intelligent man, and whether such refusal is due to a defect of moral courage or not we are unable to say. The board did not find that his refusal was due to any ignorance or misunderstanding on his part, and

no such finding would be justified on this record. . . .

"We appreciate the timidity with which the average person contemplates an operation, minor as well as major. But we also appreciate that in thousands of cases, operations, many of them of but minor degree, have restored incapacitated men to the army of wage earners, and put them in position to discharge their duty to their dependents, themselves, and to society. We are impressed that under the undisputed evidence in the case it was the plaintiff's duty to accept the tendered operation. His unequivocal refusal to follow the advice and judgment of both physicians with reference to the operation relieved defendants from further activities in that direction, and, for the time being at least, absolved them from liability." 206 Mich. 104.

The same principle was followed by the supreme court of Wisconsin in *Lesh v. Illinois Steel Co.* 163 Wis. 124, L.R.A.1916E, 105, 157 N. W. 539, where that court said:

"Where, as in this case, the applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation, which is fairly certain to result in a removal of the disability, and is not attended with serious risk or pain, and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal.

"No question of compelling the applicant to submit to an operation is involved. The question is: Shall society recompense a workman for a disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances, and which would result in the removal of the disabili-

ity within the rule as stated above? It is true that the compensation awarded under the terms of the act is not damages in the technical sense, and that the rules relating thereto are not to be applied in cases arising under this act, and cases have been cited simply for the purpose of showing that damages accruing as a direct result of claimant's unreasonable refusal to submit to reasonable medical and surgical treatment, where the results are fairly certain, were not, even in tort cases, held to be proximately caused by the accident.

"The proposition that an applicant, under the provisions of this humane law, may create, continue, or even increase his disability by his wilful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society in general, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind." 163 Wis. 131, 132.

Neither Maryland, nor Michigan, nor Wisconsin has any statute authorizing the refusal, reduction, or suspension of compensation to an injured workman who refuses to submit to an operation. A number of annotators have cited cases on this question. 6 N. C. C. A. 390, "A Note on Hernia and Varicocele under Workmen's Compensation Acts;" 6 N. C. C. A. 675; 10 N. C. C. A. 185; Joliet Motor Co. v. Industrial Bd. 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 79; Toner v. Pennsylvania R. Co. 263 Pa. 438, 106 Atl. 797, 18 N. C. C. A. 779; Jendrus v. Detroit Steel Products Co. 178 Mich. 265, L.R.A.1916A, 387, 144 N. W. 563, Ann. Cas. 1915D, 482, 4 N. C. C. A. 864; O'Brien v. Albert A. Albrecht Co. 206 Mich. 101, 172 N. W. 601, 6 A.L.R. 1260.

The last note, however, is on "Duty of injured employees to submit to an operation or to take other measures to restore earning capac-

ity." Cases might be cited from states having statutory restrictions on the right of an injured employee to recover compensation where he refuses to submit to an operation; but it is thought that the reasoning in those cases, while broad enough to include the present discussion, may have been based upon the statutory provisions, and would, therefore, not be very persuasive in this state, where there is no such statute.

Why should the plaintiff permit an operation to be performed? It might not result in his improvement; it would be painful; it is remotely possible that it might result in his death. Many, if not most, of the ordinary activities of men are painful in a sense; the man who works hard all day until his muscles cry for rest, and the man who goes into the field when the temperature is from 90 to 105, and works under the direct rays of the sun, endure sensations that are as unpleasant and many times are as unbearable as pain. They are pain, but of a kind different from that caused by wounded flesh.

Danger to life is everywhere, at all times; it cannot be escaped by anyone. The most trifling accident to the person or the smallest scratch on the skin may result in death. The locomotive engineer and his fireman, when they climb into the cab of their engine and start on their trip, constantly face dangers that may, and often do, result in their death; the miner who goes into the earth to take therefrom ore or mineral faces death every day. These men are not deterred by danger, although they know that injury or death is liable to come at any time. They go because that is their field of labor, and it is their duty to go.

One of the greatest blessings that God has given to men is the ability to work, to work with hand and head and heart. Work produces happiness; refusal to work produces misery. Whatever of happiness there is in the world is the result of hard work. Whatever has been attained by man has been done by

hard work, and the greatest achievements have been produced by the greatest efforts. In art, literature, science, and in all industrial enterprises, the greatest achievements have been accomplished by the hardest labor. The last ounce of energy of which the person laboring was capable of putting forth has been what has produced the desired result. It is a man's duty to himself, to his family, to society, and to God, to work, to work hard, to work with all his might, to accomplish in his lifetime all that it is possible for him to accomplish, to keep his mind and body in such condition as will enable him to do his best, and to avoid everything that will detract from any of his powers or prevent him from accomplishing his utmost. If misfortune overtakes him in any way, and that misfortune detracts from his ability and renders him less able to work, mentally or physically, and the effect of the misfortune can be removed, it is his duty to do the thing that will restore him, even if there are pain and danger. There is no law to compel a man to perform any of these duties, but nevertheless they exist.

The state goes to great expense to fit its people for work, to protect them in their work, and to secure to them the result of their labor. Then if a man who receives these favors from the state will not work, he, at least, is not a good citizen.

The plaintiff has been injured. The injury can be remedied, and he can be restored to his former condition. It is his duty to do whatever

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is necessary to restore him. If he refuses to perform that duty, he should not ask the state or any person to assist him in that refusal. He cannot be compelled to undergo an operation, but he can be told that if he refuses he shall not receive compensation for that which he voluntarily continues.

2. The reasonableness of the refusal of an injured employee to submit to an operation has been con-

sidered in most, if not all, the cases where he has been denied compensation on account of such refusal. That reasonableness has

been disposed of in those cases as a question of fact. **Trial—question for jury—refusal to submit to operation—reasonableness.**

It is a question of fact that must be determined by the trier of facts and when he has determined it, and his conclusion is supported by evidence, that conclusion is binding on this court the same as the determination of any other question of fact. In the present case the district court tried the fact of the reasonableness of the refusal of the plaintiff to permit an operation. The court in substance found that the plaintiff's refusal was unreasonable.

3. The plaintiff argues that "there was no testimony to support the court's finding and judgment that the appellant was not totally incapacitated."

The finding was not made as thus indicated, but in substance it amounted to that. That plaintiff testified: "I have not been able to do any work of any kind since I had the accident, except I did a little work on a neighbor's automobile. I did no lifting, and it took me two weeks to get it done, and I was paid \$10. I helped to make a fence. I stapled the wire; I did none of the heavy work; I was paid \$5 for that. That is all of the work I have been able to do, and all I have earned since the accident. I cannot do manual labor because I am injured through my shoulders and arms, and the rupture; I cannot get a truss to hold it up and keep it up properly. Have not been able to. When I try to work I do not have the strength I had before, and I suffer pain."

One physician testified: "I think he could do light work without any trouble and without any danger of increasing these hernias."

Another physician testified: "I think this man could do light work very nicely with the aid of a truss, and without danger."

That evidence was sufficient to

support the finding of partial disability after the period of total disability expired, and to support the finding that the plaintiff was able to earn \$5.25 a week, "approximately 30 per cent of prior wages."

**Evidence—
sufficiency.**

* 4. The plaintiff contends that the defendant is estopped to question the correctness of the award by reason of its having paid the \$500.26, the amount found due by the arbitrator at the time the award was made. The statute, § 16 of chapter 226 of the Laws of 1917, under which this proceeding was instituted, in part reads: "At any time before the final payment has been made under or pursuant to any award or modification thereof agreed upon by the parties, it may be reviewed by the judge of the district court having jurisdiction."

This statute provides for a review of the award after payments have been made under it. The defendant is not estopped to question the correctness of the award.

(5) The plaintiff challenges the power of the court to review the award of the arbitrator on the ground that the statute provides for such review for the following reasons only: "That the award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct or that the award is grossly excessive or grossly inadequate, or that the incapacity or disability of the workman has increased or diminished." Laws 1917, chap. 226, § 16.

The plaintiff cites *Roper v. Hammer*, 106 Kan. 374, 187 Pac. 858. That case does not control here, for the reason that the statute authorizes a review of the award where the amount given is grossly excessive. In its petition to review the award, the defendant alleged "that since the tender of said operation and its refusal by claimant, the de-

fendant says all payments directed to be made thereafter for total disability are grossly excessive, and the award of sums after the refusal of the tender is without authority on the part of the arbitrator."

Compensation for total disability, \$10.65 a week, was awarded. The court found that there was no total disability, but that there was partial disability, and that the plaintiff was entitled to recover \$7.50 a week during partial disability. This amounted to a finding that the award of the arbitrator was grossly excessive, and brought the proceeding within the statute authorizing a review of the award by the district court.

—review of
award.

The judgment is affirmed.

Johnston, Ch. J., and Burch, Mason, Porter, and Dawson, JJ., concur.

West, J., dissenting:

After about twenty-five years of European experiment, this country began to enact workmen's compensation laws. In 1884, Germany, by an accident insurance act, began the change which has thus developed. Maryland enacted a statute of this kind in 1902, followed by Montana in 1909, and New York in 1910. Ours was passed in 1911. In Germany 700,000 accidents, with 10,000 fatalities, occurred annually. The situation was less startling than in the United States, where there were from 2,000,000 to 3,000,000 accidents, with from 25,000 to 30,000 fatalities. Americana, vol. 29, p. 520.

"The great object of the workmen's compensation acts is to shift the burden of such economic waste from the employee to the industry, in order that it may ultimately be borne by the consumer as a part of the necessary cost of production." Kiser, Workmen's Comp. Acts, 8.

These cases are regarded as coming within the police power of the state, it is being held that their tendency is to raise the general standard of the people and to diminish

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the liability of injured workmen becoming public charges. *Id.* page 15.

Sixteen states and Porto Rico are named in the majority opinion as having provided by legislative enactment for the reduction, suspension, or rejection of compensation for unreasonable refusal to accept medical treatment or to submit to surgical operation. But our statute, with all its detail and all its amendments, although providing expressly for medical examination and refusal thereof, is utterly silent as to the duty of the employee to submit to a surgical operation as a condition precedent to receiving compensation. Hence, all the decisions in states which have covered this matter by legislation could be of no avail on the question here.

In 1916, twenty-five states had already enacted compensation acts. 21 New International Enc. 228. Very few of the courts of these states have had this question before them. The matter of compensation covered by our statute has nothing whatever to do with damages for injury in the ordinary acceptance of that term, and hence such decisions as *Joseph Schlitz Brewing Co. v. Duncan*, 6 Kan. App. 178, 51 Pac. 310, have no application. Cases are cited from Michigan, but the reason is not apparent, for in *Andrejwski v. Wolverine Coal Co.* 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724, 6 N. C. C. A. 807, it was held that the Compensation Act of that state was in derogation of the common law requiring strict construction, which is diametrically opposed to our decisions and to our statute which expressly provides that such statutes shall be liberally construed to promote their objects. Gen. Stat. 1915, § 11,829; *Southern Paint & Wall Paper Co. v. Perkins*, 90 Kan. 725, 136 Pac. 324.

In the cited *Schiller Case*, where the writer of that opinion said that the overwhelming weight of authority is opposed to this view, one of the cases going to make up this overwhelming weight is *United R. & Electric Co. v. Dean*, 117 Md. 686, 84

Atl. 75, which, upon examination, turns out to be an action for injury brought by a passenger against a railway company.

Numerous decisions, including some of those cited in the foregoing opinion, treat hernia as a very trivial matter. Inguinal hernia is an escape of a portion of the intestine into the inguinal canal. The known dangers are congestion, inflammation, and strangulation. Strangulation is well understood to be a most serious and dangerous condition; the per cent of fatalities being very large. The modern operation for inguinal hernia is to make an incision, close the walls of the inguinal canal as nearly as possible, and unite by suture.

In an article by Dr. Joseph A. Blake, in volume 5 of the *Reference Handbook of the Medical Sciences*, published in 1915, going most learnedly and extensively into the subject of hernia, after describing the various modern operations for inguinal hernia, this language is used: "As a rule children under four years of age and adults over fifty should not be operated upon, inasmuch as many children are cured by the wearing of a truss, and in the aged the hernia can be controlled by truss with less inconvenience than in the younger and more active while the dangers of operation are greater." Page 219.

The plaintiff testified he was fifty-four years old; that in pushing a wheelbarrow loaded with 200 or 300 pounds of iron the runway broke and threw the wheelbarrow full of iron to the bottom of the car, and plunged him headlong, so that he struck with all his weight on the upturned edge thereof, striking him in the lower abdominal region; that he had a rupture when he was a boy about eight years old, which healed up when he was about twelve, and he wore a truss until he was about twenty-one, and had never had any trouble about doing any heavy work since. He said he had no particular surgeon he had confidence in, and was not willing to choose a hospital

or surgeon and be operated on. "My particular reason for refusing to do so is that I think I am too old, I am fifty-four years of age. That is one reason; another is that I do not think I could stand it under my present age and condition. . . . I am not in condition, because I was jammed through here (indicating). By jammed through here, I mean my ribs was pulled away from my breastbone, and my spine is numb."

Dr. Stemen testified that the plaintiff had a large inguinal hernia; that the percentage of successful operations by the best doctors runs from 80 to 90 per cent. "An operation for inguinal hernia, such an operation as the person here possesses, is a major operation, and attended with some danger. I mean there is always some danger with the anesthetic, and always some danger of streptococcic infection, but the dangers are very, very minute. I would say they have 999 chances out of one thousand in getting well, but I qualify that by saying there is always some danger. . . . The danger of an operation depends upon the individual. Shock and fear have a great deal to do with an operation. . . . The chance of a complete recovery in such an operation as would be necessary in Mr. Strong's case are affected somewhat by the person's age. The cases of complete recovery are greater in young people than in older people, and in the case of a man fifty-four years of age the percentage of chances of complete recovery is much less than it would be in the case of a younger person."

Dr. Gray testified that the plaintiff's heart had some defect in the aortic valves. Dr. Lowman, who had performed 300 or 400 hernia operations, on cross-examination said: "About 10 per cent of the hernia operations are not complete successes. This is partly due to the individual conditions. Part of it is due to infection, and part of it is due to poor quality of gut and the breaking. All kinds of things may

occur in a surgical operation, even with the most extreme care."

The legislature, which since 1911 has been making provisions for the recovery of workmen's compensation, has gone into detail in minutiae, and said that one injured in the course of his employment shall receive compensation. It has, with apparent studiousness, avoided any such condition precedent as a refusal to submit to a surgical operation.

That a man like the plaintiff with no family, or one with a wife and children dependent upon him, must be barred from the benefits of the act, and thereby become in a greater or less degree a public charge, and thus bring on the very condition this legislation was confessedly made to avoid, is a startling declaration.

Even the British courts, followed by the very few tribunals which, in the absence of statute, have taken the view of the matter so ably stated by the majority opinion, have spoken almost apologetically, as an examination of the cases of *Warncken v. Richard Moreland & Son*, 100 L. T. N. S. 12, [1909] 1 K. B. 184, 78 L. J. K. B. N. S. 332, 25 Times L. R. 129, 53 Sol. Jo. 134, 2 B. W. C. C. 350; *Tutton v. The Majestic*, 100 L. T. N. S. 644, [1909] 2 K. B. 54, 78 L. J. K. B. N. S. 530, 25 Times L. R. 482, 53 Sol. Jo. 447; *Binns v. Kearley & Tonge*, 6 B. W. C. C. 608, 611, and *Walsh v. Lock & Co.* (Newland) 110 L. T. N. S. 452, 7 B. W. C. C. 117, will show.

With the eloquent eulogy on industry I agree, if industry be considered merely in contradistinction to idleness. But we are told in the sacred account of the creation that after the fall it was said to Adam:

"Because thou hast harkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life;

"Thorns also and thistles shall it

bring forth to thee; and thou shalt eat the herb of the field;

"In the sweat of thy face shalt thou eat bread, till thou return unto the ground. . . ." Genesis iii. 17, 18, 19.

I am not ready to believe that the fallen state of our first parents was better than their primal innocence, that thorns and briars are better than flowers and fruits, that "the man with the hoe" has a more desirable life than one with means of leisure, or that incessant toil is the ultima Thule of human existence. Nothing has more thoroughly marked the process of social economics and modern legislation than the belief that there should be time for recreation and cultivation of the intellectual, emotional, and spiritual elements of our nature, and such leisure is more to be desired than a treadmill, galley-slave life or a self-imposed immolation upon the altar of hard work.

Our Workmen's Compensation Act was passed in order that employees receiving injuries arising out of and in the course of their employment should not have to resort to lawsuits or be compelled to suffer without remedy; that the consumers in paying for the products should have added to their cost a sum sufficient to justify the employer in paying a reasonable compensation. This was in order that the injured workman might have the means of livelihood, and not become a pauper to be supported by the public. The scheme involves no loss to the employer, because it assumes that he will fix the price of his products so as to save himself from any sacrifice whatever. And why should he be rewarded by the public by being permitted to withhold compensation because a workman suffering with an inguinal hernia does not at the age of fifty-four, feel safe in submitting to a surgical operation?

This class of legislation is in its infancy. The progress of events in relation thereto is all in one direction. Where the legislature has been silent, the courts should also be silent. If a prophecy might be ven-

tured, it would be that before this generation shall have passed the decisions followed and announced by the few courts constituting the present small numerical majority will not only be repudiated, but will be pointed to with anything but pride.

But we are told that "the state has gone to great expense to fit its people for work, to protect them in their work, and to secure to them the result of their labor. Then if a man who receives these favors from the state will not work he, at least, is not a good citizen."

I do not like the paternalistic ring of these words. The state does nothing for "its people." The people do things for themselves through the instrumentality of "their state." They are under no load of gratitude to the state for laws which their own chosen representatives have enacted. The state has gone to no expense at all in providing compensation for the plaintiff. It does not pay or promise to pay him one cent. His employer has simply been authorized to charge enough more for its output to compensate him when disabled in the line of duty. His good citizenship does not depend on his submitting to what Dr. Stemen pronounces a major operation in order to receive what the legislature has provided for him without such submission. As a good citizen he is to be commended for asking what his own representatives have declared he may receive in case of disablement in the course of his employment, on the exact terms laid down. No duty rests on him to add to those plain terms a dangerous condition precedent, and thereby run the risk of adding himself to the number of those whose earning capacity is destroyed by death or diminished by helpless infirmity.

It is hard to believe that courts have hanged witches, sentenced men to death for shooting hares, and in effect told injured employees, when asking for safe places to work, that they could quit or starve. Indeed the ancient and ever comparatively recent disregard of the law for life and limb and human comfort is al-

most unbelievable. But be it said to the credit of the law that in all these matters we are in a new dispensation. Let us not go back to the old.

under the Workmen's Compensation Act, to submit to an operation or to take other measures to restore earning capacity, is the subject of annotation in 6 A.L.R. 1260, which is supplemented by the annotation following HENLEY v. OKLAHOMA UNION R. Co. post, 431.

NOTE.

The duty of an injured employee,

J. H. HENLEY, Appt.,

v.

OKLAHOMA-UNION RAILWAY COMPANY et al.

Oklahoma Supreme Court — February 15, 1921.

(— Okla. —, 197 Pac. 488.)

Workmen's compensation — power to require operation.

1. Section 7, Sess. Laws 1919, chapter 14, provides: "The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus as may be necessary, during sixty days after the injury or for such time in excess thereof as in the judgment of the commission may be required. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so." Held, said section is for the benefit of the injured employee, providing for him proper medical and surgical treatment at the expense of the employer in addition to the compensation provided for in said act resulting from injuries arising in the course of his employment, and that under the provisions of § 7, supra, the state industrial board is without jurisdiction to order the injured employee to submit to a major operation involving a risk of life, however slight, in order that the pecuniary obligations created by the law in his favor against his employer may be minimized.

[See note on this question beginning on page 431.]

—liberal construction of rules.

2. The Workmen's Compensation Laws of this state deprive the injured employee of the right of action in the courts of the state to recover damages for injury received, and provide a limited amount of compensation during disability, and said laws were adopted with the view of enabling employer and employee to settle their differences without litigation, and to enable each employee, not guilty of wilful misconduct, to receive quickly a reasonable recompense for the in-

juries accidentally received in the course of his employment, under certain fixed rules. These laws must be liberally construed in favor of the injured employee.

[See 28 R. C. L. 718, 714, 755.]

—award on condition of operation.

3. An award of the state industrial commission, in case of injuries resulting in hernia, requiring claimant to undergo an operation or forfeit his right to compensation, is error. The rule is that the industrial commission must award compensation as provided

for by law for the disability of an injured employee as it exists at the time of making the award, and the commission is without jurisdiction to impose

upon the injured employee the option of submitting to a major operation or forfeiting his right to compensation. [See note in 6 A.L.R. 1260.]

APPEAL by claimant from a decision of the State Industrial Commission directing him to submit to an operation or forfeit his right to compensation in a proceeding under the Workmen's Compensation Act to recover compensation for an injury received while in the employ of defendants. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. M. Springer and E. G. Wilson for appellant.

Messrs. Abernathy & Howell and S. P. Freeling, Attorney General, for respondents.

Kenamer, J., delivered the opinion of the court:

This matter is before the court upon a petition filed by J. H. Henley, claimant, to review an award made by the state industrial commission on the 3d day of May, 1920, which is as follows:

"Now on this 3d day of May, 1920, the above cause coming on to be heard pursuant to legal notice given and the commission having examined all reports on file, and being well and sufficiently advised in the premises, finds: That the claimant, while in the employ of the respondent and in the course of his employment, was injured March 13, 1920, and as a result of said injury developed a hernia, and that it would be to his best interest to receive an operation for said injury.

"The commission further finds that he is entitled to an operation and compensation for four weeks at the rate of \$14.58 per week, being a total sum of \$58.32.

"It is ordered: That within ten days from this date the Aetna Life Insurance Company or the Oklahoma Union Railway Company pay to the above claimant compensation computed from March 13, 1920, at the rate of \$14.58 per week, continuing until termination of disability, unless within ten days from this date the respondent will notify the claimant and the commission of its willingness to pay for the operation. In such event claimant shall in ten days thereafter notify the insur-

ance carrier or respondent and the industrial commission of its willingness to accept said operation.

"It is further ordered: If the claimant agrees to accept said operation, the insurance carrier or respondent shall make all necessary arrangements for claimant to receive said operation and pay all cost incident thereto, including the hospital, surgical, nurse, cost of medicine, and other expenses incident thereto, and the traveling expenses of the claimant from his home to the place where said operation will be performed, said operation to be performed within thirty days after the claimant agrees to accept same, unless additional time is agreed upon by the parties thereto.

"It is further ordered: That in the event said operation is accepted, upon its performance the respondent pay to the claimant four weeks' compensation at the rate of \$14.58, being a total sum of \$58.32. If said operation is refused by claimant, the respondent's liability shall cease upon payment of four weeks' compensation."

The award found that the claimant had developed a hernia as a result of an accident occurring in the course of his employment, and gave him the alternative of an operation or accepting \$58.32, four weeks' compensation, and in the event the claimant failed or refused to submit to the operation as ordered by the commission, further compensation, irrespective of the condition of the claimant, was denied.

Section 7, chapter 14, Session Laws of 1919, provides: "The employer shall promptly provide for an injured employee such medical,

surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus as may be necessary, during sixty days after the injury or for such time in excess thereof as in the judgment of the commission may be required. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so."

It is apparent that the state industrial commission has misconstrued § 7, supra, in that they have exercised jurisdiction to order the claimant herein to submit to a major operation under penalty, in case of his failure to comply with the order, of forfeiting his right to compensation. A careful reading of § 7, supra, herein, fails to disclose the authority for the commission directing the injured employee to submit to a major operation under penalty or forfeiting his right to compensation. Section 7, supra, of said act, provides for the injured employee proper medical and surgical treatment at the expense of the employer; and the treatment provided for is in addition to the compensation provided for under the Workmen's Compensation Act of 1919, during disability; but nowhere in said act is the commission authorized to require

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the injured employee to submit to a serious operation involving a risk of life, however slight,

in order that the pecuniary obligation created by the law in his favor may be minimized. The award in the case at bar presupposes that the operation would be successful, and that the claimant would be cured. This is in excess of the commission's authority. The respondents in their brief contend that an operation for hernia is not regarded as

a dangerous or serious operation, but is a comparatively slight inconvenience, and results in a permanent cure. The record in the present cause does not disclose the kind of hernia the claimant was afflicted with; but we cannot agree with the contention that an ordinary operation for hernia is to be regarded as a slight inconvenience, and we know of no medical authority or reputable physician that would class an operation for hernia as a minor operation. On the other hand, ordinary hernia requires the administration of an anesthetic and an incision of the abdominal wall, and in some instances it proves fatal. The rule appears to be supported by the overwhelming weight of authority that no man shall be compelled to take a risk of death, however slight, in order that the pecuniary obligation created by law in his favor against his employer may be minimized. *Tutton v. The Majestic* [1909] 2 K. B. 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 Times L. R. 482, 53 Sol. Jo. 447; *Blate v. Third Ave. R. Co.* 44 App. Div. 163, 60 N. Y. Supp. 732; *McNally v. Hudson & M. R. Co.* 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185; *Donovan v. New Orleans R. & Light Co.* 132 La. 239, 48 L.R.A.(N.S.) 109, 61 So. 216. See note in 48 L.R.A.(N.S.) 110; *McNamara v. Metropolitan Street R. Co.* 133 Mo. App. 645, 114 S. W. 50; *Guild v. Portland R. Light & P. Co.* 64 Or. 570, 131 Pac. 310; *Jendrus v. Detroit Steel Products Co.* 178 Mich. 265, L.R.A.1916A, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864.

In the case of *McNally v. Hudson & M. R. Co.* 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185, supra, the supreme court of New Jersey, in considering a case almost identical with the case at bar, said: "The consensus of opinion of the medical witnesses is that the operation is a major one, accompanied with some peril to life. Although the peril to life seems to be very slight, 48 chances in 23,000, nevertheless the idea is appalling to one's conscience

that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by law in his favor against his employer may be minimized. The English cases cited by counsel for defendant do not lay down any such doctrine. . . . We think the sound rule on the subject to be as stated by Lord McLaren, in *Donnelly v. Baird* [1908] S. C. (on page 536), which is as follows: 'In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life and health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him.' . . . It cannot, however, be properly said that where it appears, as it does in the present case, that a risk of life is involved, that the refusal of the prosecutor to submit to an operation is unreasonable. There was, therefore, no basis for the order made by the trial judge that the prosecutor should submit to an operation. The compensation adjudged by the court is a weekly compensation. In the event that the prosecutor chooses to submit to an operation and recovers, the defendant can petition the trial court to reduce the compensation or stop it, if the proper number of weeks have elapsed for which compensation should have been made."

In the case of *McNamara v. Metropolitan Street R. Co.* 133 Mo. App. 645, 114 S. W. 50, supra, the court said: "We do not think plaintiff should be criticized and punished on account of his failure to undergo a surgical operation. He should be accorded the right to choose between suffering from the disease all his life or taking the risk of an unsuccessful outcome of a

serious surgical operation. Certainly, defendant, whose negligence produced the unfortunate condition, is in no position to compel plaintiff again to risk his life in order that the damages may be lessened. To give heed to such contention would be to carry to an absurd extreme the rule which requires a person damaged by the wrong of another to do all that reasonably may be done to minimize his damages."

The Workmen's Compensation Laws of this state abolish the right of the injured employee to maintain an action for damages in the court, and vests the state industrial commission with jurisdiction to award compensation for injuries sustained by the employee in the course of his employment at a fixed rate prescribed by the statute, which amount is 50 per cent of the average weekly earning, during the disability, or partial disability, of the injured employee until the maximum amount prescribed by the act has been paid. In view of the fact that the law has abolished the right of action of the injured employee to recover damages for his injuries, the law should be liberally and fairly construed in favor of the injured employee; and in making an award the industrial commission has no authority to impose any condition upon the injured employee not authorized by law.

That part of the award, in the case at bar, directing the claimant to submit to an operation or forfeit his right to compensation, is unauthorized and beyond the jurisdiction of the commission, and the award herein made is reversed and remanded, with directions that the claimant be allowed compensation during disability as prescribed by law.

All the Justices concur, except Miller, J., absent and not participating.

Petition for rehearing denied May 3, 1921.

—liberal construction of rules.

—award on condition of operation.

ANNOTATION.

Workmen's compensation: duty of injured employee to submit to operation, or to take other measures to restore earning capacity.

This annotation is supplementary to that in 6 A.L.R. 1260, on the above question.

Generally, as to duty of injured person to submit to operation to reduce damages, see annotation to *Gibbs v. Almstrom*, 11 A.L.R. 230.

As stated in the prior annotation, it is a settled rule that an injured workman will be denied compensation for incapacity which may be removed or modified by an operation of a simple character, not involving serious suffering or danger.

And it will be observed that in *STRONG v. SONKEN-GALAMBA IRON & METAL CO.* (reported herewith) ante, 415, where the employee had sustained a hernia, it was held that the unreasonable refusal of an injured employee to permit a surgical operation, where the danger to life therefrom would be very slight, and the probabilities of a permanent cure very large, justifies a refusal of an award under the Compensation Act, and that the reasonableness or unreasonableness of the refusal of an injured employee to permit an operation is a question of fact to be determined from the evidence.

And in *Schiller v. Baltimore & O. R. Co.* (1920) 137 Md. 235, 112 Atl. 272, the court stated that, by the overwhelming weight of authority, an injured employee cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily reasonable man would submit to under like circumstances, and it held that evidence as to the safety of an operation for hernia and its probable effect in removing the claimant's disability was relevant.

In *Myers v. Wadsworth Mfg. Co.* (1921) — Mich. —, 183 N. W. 913, where the only medical witness who testified stated that the proposed operation to the claimant's arm would be a minor one, attended with

little or no risk or pain, and that the hand certainly would be no worse, and that there was a good chance of improving the function by the operation, it was held the duty of the claimant to submit to an operation, and that his refusal to do so was unreasonable.

And in *Rosenthal & Co. v. Industrial Commission* (1920) 295 Ill. 182, 129 N. E. 177, where the Compensation Act vested the industrial commission with the right to suspend the compensation of an injured employee if he shall refuse to submit to such surgical treatment as is reasonably essential to promote his recovery, it was held that whether the operation is reasonably essential is for the industrial commission to determine upon the evidence submitted to it, and that it is only in a case where the commission has acted unreasonably or has abused its discretion that the court will interfere with its finding; and it was held that a finding of the commission suspending the award because of the employee's refusal to submit to an operation for hernia was justified, there being evidence that his life would not be jeopardized by the operation, and that the condition caused by the hernia could be so corrected that he could resume work, and that the operation would be a minor one.

And in *Mt. Olive Coal Co. v. Industrial Commission* (1920) 295 Ill. 429, 129 N. E. 103, where the operation to the employee's wrist which was necessary to restore its use was a simple one, unattended with danger, and with no pain, under an entirely safe anesthetic, the continuance of his total disability was held due to his unreasonable refusal to submit to an operation. The court said: "It is conceded that there is no power in the industrial commission or elsewhere to compel defendant in error to submit to an operation, but, on the other

hand, it must be conceded that whether the loss of 80 per cent of the use of the right hand of defendant in error is attributable to the accident or to the refusal of defendant in error to have the adhesions in the tendons forcibly broken up is a question for the commission, in the first instance, to determine. The uncontradicted evidence in the record shows that there was no possibility of danger to defendant in error from the operation. It is such an operation as any reasonable man would take advantage of, if he had no one against whom he could claim compensation. A reasonable and salutary rule, which has been followed by the American and English courts of last resort, is this: 'If the operation is not attended with danger to life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employer from the obligation to maintain him.' *Kricinovich v. American Car & Foundry Co.* (1916) 192 Mich. 687, 159 N. W. 362; *Jandrus v. Detroit Steel Products Co.* (1913) 178 Mich. 265, L.R.A.1916A, 381, 144 N. W. 563, Ann. Cas. 1915D, 476, 4 N. C. C. A. 864; *Lesh v. Illinois Steel Co.* (1916) 163 Wis. 124, L.R.A.1916E, 105, 157 N. W. 539. The evidence here shows, without dispute, that there is a solid union of the bone, and that the only thing the matter with defendant in error is the adhesions in the tendons of his wrist and hand. The operation is a simple one, attended with no danger whatever, and with no pain under a mild and entirely safe anesthetic. We must therefore hold the permanent disability of defendant in error is due to his refusal to submit to this simple operation, and not due to the accident. *Joliet Motor Co. v. Industrial Bd.* (1917) 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75. For the errors appearing in the record this cause must be remanded to the industrial commission for further proceedings consist-

ent with the views expressed in this opinion. If the operation should be had and prove unsuccessful, plaintiff in error would be liable for whatever loss of use of his hand defendant in error suffers, as well as surgical and hospital services necessary for the operation and for treatment already received, but if successful its liability would be for temporary loss of time, and for treatments had and surgical and hospital expenses incurred in the operation. Whatever time the commission finds, from the evidence, defendant in error has lost by his unreasonable refusal to submit to this operation, must be credited to plaintiff in error in awarding compensation. Such loss of time must be attributed to the voluntary act of defendant in error in refusing to submit to proper medical treatment, and must not be attributed to the accident."

In *Shea v. O'Neill* (1919) 13 B. W. C. C. (Eng.) 560, where a workman sustained an injury to his finger, which rendered the first joint stiff and painful, it was held that his refusal to undergo a slight operation was unreasonable, where one doctor stated that if the top of the finger were removed the workman's capacity for work would be increased, and that the operation would not be dangerous, except for the danger arising from the anesthetic, and another doctor agreed with the other's opinion, but stated that if the top joint of the finger were removed there would be a serious risk that a still larger portion of the finger might have to be removed.

In *HENLEY v. OKLAHOMA UNION R. Co.* (reported herewith) ante, 427, however, the section of the Compensation Act providing that the employer should promptly provide an injured employee with such medical, surgical, or other attendance or treatment, or hospital service, as might be necessary during sixty days after injury, or for such time thereafter as in the judgment of the commission might be required, was held not to authorize the commission to order an injured employee to submit to a major operation for hernia, under penal-

ty, in case of failure to comply with the order, of forfeiting his right to compensation.

In *Smith v. Battjes Fuel & Bldg. Material Co.* (1918) 204 Mich. 9, 169 N. W. 943, the finding of the board that the refusal of the injured employee to submit to proposed operations upon his arm was not unreasonable was held warranted by the evidence, and an order refusing to allow the discontinuance of payments was affirmed.

In *Grant v. State Industrial Acci. Commission* (1921) — Or. —, 201 Pac. 438, where the statute provided for suspension of compensation for the time that a workman should refuse to submit to such medical treatment as the commission deemed "reasonably essential to promote his recovery," it was construed to mean that the workman's right to compensation should be suspended if he refused to submit to an operation to which an ordinarily reasonable man would submit, if similarly situated, and the determination whether he had so refused was held a question of fact

for the jury, and where there was evidence, in part, that an operation on the workman's knee would be a major one, and might result in a "stiff knee," the jury found that his refusal to submit to an operation was reasonable, and the court was held bound by the jury's decision.

In *Fife Coal Co. v. Cant* (1920) 65 Sol. Jo. (Eng.) 204, 90 L. J. P. C. N. S. 69, [1921] W. C. & Ins. Rep. 79, 124 L. T. N. S. 545, 13 B. W. C. C. 449, the evidence was held sufficient to support the arbitrator's finding that the employers had not established that the employee's incapacity was due to his unreasonable refusal to undergo a surgical operation, there being testimony that the employee had sustained an injury to his thumb, and that the employer's physicians were of opinion that an operation to the thumb would enable him to have much more use of that member, but the employee's physician stated that the operation contemplated was of an experimental nature, and that it would not restore the hand so as to make it of real service.
J. T. W.

ROBERT W. MORRISON et al., Appts.,

v.

HERMAN HESS et al., Respts.

Missouri Supreme Court (In Banc)—May 24, 1921.

(— Mo. —, 231 S. W. 997.)

Covenant — tiers of double houses.

1. A restriction of the use of a lot to not more than one dwelling house on each 50-foot frontage forbids the erection on 125 feet of frontage of a building divided by solid walls into six double buildings, to open two on the street and four on a court in the rear, and designed to accommodate thirty-six separate families.

[See note on this question beginning on page 451.]

Appeal — suit to enjoin violation of restrictive covenant — effect of expiration of covenant.

2. Although the time during which the use of real estate for building purposes is restricted by the deed of conveyance expires pending appeal from 18 A.L.R.—28.

a judgment dismissing a bill to enjoin its violation, the appellate court does not lose jurisdiction, where appellant has become liable on his injunction bond and for costs if the case is not reversed.

[See 2 R. C. L. 169-171.]

—effect on right to assess damages on injunction bond.

3. A proceeding to assess damages on an injunction bond is suspended by appeal from the order dissolving the restraining order and dismissing the action.

Covenant — restriction — dwelling house — apartment house.

4. A single building to constitute an apartment house does not violate a restriction in a deed that there shall not be more than one dwelling house on the lot.

(Woodson, J., dissents.)

APPEAL by plaintiffs from a decree of the Circuit Court of the City of St. Louis (Falkenhainer, J.) dismissing a bill filed to enjoin defendants from constructing a dwelling house in alleged violation of the restrictions in a deed under which they claimed title, and overruling a motion for new trial. *Reversed.*

Statement by Railey, C.:

This action was commenced in the circuit court of the city of St. Louis, Missouri, on October 3, 1916, by the above-mentioned plaintiffs, who are residents and owners of homes in city block 4864 of the city of St. Louis, Missouri, to enjoin said defendants from constructing, upon a portion of said block 4864, a three-story apartment house, containing thirty-six separate and distinct apartments, in violation of the restrictions in the deed under which said defendants claim title, which recites that not more than one dwelling house may be constructed on the 50-foot front of said lot.

The defendants answered, partially admitting the allegations of petition, denying other averments therein, and pleading, by way of waiver and abandonment, that the above restriction was no longer in force. The reply is a general denial of the new matter contained in the answer.

The evidence shows that Selah Chamberlain, a resident of Ohio, was the owner of city block 4864, in St. Louis, Missouri, bounded on the south by Maple avenue, running east and west, and by Chamberlain avenue on the north, also running east and west; that prior to May 31, 1887, said Chamberlain and wife sold all of the property in said block 4864 to various persons; and that each and every deed made by him contained the same covenants and restrictions as are recited in the deed to defendant Hess. On May 31, 1887, said Selah Chamberlain,

who was then the owner of five or six tracts of land lying in the vicinity of said block 4864, filed a plat in the recorder's office, laying off said last-described tracts of land into lots and blocks, and designating the same as Chamberlain park. The latter entirely surrounded block 4864, *supra*, except on the south.

It was stipulated and agreed at the trial "that all of the plaintiffs and the defendants own property in city block No. 4864 and hold title to their said property by and through deeds from Selah Chamberlain, and that all of the deeds through which all of the plaintiffs and all of the defendants held title contained the same covenants and restrictions as those contained in the deed from Selah Chamberlain and wife to Josiah A. Parker, . . . and that all of the property in city block No. 4864 is subject to the same restrictions, and is held under a common source of title, namely, Selah Chamberlain and that all of the property in city block No. 4864 had been sold by said Selah Chamberlain, prior to May 31, 1887."

The deed from Chamberlain and wife to Josiah A. Parker aforesaid is dated February 19, 1887, and, among other things, contains the following: "The foregoing conveyance and grant is hereby declared to be subject to and limited by the following exceptions, reservations, conditions, and reversion: That neither said grantee nor anyone claiming by, through, or under him prior to the last day of December,

A. D. 1920: I. Shall construct or allow to be constructed on the premises above described any dwelling house less than two stories in height. II. Shall construct or allow to be constructed more than one such dwelling on each 50-foot front of said lot. III. Shall construct or allow to be constructed thereon any dwelling to cost less than \$4,000 in cash, nor locate or erect such dwelling nearer than 30 feet to the line of the street on which such dwelling fronts. IV. Shall construct or allow to be constructed any stable, shed, or out-house nearer to any public driveway than 100 feet. V. Shall construct or allow to be constructed or erected, or to exist, any nuisance, or any livery stable or manufacturing establishment of any kind on said premises. VI. Shall construct or allow to be constructed, used, or occupied, any grocery store, bar-room, or business place for the bargain and sale of any kind of merchandise on said premises."

It is conceded that defendant Hess, about sixty days before the trial below, bought from defendant Schwenker the following-described property, to wit: "A lot in Chamberlain park in block No. 4864 of the city of St. Louis, having a front of 125 feet on the north line of Maple avenue, by a depth northwardly between parallel lines of 155 feet to a line, bounded on the west by a line 130 east of the east line of Clara avenue."

It is admitted that the above deed to Hess contains the same covenants, restrictions, etc., as are recited in the deed from Chamberlain to Parker aforesaid. It is also undisputed that defendant Hess knew of the above restrictions when he was negotiating for said property, and when he received his deed therefor.

It appears from the evidence that all of the property in said block 4864, except about 200 feet which was vacant, had been improved, before defendant Hess purchased his property, with high-class residences, owned by the plaintiffs; that each

of said houses was used as a single-family dwelling house, was more than two stories in height, and each cost from \$10,000 to \$15,000; that each house occupied 50 feet or more of ground, fronting on either Chamberlain avenue or Maple avenue; that all of said houses were built and used in accordance with the covenants and restrictions contained in the Parker deed, *supra*. It does not appear from the evidence that buildings of any kind were ever constructed in said block 4864, other than single private dwelling houses.

Plaintiffs offered in evidence a copy of the plans for the construction of the proposed building of defendant Hess, which is marked exhibit C, and, in order to avoid repetition, will be considered in the opinion with such matters as may be deemed of importance.

On April 7, 1919, the court below entered a decree in favor of defendants against all of the plaintiffs and dismissed the bill of latter. Plaintiffs, in due time, filed their motion for a new trial, which was overruled, and the cause duly appealed by them to this court.

Mr. S. T. G. Smith, for appellants:

Courts should give effect to the plain intention of the parties in imposing restrictions on land, and not seek ingenious subtleties of interpretation by which to avoid the same.

Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577; *Reed v. Hazard*, 187 Mo. App. 547, 174 S. W. 111; *Zinn v. Sidler*, 268 Mo. 680, L.R.A.1917A, 455, 187 S. W. 1172; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364.

Where property is laid out by an owner and conveyed to various purchasers under a general plan of restrictions, the restrictions are for the benefit of the purchasers, and not the grantor, and each purchaser can sue the other purchasers to compel them to observe these restrictions.

King v. St. Louis Union Trust Co. 226 Mo. 351, 126 S. W. 415; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364; *Hall v. Wesster*, 7 Mo. App. 56; *Coughlin v. Barker*, 46 Mo. App. 54; *Bleeker v. Bingham*, 3 Paige, 246; *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

The words, "neither said grantee, nor anyone claiming by, through, or under him, . . . shall construct, or allow to be constructed, more than one such dwelling on each 50-foot front of said lot," when contained in the covenant of the deed by which title is held, are violated by the erection of six separate groups of apartments.

Schenck v. Campbell, 11 Abb. Pr. 292; Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808; Sanders v. Dixon, 111 Mo. App. 229, 89 S. W. 577; Brigham v. H. G. Mulock Co. 74 N. J. Eq. 287, 70 Atl. 185; Schadt v. Brill, 173 Mich. 647, 45 L.R.A.(N.S.) 726, 139 N. W. 878; Bagnall v. Young, 151 Mich. 69, 114 N. W. 674; Harris v. Roraback, 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391; Loring v. Bacon, 4 Mass. 575; Tracy v. Talbot, 6 Mod. 214, 87 Eng. Reprint, 966; Fortesque v. Carroll, 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79; Pearson v. Adams, 27 Ont. L. Rep. 87, 7 D. L. R. 139; Gillis v. Bailey, 21 N. H. 149; State v. Huffman, 136 Mo. 58, 37 S. W. 797.

No estoppel can arise where defendant is violating rights created by contract.

St. Louis Safe Deposit & Sav. Bank v. Kennett, 101 Mo. App. 370, 74 S. W. 474; Miller v. Klein, 177 Mo. App. 557, 160 S. W. 562; Compton Hill Improv. Assn. v. Strauch, 162 Mo. App. 76, 141 S. W. 1159; Atty. Gen. v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500, 27 N. E. 2; Hall v. Wesster, 7 Mo. App. 56; State ex rel. Hopkins v. Excelsior Powder Mfg. Co. 259 Mo. 254, L.R.A.1915A, 615, 169 S. W. 267; Spahr v. Cape, 143 Mo. App. 114, 122 S. W. 379.

Where the acts complained of are in violation of contract, no damage is required to be shown in order for the court to issue a mandatory injunction.

Hall v. Wesster, 7 Mo. App. 56; Atty.-Gen. v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500, 27 N. E. 2; State ex rel. Hopkins v. Excelsior Powder Mfg. Co. 259 Mo. 254, L.R.A.1915A, 615, 169 S. W. 267; Meriwether v. Joy, 85 Mo. App. 634; Dulce Realty Co. v. Staed Realty Co. 245 Mo. 417, 151 S. W. 415; St. Louis Safe Deposit & Sav. Bank v. Kennett, 101 Mo. App. 370, 74 S. W. 474.

Messrs. Frank X. Hiemenz, H. A. Hamilton, and C. R. Hamilton, for respondents:

Restrictive covenants are in derogation

of the right of unrestricted use of property, and are to be strictly construed against the party seeking to enforce them. They will not be extended by implication, or include anything not plainly prohibited.

Zinn v. Sidler, 268 Mo. 689, L.R.A. 1917A, 455, 187 S. W. 1172; Kitchen v. Hawley, 150 Mo. App. 503, 131 S. W. 142; Pank v. Eaton, 115 Mo. App. 176, 89 S. W. 586; Hartman v. Wells, 257 Ill. 167, 100 N. E. 500, Ann. Cas. 1914A, 901.

A grantor entering into detail in specifying certain matters as prohibited is presumed, if nothing to the contrary appears, to permit buildings and uses of a character not thus excluded; all doubt is to be in favor of the free and unrestricted use of the property.

Underwood v. Herman & Co. 82 N. J. Eq. 353, 89 Atl. 21; Kitchen v. Hawley, 150 Mo. App. 503, 131 S. W. 142; Hutchinson v. Ulrich, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; Hunt v. Held, 90 Ohio St. 280, L.R.A.1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051; St. Andrew's Lutheran Church's Appeal, 67 Pa. 512.

A restriction against a plural structure will not be construed to prohibit a plural use of a single structure, unless such intention is clearly expressed.

Hamnett v. Born, 247 Pa. 418, 93 Atl. 505; Arnoff v. Williams, 94 Ohio St. 145, 113 N. E. 661; Pank v. Eaton, 115 Mo. App. 176, 89 S. W. 586; Kenwood Land Co. v. Hancock Invest. Co. 169 Mo. App. 723, 155 S. W. 861; Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444.

The term "dwelling house" is merely descriptive of a structure suitable for human habitation, irrespective of how it may be occupied, and one dwelling house may be so constructed as to contain separate apartments, each of which may constitute a dwelling, yet the whole be in fact but one structure.

Bolin v. Tyrol Invest. Co. 273 Mo. 257, L.R.A.1918C, 869, 200 S. W. 1059; Berry, Real Prop. § 15; Johnson v. Jones, 244 Pa. 389, 52 L.R.A.(N.S.) 325, 90 Atl. 649; Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444.

An apartment house is a "dwelling house." and does not violate a restric-

tion prohibiting the erection of more than one dwelling house on a single lot.

Bolin v. Tyrol Invest. Co. 273 Mo. 257, L.R.A.1918C, 869, 200 S. W. 1059; *Hamnett v. Born*, 247 Pa. 418, 93 Atl. 505; *Arnoff v. Williams*, 94 Ohio St. 145, 113 N. E. 661; *Sonn v. Heilberg*, 38 App. Div. 515, 56 N. Y. Supp. 341; *Holt v. Fleischman*, 75 App. Div. 593, 78 N. Y. Supp. 647; *Bates v. Logeling*, 137 App. Div. 578, 122 N. Y. Supp. 251; *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768; *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; *Morrison v. Darr*, — Mo. —, 201 S. W. 1147.

Railey, C., filed the following opinion:

1. Upon the issuing of a temporary restraining order by the trial court in this case, plaintiffs were required to, and did, give a \$5,000 injunction bond. On November 29, 1916, the restraining order aforesaid was dissolved by the court, and the temporary injunction denied. On December 2, 1916, defendants filed herein a motion to assess the damages on the bond aforesaid.

Appeal—suit to enjoin violation of restrictive covenant—effect of expiration of covenant.

The restrictions in the deed to defendant Hess terminated on December 31, 1920. While this

court could not issue, or direct the lower court to issue, a restraining order enjoining defendants from constructing said building on block 4864 aforesaid, by reason of the termination of said restrictions, yet, as plaintiffs have incurred liability on said bond for damages, and have become responsible for the costs of this litigation, should the judgment below be affirmed, or the appeal dismissed, they, as well as the public, still have an interest in the result of the litigation, which requires at our hands an investigation of the merits. *Civic League v. St. Louis*, — Mo. —, 223 S. W. loc. cit. 892, 893, and cases cited; *Stegmann v. Weeke*, 279 Mo. 131, 214 S. W. loc. cit. 135, 136; *State ex rel. Bayha v. Philips*, 97 Mo. 331, 3 L.R.A. 476, 10 S. W. 855; *Long v. Charles A. Kaufman Co.* 129 La. 430, 56 So.

357; *Froemke v. Parker*, 39 N. D. 628, 169 N. W. 80; *Peters v. Fisher*, 50 Mich. 331, 15 N. W. 496; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; *People ex rel. Spire v. General Committee*, 25 App. Div. 339, 49 N. Y. Supp. 723; *Russell v. Crook County Ct.* 75 Or. 168, 145 Pac. 653, 146 Pac. 806.

(a) The appeal from the merits suspended action on the motion to assess damages until the case is disposed of here. *Cohn v. Lehman*, 93 Mo. 584, 6 S. W. 267; *Joplin & W. R. Co. v. Kansas City, Ft. S. & M. R. Co.* 135 Mo. loc. cit. 554, 555, 37 S. W. 540; *State ex rel. Patton v. Gates*, 143 Mo. loc. cit. 68, 44 S. W. 739; *Reed v. Bright*, 232 Mo. loc. cit. 415, 134 S. W. 653; *Brown v. Simpson*, — Mo. —, 201 S. W. loc. cit. 899, 900.

—effect on right to assess damages on injunction bond.

2. It is contended by respondents that the covenants and restrictions aforesaid are in derogation of the right of unrestricted use of property, and should not be extended by implication, or to include anything not plainly prohibited. We are cited, in support of this contention, to *Zinn v. Sidler*, 268 Mo. 689, L.R.A.1917A, 455, 187 S. W. 1172; *Kitchen v. Hawley*, 150 Mo. App. 503, 131 S. W. 142; *Pank v. Eaton*, 115 Mo. App. 176, 89 S. W. 586; and *Hartman v. Wells*, 257 Ill. 167, 100 N. E. 500, Ann. Cas. 1914A, 901. On the other hand, appellants contend that the courts should give effect to the plain intention of the parties imposing restrictions on land, and not seek ingenious subtleties of interpretation by which to avoid the same. In support of this contention we are cited to *Zinn v. Sidler*, 268 Mo. 680, L.R.A.1917A, 455, 187 S. W. 1172; *Reed v. Hazard*, 187 Mo. App. 547, 174 S. W. 111; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364; *Sanders v. Dixon*,

114 Mo. App. 229, 89 S. W. 577. Keeping in mind the contention of both parties, *supra*, is there anything in the foregoing covenants and restrictions which precludes the defendant from building an apartment on his lot, provided it is constructed as other dwelling houses were required to be built, under the covenants and restrictions aforesaid?

It is possible that if the attention of the parties had been called thereto, in devising the plan for selling lots in block 4864, they might have excluded apartments therefrom, but they did not do so, and hence we conclude that, under the covenants and restrictions before us, the defendant had the right to construct a single building in the nature of a flat or apartment, subject to the same limitations as would apply to an ordinary dwelling house; that is to say, only one such dwelling should be permitted on each 50-foot front of the lot, subject to the other cove-

Covenant—
restriction—
dwelling house—
apartment
house.

nants and restrictions aforesaid.

We are therefore of the opinion that the building of an apartment, within itself, would not be violative of the covenants and restrictions aforesaid, if constructed as above indicated.

(a) By parity of reasoning, we do not find anything in said covenants and restrictions which precludes the plural use of a single dwelling house or single apartment.

3. The real question, however, in this case, is not whether a single apartment, built on the same terms and subject to the same restrictions as an ordinary dwelling house, would violate the covenants and restrictions aforesaid, but whether the structure contemplated by defendant Hess was to include more than one dwelling on each 50-foot front on said lot. Mr. Hess bought 125 feet frontage on Maple avenue. Under the covenants and restrictions in his deed, he could only have constructed thereon two ordinary dwelling houses, as not more than

one could be built on each 50-foot frontage of his lot. This does not mean that the covenants and restrictions aforesaid authorized him to build one dwelling house on each 50-foot front of his lot, and another of the same character on the same lot in the rear of the former building; that is to say, if his lot contained a 50-foot frontage on Maple avenue, and extended back to the alley, a depth of 155 feet, he could only build on the entire lot a single dwelling house or apartment. This proposition, to our mind, is too plain for argument. We are thus brought face to face with the main question in the case, to wit, whether the plan for the Hess apartment calls for more than one dwelling house on each 50-foot frontage of his lot.

4. It is undisputed that the plan for the foregoing structure called for six double buildings, with an outside entrance into each of said double buildings; that after passing through each of the outside entrances aforesaid, into a hall inside of each double building, there was to be placed a separate door, leading from said hall into each of the buildings constituting said double building. In each of the single buildings constituting the double building the plan called for an apartment, composed of a living room, dining room, kitchen, bathroom, and another room. In other words, there was to be constructed on this lot of 125-foot frontage and 155 feet in depth, six double buildings, with six outside entrances respectively, or the equivalent of twelve single buildings, with each containing, on the ground floor, a living room, dining room, bathroom, and another room, each to be used by separate families as a separate dwelling, without any connection whatever with each other, except through the general entrances aforesaid. The plan called for two of said double buildings to front on Maple avenue, and the remaining four double buildings were to open on a court in the rear of said 155 feet in depth by 125 feet in frontage. It further appears from

said plan and the evidence that the masonry walls of said structure, between each of said double buildings, were to extend from the ground to the first floor of the respective ground floor buildings, and that 13-inch brick walls were to be constructed on the respective tops of said masonry walls, extending through the top of the building and 8 or 10 inches above the top of same.

Passing, for the present, the question as to whether each of said twelve ground floor buildings, composing the six double buildings aforesaid, constitute twelve separate and distinct dwelling houses, on a lot 125 feet by 155 feet, we are still confronted with the undisputed fact that said plan calls for the construction of at least six double buildings, two fronting on Maple avenue and four opening into the court in the rear, with six separate solid walls between the respective double buildings, with six separate outside entrances, one opening into each double building, without any intercommunication between said double buildings, and all six of same to be used as a dwelling place for thirty-six separate and distinct families.

We held, under the facts of this case, that the six double buildings could not be legally constructed on the

Hess lot with a frontage of 125 feet and a depth of 155 feet. We are of the opinion that no well-considered case can be found announcing a contrary view. The Belin and Darr Cases, relied on by defendants, do not authorize the construction of such an apartment as that called for by the foregoing plans.

5. The latter, as shown by plaintiff's exhibit C, provides that two of the double buildings heretofore mentioned were to front on Maple avenue, with a granitoid passway between them, leading through the court in the rear of said 155 feet. Each of the two double buildings on Maple avenue was to have an outside entrance leading into a hall and from the latter separate doors were

to be constructed opening into each of the single buildings composing said group of double buildings. If each of the buildings composing the double buildings on Maple avenue be considered a separate dwelling house, then we would have four separate dwelling houses, to be constructed on a frontage of 125 feet on Maple avenue, in the face of restriction II., supra, which provides that not more than one such dwelling house shall be constructed on each 50-foot front of said lot.

Respondents mainly rely upon the ruling in *Bolin v. Tyrol Invest. Co.* 273 Mo. 257, L.R.A.1918C, 869, 200 S. W. 1059, and *Morrison v. Darr*, — Mo. —, 201 S. W. 1147, in support of their contention that there was only a single dwelling house to be constructed on Maple avenue instead of four separate and distinct dwelling houses.

Judge Goode, in *Sanders v. Dixon*, 114 Mo. App. loc. cit. 253, 89 S. W. 585, very forcefully and clearly stated the law in respect to this matter as follows: "In St. Louis, and all other large cities, there are numerous dwelling houses built together in solid rows. Such structures often have continuous outside walls and foundations, but inside partition walls. They are always spoken of and regarded as different residences or dwellings; and sometimes they cover an entire block. It would be preposterous to call them one dwelling. Unquestionably a building of that kind was prohibited by the covenant in Dixon's deed; that is, putting more than one dwelling of the kind on a single lot. If it was not, what is the restriction worth? It might hinder the building of two detached residences, but two or three semidetached residences would be lawful; that is to say, houses having continuous outside walls and constituting more than one dwelling on a lot. We think such a structure is no less obnoxious to the covenant because designed for use as flats by different families."

"Defendants' counsel lay much stress on the division wall of Dixon's flats being a fire wall put in to comply with certain municipal regulations, and not a party wall. The city ordinances are not before us, but we do not regard the point as material. It is no party wall in the legal sense, because both houses belong to one owner. It hardly would be claimed that the houses are one dwelling if two men owned them. Are they any the less plural dwellings because owned by one man? A brick wall 13 inches thick, resting on a foundation 18 inches thick, entirely separating the two halves of a building 45 feet wide, each half of which is prepared for a home or homes, is, for all practical purposes, a partition wall between two dwellings, if not a party wall. It is as much a partition wall as the dividing wall between residences built in a solid row, each of two or more stories, but all the stories designed for the use of a single family. Our opinion is that the only ambiguity in the covenant is as to whether or not it prohibits one house planned for plural use as a dwelling. It certainly prohibits two houses planned for separate dwellings and divided by a partition wall which bisects the lot; and this is enough to sustain the plaintiffs' case against the continued use of Dixon's houses as now arranged."

The law, as declared by Judge Goode, *supra*, meets with our approval, and is directly applicable to the case before us. In our opinion, the conclusion reached by the court in *Bolin v. Tyrol Invest. Co.*, and *Morrison v. Darr*, *supra*, is unsupported by either reason or authority in respect to the above matter, and should be overruled.

6. In the *Bolin Case*, *supra*, the authorities relied upon by respondents are cited and discussed, while those relied on by appellants are fully considered and reviewed by Judge Goode, in *Sanders v. Dixon*, 114 Mo. App. 229, 89 S. W. 577. We have preferred to consider this case, and discuss the questions presented,

along common-sense lines, based upon sound reason, rather than upon the technical definitions of lexicographers, law writers of similar import, etc. We are clearly of the opinion that the structure which defendant Hess contemplated building on the lot contained in block 4864 aforesaid, if constructed as planned, would be violative of the covenants and restrictions contained in the deed under which he claims title. We are further satisfied that the principles of law announced in the *Bolin* and *Darr Cases*, in respect to foregoing matters, are not in accord with our views as to what the law ought to be under the circumstances of this case, and should not be followed. In view of the foregoing, we are of the opinion that the case should be certified to the court in banc.

7. Appellants have not sought to recover any damages by reason of the acts complained of in petition, and as the restrictions aforesaid terminated on the last day of December, 1920, we cannot issue an injunction to restrain the completion of said structure.

We therefore simply reverse and remand the cause, with directions to the trial court to set aside its former orders and judgments, and to enter a new decree finding the issues in favor of plaintiffs, and entering judgment in their behalf for nominal damages and for costs.

White and Mozley, CC., concur.

Per Curiam:

The foregoing opinion of *Railey, C.*, is hereby adopted as the opinion of the court.

All concur, *James T. Blair, J.*, in paragraphs 3, 4, 5, 6, and 7, and result, except *Woodson, J.*, who dissents.

NOTE.

Multiple residence structures as violation of restrictive covenant is the subject of the annotation following *ELTERICH v. LEICHT REAL ESTATE CO.* post, 451.

KATHRYN E. ELTERICH et al., Appts.,

v.

LEICHT REAL ESTATE COMPANY.

Virginia Supreme Court of Appeals — June 16, 1921.

(*Elterich v. Leight Real Estate Co.* — Va. —, 107 S. E. 785.)

Covenant — against apartment house — two-family flat.

1. A building divided into two apartments, one on the ground floor and one on the floor above, with a common entry in front and in the rear, is within a covenant in a deed of the property, forbidding the construction of an apartment house thereon.

[See note on this question beginning on page 451.]

Deed — construction — most strictly against grantor.

2. The rule that a deed must be construed most strictly against the grantor has no application where, in the light of the surrounding circumstances, the meaning of the language in the deed is plain.

[See 8 R. C. L. 1051.]

Covenant — construction — object.

3. In construing a restrictive covenant in a deed, regard must be had to the object which the covenant was designed to accomplish.

— waiver — negotiation — effect.

4. An agreement between the parties must be reached to waive a covenant in a deed of real estate, forbidding the erection of an apartment house upon the premises, where the matter becomes a subject of negotiation, and is not affected where grantor insists that rooms on the second floor, designated on the plans as pantry, kitchen, and dining room, shall be used only as bedrooms, to which grantee refuses to agree.

APPEAL by defendants from a decree of the Circuit Court for Norfolk County (Coleman, J.) in favor of plaintiff in an action brought to enjoin defendants from erecting a certain dwelling house on a lot purchased from plaintiff, alleged to be in violation of a restriction contained in the deed.

Affirmed.

Statement by Sims, J.:

This suit was instituted by the appellee against the appellants (who will be hereinafter designated plaintiff and defendants, respectively, in accordance with their positions in the court below), having for its object the obtaining of a permanent injunction restraining the defendants from proceeding with the erection of a certain building, alleged to be in violation of certain restrictions or conditions contained in the deed from plaintiff to one of the defendants, which conveyed to the latter the lot on which the building was being erected.

A preliminary injunction was granted on the filing of the bill; subsequently depositions were taken and filed in behalf both of plaintiff

and defendants, and upon consideration of the cause on the merits the court below entered the decree under review, which granted the permanent injunction sought by the bill.

The material facts, the issues, and conflicts in the evidence, are as follows:

The plaintiff is engaged in the business of developing a residential section known as Winona, located in Norfolk county, constituting one of the suburbs of Norfolk city. The plaintiff was chartered in 1909, acquired the ownership of the real estate in that section, subdivided it into lots, with streets and avenues, and undertook to build sidewalks, macadamize the streets and avenues, lay gas and water mains, pro-

vide a drainage and sewerage system, etc., and sold the lots to purchasers with certain restrictions and conditions contained in all of the deeds to purchasers. The purchasers united in the deeds. These restrictions and conditions were the same as those contained in the deed to the defendant Mrs. Kathryn E. Elterich, presently to be more specifically mentioned, except that about five years before this suit the words "apartment house" were added to the restrictions as contained in the sixth clause of the last-named deed.

By deed dated February 5, 1919, in which the defendant Mrs. Elterich united as the party of the second part, the plaintiff conveyed to such defendant the lot above mentioned, subject to certain conditions and restrictions set forth in the deed, a portion of which are as follows:

"First. The property hereby conveyed shall not, for a period of twenty-one years, be sold, rented or otherwise disposed of to persons of African descent.

"Second. No intoxicating liquor or ardent spirits shall be sold upon the property hereby conveyed.

"Third. No swine shall be kept upon the property hereby conveyed.

"Fourth. Wood posts may be used in constructing fences on and around said property, but otherwise no wood fences shall be erected or placed on or around the property hereby conveyed.

"Fifth. Not more than one house, outbuilding excepted, shall be erected or placed upon one lot designated on said plat, nor shall such house be erected or placed upon said property, except in conformity to the building line established by the said company, nor shall any house or any part thereof, except outside steps, be erected or placed within 15 feet of the front of any lot shown on said plat.

"Sixth. No flat roofed or double house, storehouse, factory building or apartment house, shall be erected or placed upon the property hereby conveyed, nor shall it be used for

commercial or manufacturing purposes.

"Seventh. No residence shall be erected or placed upon the property hereby conveyed to cost less than four thousand (\$4,000) dollars, and no house shall be erected or placed upon said property so as to throw the rear part thereof toward the side of any adjoining lot, and for a period of ten years from January 1, 1910, all dwelling houses erected upon said property shall be built according to plans submitted to the directors of said company and approved by them.

"Eighth. No stable shall be placed or erected upon any of the lots shown on said plat without the consent in writing of the said company as to the plans and location thereof; nor shall outbuildings be placed within 70 feet of the front of any lot shown on said plat, and no stable or outbuildings shall be erected or placed on any water-front lot shown on said plat, except a garage, the plans and location of which shall be subject to approval of said company.

"Ninth. Live stock, owned or controlled by the said purchaser, shall not be permitted to roam beyond the boundary lines of such property as may be owned or controlled by said purchaser, nor shall such live stock be fastened to any trees upon the streets or avenues shown on said plat.

"Tenth. No use shall be made of the said property or any part thereof, which may constitute a nuisance or injure the value of any of the neighboring lots, and no signboards shall be erected or placed upon said property, without the consent in writing of said company.

"Eleventh. All houses erected upon any lots shown on said plat shall, when required by the company, be connected by the owner thereof with such sewerage system as may be installed by the company, as herein provided.

"Eighteenth. The said company shall not be required to enforce said

conditions, restrictions, rules and regulations except so far as it has lawful right to enforce the same.

"The above restrictions and conditions shall be inserted in all deeds of conveyance hereafter made by the said company. Except that required cost of house may be changed according to location.

"The said purchaser, in consideration of the premises, agrees and promises not to violate any of the aforesaid conditions, and it is hereby agreed that should the said purchaser violate the first of the above conditions, the said company shall, in addition to the remedies provided by law, have the right to re-enter for such breach of condition and be seised of its former estate, subject to the lien of any deed of trust created by said purchaser or ——— successors to secure a debt hereafter contracted, and in the event of the violation of any of the other of the aforesaid conditions, the said company shall, in addition to all remedies provided by law, have the right of re-entry and abatement without liability for damages."

The bill quotes the sixth and seventh clauses of the restrictions or conditions in the deed, and alleges that the defendants had commenced the erection on said lot of a dwelling house according to certain plans, of which copies were filed with the bill, and that the erection of such home on such lot would be in violation of the sixth clause of said restrictions or conditions, in that such house would be a double house or an apartment house.

The testimony both for plaintiff and defendants concurs in showing that the house which the defendants were proceeding to erect, and which they claim by answer filed in the case and by their proof that they have the right under their deed to erect, was a two-story dwelling house, in addition to the basement, with but one outside front door and one outside back door, but both of such doors opened into front and rear vestibules, respectively, from which vestibules there were sep-

arate front and separate rear entrances into two separate apartments; one apartment, on the first floor above the basement, consisting of a kitchen, dining room, living room, bathroom, water-closet, and three bedrooms, together with a hall, pantry, and certain closets; and the other apartment, on the second floor, being the exact duplicate of the first floor with respect to the same number and size of rooms, including a bathroom, water-closet, hall, pantry, and closets; so as to be suitable for the separate occupancy of the building by two families, for living, cooking, and eating therein; the front and rear entrances to the first-named apartment being on the said first floor, and such entrances to the second-named apartment being up front and rear stairways extending from the front and rear vestibules aforesaid to the said second story of the house.

The primary question in issue between the parties plaintiff and defendant is whether such a house is an apartment house within the meaning of the sixth covenant aforesaid in the deed; it not being contended for the plaintiff that the proofs shows that such a house is a double house.

At the time the deed was executed the plaintiff had sold a considerable portion of the lots in Winona, on quite a number of which dwelling houses had been erected and were occupied. During the World War and up to the time of such deed some 50 per cent of such houses were occupied by more than one family, although, with a single exception presently to be mentioned, they were not constructed so that the respective families could occupy separate apartments; but this was considered an exceptional condition, due to the scarcity of houses to accommodate the congested population in that section during that period. Even the president of the plaintiff company at that time rented to another family a portion of the residence in Winona in which he, with his family, lived during such peri-

od, and such renting was going on when defendants purchased said lot and the deed thereto was made. When such purchase and deed were made there was one, and but one, dwelling house in Winona which was constructed for separate occupancy by two families. That was what is designated in the record as the "Neff" residence, which was a two-story house constructed into two separate apartments, one on the first and the other on the second floor. All the other dwelling houses in Winona, including that of the president of the plaintiff company, were constructed for the separate occupation of only one family. Many of them, however, were large enough for the joint occupancy of more than one family.

It does not appear from the evidence at what time the deed from the plaintiff was made, conveying the lot on which the one exceptional house just mentioned was located, nor whether such deed contained the restriction against an apartment house. It does appear from the testimony of the secretary of the plaintiff company that such house was erected about four and one half or five and one half years before this suit was instituted, and that the secretary did not discover that that house had been constructed in that way until he moved to Winona, which was about a year and a half before such suit.

At the time the purchase by defendants and the deed to one of them were made, the defendants, as well as the plaintiff, were familiar with the character of construction of all of the dwelling houses which had been built in Winona.

As bearing on the questions of whether the defendants and the plaintiff contracted, in the matter of the restrictions contained in the sixth clause thereof, with the contemplation that the defendants would build a dwelling house which would be large enough for the joint occupancy of more than one family, such as the dwelling house of the president of the plaintiff company

and all the other large dwelling houses which had at that time been built in Winona, except the Neff house, but not for the separate occupancy of more than one family, or with the contemplation that they would build a dwelling house with two separate apartments, such as the Neff house, the defendant C. F. Elterich testified as follows, making reference to the time and to what occurred when the purchase of the lot by defendants was closed: "The question was brought up as to what kind of a house we anticipated building, and we told them [Mr. Leicht, the president, and Mr. Sherritt, the secretary of the plaintiff company] that we anticipated building a house for ourselves and to make it a little large so in case we saw fit we could give somebody else a home that would appreciate it. . . . Mr. Leicht stated, 'If you are going to build that kind of a house, fix it so that it won't look like an apartment house.' I said, 'Mr. Leicht, I don't want it to look like an apartment house, because this is my home.' He says, 'You will have one door in front and one door in the back?' I said, 'That is my idea exactly.' I said, 'Being familiar with the requirements of the Winona property, I want to strictly adhere to them.' He said, 'Well, if you put one door in the front and one door in the back and build you a nice house, we won't have anything to say about it.'"

Mrs. Elterich testified on the same subject as follows: ". . . . Mr. Sherritt asked us what kind of a house we were going to build, . . . and I told him . . . that we were going to build a large house. He said, 'What do you mean by a large house?' I said: 'A house large enough that can be used by two families.' Mr. Leicht said: 'That is a very good idea. I am renting my house now at the present time, and making enough out of it to pay interest on \$6,000, and I think it a fine idea.' Mr. Sherritt said: 'Well, you remember that you are not to have but one entrance in the

front.' I said: 'We thoroughly understand that. We understand what the restrictions are in Winona, and it is just going to be a home, but we are going to have it made large enough, so if we wish to rent out part of it we can'—and they both agreed it was a very good idea."

The defendants shortly thereafter had an architect make for them the plans above mentioned, and they let the contract for the building to be erected in accordance therewith.

Both the plaintiff and defendants introduced a number of architects and builders as witnesses in their behalf, respectively. All of them, in substance, concur in the statement that a building constructed in accordance with the plans aforesaid would be a two-family apartment house, although the witnesses for the defendants balk at the word "apartment," and, for the most part, prefer to designate the house as a "two-family house."

The testimony for the plaintiff is to the effect that in the ordinary and popular understanding generally, and in Winona and also in Norfolk city, such a house as that mentioned in the last paragraph above is considered to be an "apartment house," sometimes designated a "two-family apartment house."

The testimony for the defendants is to the effect: That in the United States at large many cities have adopted the Building Code recommended by the National Board of Fire Underwriters of New York, of which Code § 9 gives the following definition of an apartment house, namely: "An apartment house shall be taken to mean and include every building which shall be intended or designed for, *or used as the home or residence of three or more families or households, living independently of each other,*" etc. (Italics supplied.) That the Building Code of Norfolk city defines an apartment house as, "Any building or any portion thereof designed *or used as a residence for more than two families or households living independently of each other and in*

which every such family or household shall have provided for it a separate bathroom and water-closet, separate and apart from each other." (Italics supplied). That irrespective of such Codes "there is no generally accepted, or hard and fast rule for the characterization of buildings of this character accepted everywhere by everybody." But that, "generally speaking, the common acceptance of the term, 'an apartment house,' is a house where separate residences are furnished for families," which would include a two-family apartment house.

When the contractor had just begun work on the building for defendants,—had "only dug the basement,"—the plaintiff called upon the defendants to submit the plans for the house to the directors of the plaintiff company, in accordance with the seventh clause of the restrictions and conditions contained in the deed of Mrs. Elterich. Promptly on April 22, 1919, the defendants submitted the plans to such directors. There is a conflict between the testimony for plaintiff and defendants with respect to what occurred at this meeting of the directors.

According to the testimony for the plaintiff, the following minutes of the meeting of said directors on April 22, which were formally adopted by the board on April 23, correctly set forth the substance of what occurred at said meeting on April 22:

"Minutes of Meeting of the Board of Directors of the Leicht Real Estate Company, Incorporated.

"At a meeting of the board of directors of the Leicht Real Estate Company, Incorporated, held by adjournment from a meeting of said board, held on April 22, 1919, and adjourned at 2 P. M. of said day, to be now reconvened and held on this, the 23d day of April, 1919, at the hour of 7 o'clock in the evening, at the residence of Mr. Jacob Leicht, the president of the company, at No. 1201 on Huntington place, in Wino-

na, in Norfolk county, Virginia, with a quorum of directors present as follows:

"Jacob Leicht, Martha F. Leicht, and H. C. Sherritt.

"Mr. Jacob Leicht, president of the company, presiding as chairman, called the meeting to order, and announced the same open for the transaction of business at the above place, date, and hour:

"The plans submitted by Mrs. Kathryn E. Elterich for the building proposed to be erected by her on her lot number three (3) in block number eight (8), as shown on the plat of said company, in that place in said county, known as 'Winona,' which said lot had recently been conveyed to her by said company, were then presented and inspected (no specifications being submitted), and after consideration, upon motion duly made and unanimously carried, it was ordered and directed that said plans be approved, upon condition that there shall be no kitchen or kitchen plumbing upon or in the second floor of said building, and upon the assurance of said Mrs. Kathryn E. Elterich that said building is not being or to be constructed for use as an apartment house, and that such use is not intended: And upon the further condition that this approval is not to have force or effect until the said Kathryn E. Elterich has signed the said plans in duplicate, with a certified copy of these minutes attached thereto (to each separate plan), to indicate her acceptance of the above conditions; Duplicate copy of said plans to be retained by said company with said certified copy of minutes attached.

"There being no further business, the meeting was then declared adjourned."

The testimony for defendants of Mr. Elterich and the contractor is to the effect that the directors, at said meeting on April 22, did not require that any change whatever be made in the proposed construction of the building; that the directors

said, in substance, that all they desired was that the writing on the original plans of the second floor above the basement of the words "pantry," "kitchen," and "dining room," as designating those rooms, be altered to the words "closet," "bedroom," and "bedroom," respectively, and that fair copies of the plans so altered be made and furnished to the plaintiff, so that the plaintiff could have same on file to exhibit to any persons interested, inclined to complain on the subject of the character of the house defendants were being allowed to erect; that Mr. Elterich agreed to this; that the contractor thereupon, at the time, made the alterations in verbiage aforesaid on the original draft of the plans with a pencil; that the directors thereupon said that, with the understanding that the contractor would have the fair copies of the plans as altered made and furnished to the plaintiff, the contractor could go ahead with the construction of the building; that the contractor did make such fair copies promptly, delivered them to the plaintiff, and proceeded with the erection of the building until stopped by the temporary injunction awarded on the filing of the bill, which was subsequently made permanent.

The testimony of Mr. Shelton (a witness for defendants, who was present at the meeting of April 22), in regard to the correctness of the above-copied minutes, and with respect to what occurred at such meeting, is as follows:

I would say that the minutes ought to be corrected to the following extent: I don't remember any question arising about there being no kitchen plumbing. It was understood there was to be no kitchen. The minutes are correct, in that Mrs. Elterich was to sign the plans in duplicate after they were again prepared by the contractor, but I don't recollect about the certified copy of the minutes of the meeting being attached thereto. I don't see

where that makes any difference, however, I think that is more detail than otherwise. The minds of the parties met after they had discussed the situation. The agreement that Mr. Cox, the general contractor, had, was to remake two sheets, I think, or certainly one sheet, in order that the records in Mr. Sherritt's office would be consistent and correct.

Q. Was anything said at that meeting or any agreement entered into as to the manner or use of the house?

A. It was frankly stated that some other persons would use those rooms, but that the house would not be an apartment house in any sense of the word, or used as an apartment house.

Cross-examination by Judge Willcox:

Q. As a matter of fact, Colonel, you thought the parties had reached an adjustment of the matter, which was to be carried out by the change in the plans to a certain extent by the contractor, which were then to be submitted to Mr. Sherritt. Was there any formal resolution adopted on the 22d, while you were there, by the board of directors?

A. No, not to my knowledge. I understood that the directors were then in meeting, and we were talking for their benefit.

Q. But no formal action was taken by the directors while you were there?

A. No formal action was taken in my presence. It was just agreed that the only thing remaining to be done was that Mr. Cox should put these pages in the final shape that they should be, he having marked them with his pencil to comply with the changes demanded. That, I think, is the whole thing.

Promptly after the receipt by the plaintiff of the fair copies of the plans, altered as aforesaid, the plaintiff presented such copies to Mrs. Elterich for her signature in duplicate, with a copy of the min-

utes of the said directors' meetings attached, whereupon Mrs. Elterich refused to sign such plans. Thereupon, on the next day, the bill in this cause was filed, and the preliminary injunction was awarded as aforesaid.

Messrs. Thomas W. Shelton and Alfred Anderson, for appellants:

The house proposed to be erected is neither a double house nor an apartment house, and is not in violation of the sixth restriction of the deed, although it can be used by two families.

Forest View Land Co. v. Atlantic Coast Line R. Co. 120 Va. 315, 91 S. E. 198; Richards v. East Tennessee, V. & G. R. Co. 106 Ga. 614, 45 L.R.A. 727, 33 S. E. 193; South & W. R. Co. v. Mann, 108 Va. 557, 62 S. E. 354; 8 R. C. L. p. 1051, § 104.

The plans were approved by the company's directors, and the general contractor was authorized to proceed, and did proceed at great loss.

Kelly v. Board of Public Works, 75 Va. 263.

Messrs. Martin & Martin, Homer C. Sherritt, and Willcox, Cooke, & Willcox, for appellee:

The building proposed to be erected is in violation of the restriction or condition in the deed.

White v. Collins Bldg. & Constr. Co. 82 App. Div. 1, 81 N. Y. Supp. 434; Kitching v. Brown, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241; Lignot v. Jaekle, 72 N. J. Eq. 238, 65 Atl. 221; Godfrey v. Hampton, 148 Mo. App. 157, 127 S. W. 626; Kenwood Land Co. v. Hancock Invest. Co. 169 Mo. App. 715, 155 S. W. 861; Schadt v. Brill, 45 L.R.A.(N.S.) 726, and note, 173 Mich. 647, 139 N. W. 878; Brigham v. H. G. Mulock Co. 74 N. J. Eq. 287, 70 Atl. 185; Powers v. Radding, 225 Mass. 110, 113 N. E. 782; Walker v. Haslett, — Cal. App. —, 186 Pac. 622; Ilford Park Estates v. Jacobs [1903] 2 Ch. 522, 1 B. R. C. 988, 72 L. J. Ch. N. S. 699, 89 L. T. N. S. 295, 19 Times L. R. 574; Shadt v. Brill, 45 L.R.A.(N.S.) 731, note; Kingston v. Busch, 176 Mich. 566, 142 N. W. 754.

Sims, J., delivered the opinion of the court:

The questions presented for our decision will be disposed of in their order as stated below:

1. Is the building proposed to

be erected an "apartment house" within the meaning of the sixth clause of the restrictions and conditions contained in the deed to the defendants, the appellants, and hence in violation thereof?

This question must be answered in the affirmative.

No authority precisely in point has been cited before us in argument.

No authorities whatever have been cited in argument for the defendants, except *South & W. R. Co. v. Mann*, 108 Va. 557, 62 S. E. 354, and 8 R. C. L. § 104, p. 1051, to sustain the following familiar rule, namely: "A deed is construed most strongly against the grantor and in favor of the grantee. This rule has been called one of the most just and sound principles of the law because . . . the grantor selects his own language. . . . If, therefore, the deed can inure in different ways, the grantee, it is said, may take it in such way as will be most to his advantage."

This rule, however, has no application where, in the light of the surrounding circumstances, the meaning of the language of the deed is plain. "Quod id certum est quod certum reddi potest."

For the plaintiff are cited the note in 45 L.R.A.(N.S.) 727 et seq.; *Kitching v. Brown*, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241, and some other cases which we need not here mention. These authorities refer, among other things, to the following well-understood general rules, which are not controverted in the argument before us for the defendants, namely:

As said in *Kitching v. Brown*, supra, 180 N. Y. at page 419:

"When a word or phrase used in a covenant has more than one meaning, judicial knowledge of existing circumstances and conditions is indispensable to a correct exposition of the law upon the subject, and to

that end parol evidence is admissible" (citing cases).

"One of the familiar rules applicable to the interpretation of ambiguous covenants and agreements is to ascertain, as nearly as may be, the situation of the parties, their surroundings and circumstances, the occasion and apparent object of their stipulations, and, from all these sources, to gather the meaning and intent of their language" (citing numerous cases).

As said in the note in 45 L.R.A.(N.S.) supra, at page 727: "Regard must be had to the object which the covenant was designed to accomplish, and the language used is to be read in an ordinary or popular, and not in a legal and technical, sense" (citing numerous cases).

As said of covenants such as that in question before us, 45 L.R.A.(N.S.) 728: "The language used must be given its obvious meaning, and be construed in accordance with the intention of the parties, assuming that the restriction was put into the deed not simply for the benefit of the grantor, but for the benefit of every owner of property and of every resident on the street" (citing a Michigan case, *Harris v. Roraback*, 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391).

As said (45 L.R.A.(N.S.) 728): "Particular words in such a covenant are to be given the meaning that was commonly given to them at the time the instrument containing the covenant was executed" (citing a New York case, *White v. Collins Bldg. & Constr. Co.* 82 App. Div. 1, 81 N. Y. Supp. 434).

And as said (45 L.R.A.(N.S.) 727): "The primary rule of interpretation of such covenants is to gather the intention of the parties from their words by reading, not simply a single clause of the agreement, but the entire context; and, where the meaning is [otherwise] doubtful, by considering such surrounding circumstances as they are presumed to have considered when

Covenant—
against apart-
ment house—
two-family flat.

Covenant—
construction—
object.

Deed—construc-
tion—most
strictly against
grantor.

their minds met" (citing a number of cases), "or in connection with the surrounding circumstances at the time the deed was executed" (citing cases).

From reading the whole context of the deed in question in the cause before us, in the light of the surrounding circumstances which appear from the statement preceding this opinion, it plainly appears that the restriction with respect to prohibition of the erection of apartment houses was in furtherance of the undertaking which the plaintiff had entered into to develop Winona as a high-class residential suburb of Norfolk city.

It is in substance admitted by the appellants that a three-family apartment house would be in violation of the sixth clause of the restrictions contained in the deed. The proof shows that the building in question would be a two-family apartment house. We are of opinion that a two-family apartment house would be, in kind, as much a violation of the object which the covenant in the deed with respect to apartment houses (the sixth clause aforesaid) was designed to accomplish as would a three-family apartment house.

Further: We think that when the sixth clause aforesaid is read in the light of the circumstances disclosed by the testimony of the defendants themselves and by the other evidence in the cause, which is set forth or referred to in the statement preceding this opinion, it is plain that the words "apartment house" were used in such clause, not with the meaning that the defendants might erect a building such as was the one exceptional building then existing in Winona, known as the "Neff" residence, which was a two-family apartment house, but with the meaning that the defendants were not to erect such a house, although they would be permitted to erect a house of the same character as that of the president of the plaintiff company, and of all the other large dwelling houses then existing

in Winona; namely, a house larger than necessary for one family, which might be occupied by more than one family, but which would not be constructed with any *separate* apartments suitable for the use of more than one family.

One of the surrounding circumstances, shown by the preponderance of the evidence, as we view it, which perhaps should be specifically mentioned, is that in Winona, and also in Norfolk city, according to the ordinary and popular understanding at the time the deed in question was executed, such a building as that proposed to be erected by the defendants would have been considered "an apartment house."

There is evidence for the defendants to the effect that, in accordance with the Building Codes referred to in the statement preceding this opinion, a building is not defined as an apartment house unless it is constructed or used for the separate occupancy of *more than two* families or households. But there is no evidence in the cause tending to show that the parties, in entering into the covenant in question in the deed aforesaid, contracted with reference to either of those Codes. Indeed, by the very terms of the definition aforesaid in such Codes, if the building was *used* by more than two families, although not constructed for the separate use of more than one family, the building would be an apartment house. That very thing was unquestionably admissible under the covenant in question, as expressly understood by both parties thereto. This of itself shows that the parties did not contract with reference to the definition contained in such Codes. Further: An apartment house, as we understand it, within the definition of said Codes, must, according to the requirements of such Codes, have a certain construction with a view to safety, sanitation, etc. As said in *Kitching v. Brown*, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241, *supra*, of a definition of a "tenement house" in a statute requiring a certain construc-

tion of such houses with a view to safety, sanitation, etc.: "The definition was coined for a limited and specified purpose. . . . It is obvious, therefore, that this statutory definition, in and of itself, throws no light upon the question before us," which question was the proper interpretation of a covenant in a deed not to erect a "tenement building" on a certain lot.

2. Was the objection to the building proposed to be erected by defendants, on the ground that it would be an apartment house, waived by the plaintiff, by what occurred at the board of directors meeting on April 22d, set forth in the statement preceding this opinion?

This question must be answered in the negative.

The evidence does indeed show that the plaintiff, at the directors' meeting mentioned, agreed to waive any objection to the proposed building on account of its being constructed into two separate apartments; but, as we think is shown by the preponderance of the evidence, only upon condition that the upstairs kitchen should not be constructed for use as a kitchen, and that the defendant Mrs. Elterich would personally agree that the rooms on the second floor above the basement, designated on the original plans, "pantry," kitchen," and "dining room," respectively, would not be used as such, but only as bedrooms; that is to say (in the language of Mr. Shelton, a witness for defendants): "It was understood that there was to be no kitchen," and that "the house would not be an apartment house *in any sense of the word*, or used as an apartment house." (*Italics supplied.*)

This agreement on the part of Mrs. Elterich was to be evidenced by her signing in duplicate the altered copy of the plans designating the rooms in question as "closet" and "bedrooms," respectively, as set forth in the statement preceding this opinion. Mrs. Elterich refused to sign such plans, and refused to

enter into such an agreement, and both of the defendants insisted upon their right to proceed with the construction of the building without any actual alteration of the original plan of construction, which included the construction of the upstairs kitchen in a way to make it suitable for use as a kitchen, and which, of course, included the necessary plumbing of a kitchen, etc. In view of such failure of defendants to comply with the condition aforesaid, the waiver on the part of the plaintiff, predicated thereon, never came into effect.

The precise point of difference between the plaintiff and the defendants on the subject under consideration is that defendants claim that no objection to the proposed construction of the building itself existed on the part of the plaintiff; that all the plaintiff demanded was that the plans for the second floor above the basement should not disclose on their face that rooms on that floor were to be constructed and used as a separate pantry, kitchen, and dining room, respectively, from those on the floor below; that the plaintiff was entirely willing that such actual construction and use should proceed; whereas the plaintiff claims that its objection in the premises was a substantial objection, which went to the actual construction of the upstairs kitchen as a kitchen, and to the use of the second floor as a separate apartment from that below. We are of opinion that the preponderance of the evidence sustains the claim of the plaintiff.

It may be that the defendants may have considered that, by what occurred at the April 22d meeting of the board of directors, the plaintiff had in effect waived the aforesaid sixth covenant in the deed, and had stipulated in lieu thereof for a personal agreement of Mrs. Elterich, which amounted substantially to nothing. It is not uncommon for a party to erroneously convince himself that he has secured an agreement which will operate wholly in

his favor. There was room in the case before us for such a misunderstanding on the part of defendants as to the result of the April 22d directors' meeting. But we are satisfied that the evidence shows that when the deed was made the minds of the parties met on the sixth covenant, with the meaning which we have held above its words import; and, while it may be true that their minds did not meet on the subse-

quent agreement, which is relied on by defendants to discharge the former covenant, that fact, instead of sustaining, is sufficient of itself to defeat such claim of the defendants; the fact being that the defendants did not perform the condition aforesaid as it was stipulated by the plaintiff.

—waiver—
negotiation—
effect.

The decree under review will be affirmed.

ANNOTATION.

Multiple residence structures as violations of restrictive covenants.

- I. Introductory, 451.
- II. Construction of particular forms of covenants:
 - a. Residence purposes only, 453.
 - b. Dwelling house or houses, 454.
 - c. One dwelling or a single dwelling, 457.
 - d. One house, 458.
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I. Introductory.

As will be seen by the cases subsequently cited, covenants restricting the class of building which may be placed on granted premises are valid, and will be enforced if their meaning is clear, but they are to be construed most strongly against the grantor, and the two elements of clarity of meaning and strictness of construction furnish sufficient grounds for difference of opinion to cause considerable diversity of decision among the courts upon similar states of fact, and to throw some uncertainty into the question just what ruling will be made on any particular form of covenant.

For the convenience of the user, the cases, with the exception of those merely declaring general principles, have been duplicated under a double classification; they being classified first with reference to the form of the covenant, and, second with reference to the kind or character of the building involved.

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The owner of property may, in selling it, impose such restrictions on its use as he sees fit, provided they violate no law and are not contrary to public policy; and a restriction of the use of the buildings which may be erected will be binding on each purchaser with notice. *Dick v. Goldberg* (1920) — III. —, 128 N. E. 723.

But courts of equity do not aid one man to restrict another in the uses to which he may put his land, unless the right to such aid is clear. *Fortesque v. Carroll* (1910) 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79.

In *Davison v. Taylor* (1917) 196 Mich. 605, 162 N. W. 1033, in which the attempt was made to erect a four-family flat on a lot which was restricted to a building for one single residence, questions of estoppel were raised, and the court stated that the enforcement of such covenants by a court of equity was not a matter of absolute right, but was governed by the same general rules that control

equitable relief by specific performance.

The primary rule of interpretation of such covenants is to gather the intention of the parties from their words, by reading not simply a single clause of the agreement, but the entire context; and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met (*Kitching v. Brown* (1905) 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241; *White v. Collins Bldg. & Constr. Co.* (1903) 82 App. Div. 1, 81 N. Y. Supp. 434; *Sonn v. Heilberg* (1899) 38 App. Div. 515, 56 N. Y. Supp. 341; *Gillis v. Bailey* (1850) 21 N. H. 149); or in connection with the surrounding circumstances at the time the deed was executed (*Hutchinson v. Ulrich* (1893) 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556; *Kenwood Land Co. v. Hancock Invest. Co.* (1913) 169 Mo. App. 715, 155 S. W. 861).

Such covenants must also be considered with reference to the situation of the property affected and its present and prospective use. *Kenwood Land Co. v. Hancock Invest. Co.* (Mo.) *supra*.

Attempts to give precise scope and meaning to common words of human speech are bound to fail unless resort is had to the surroundings of both the parties and subject-matter, the writer and the matter written about. *Arnoff v. Chase* (1920) — Ohio St. —, 128 N. E. 319.

Regard must be had to the object which the covenant was designed to accomplish; and the language used is to be read in an ordinary or popular, and not in a legal and technical, sense. *Pearson v. Adams* (1912) 27 Ont. L. Rep. 87, 3 Ont. Week. N. 1660, 7 D.L.R. 139; *Rogers v. Hosgood* [1900] 2 Ch. (Eng.) 388, 69 L. J. Ch. N. S. 652, 83 L. T. N. S. 186, 16 Times L. R. 489, 48 Week. Rep. 659; *Re Robertson* (1911) 25 Ont. L. Rep. 286, 20 Ont. Week. Rep. 712, 3 Ont. Week. N. 431.

The purposes to be achieved by the covenant should be kept in mind.

Godfrey v. Hampton (1910) 148 Mo. App. 157, 127 S. W. 626.

The court must look to the context and attending circumstances, and to the intention of the parties, and must give effect to that intention in good faith, and not seek by ingenious subtleties to evade the restrictions. *Sanders v. Dixon* (1905) 114 Mo. App. 229, 89 S. W. 577.

The language used must be given its obvious meaning, and be construed in accordance with the intention of the parties, assuming that the restriction was put into the deed not simply for the benefit of the grantor, but for the benefit of every owner of property and of every resident on the street. *Harris v. Roraback* (1904) 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391.

Particular words in such a covenant are to be given the meaning that was commonly given to them at the time the instrument containing the covenant was executed. *White v. Collins Bldg. & Constr. Co.* (1903) 82 App. Div. 1, 81 N. Y. Supp. 434.

Restrictive covenants are not to be extended by implication. *Rohrer v. Trafford Real Estate Co.* (1918) 259 Pa. 297, 102 Atl. 1050.

Restrictions on the mode of enjoyment of a lot will be enforced, but are not favored, and doubts will, in general, be resolved against them. *Walker v. Haslett* (1920) — Cal. App. —, 186 Pac. 622.

Covenants are to be construed strongly against, rather than liberally in favor of, the grantor. *Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co.* (1915) 214 N. Y. 263, L.R.A.1915F, 651, 108 N. E. 444; *Casterton v. Plotkin* (1915) 188 Mich. 333, 154 N. W. 151.

Where the right to enforce a restrictive covenant in the conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes by the owner of the fee. *Hunt v. Held* (1914) 90 Ohio St. 280, L.R.A.1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051.

If a reasonable and substantial doubt is raised by the words employed

in the covenant, it must be resolved against the grantor. *Bolin v. Tyrol Invest. Co.* (1918) 273 Mo. 257, L.R.A. 1918C, 869, 200 S. W. 1059.

Within fairly wide limits, the question whether a particular structure is or is not within the covenant is one of fact, and not of law. *Pearson v. Adams* (1912) 27 Ont. L. Rep. 87, 3 Ont. Week. N. 1660, 7 D. L. R. 189.

II. Construction of particular forms of covenants.

a. Residence purposes only.

The rule seems to be that any kind of building devoted exclusively to residence purposes, whether a duplex house or an apartment house, may be erected under a covenant limiting the use of the property to residence purposes only.

Kentucky. — *McMurtry v. Phillips Invest. Co.* (1898) 103 Ky. 308, 40 L.R.A. 489, 45 S. W. 96; *Struck v. Kohler* (1920) 187 Ky. 517, 219 S. W. 435.

Michigan. — *Tillotson v. Gregory* (1908) 151 Mich. 128, 114 N. W. 1025; *Maine v. Mulliken* (1913) 176 Mich. 443, 142 N. W. 782; *Casterton v. Plotkin* (1915) 188 Mich. 333, 154 N. W. 151; *Teagan v. Keywell* (1920) — Mich. —, 180 N. W. 454.

New York. — *McDonald v. Spang* (1907) 55 Misc. 332, 105 N. Y. Supp. 617.

Ohio. — *Hunt v. Held* (1914) 90 Ohio St. 280, L.R.A.1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051; *Arnoff v. Williams* (1916) 94 Ohio St. 145, 113 N. E. 661.

Canada.—*Re Robertson* (1911) 25 Ont. L. Rep. 286, 20 Ont. Week. Rep. 712, 3 Ont. Week. N. 431.

Thus, a covenant in that form does not prohibit an apartment house costing \$40,000, with accommodations for a common dining room, laundry tubs, and storage rooms. *McMurtry v. Phillip Invest. Co.* (Ky.) *supra*.

In that case it was contended that the words "residence purposes" conveyed the idea of a single residence for a single family; or, at any rate, excludes the idea of a number of residences under the same roof or in the same house. The court says: "We

think, however, that to give the language used this meaning would be to extend its scope beyond the expressed intention of the parties." As the house in controversy is to be used for residence purposes only, it is construed as not prohibited by the restrictive clause.

And a covenant that property shall be used for residence purposes only; the residences to be at least two stories high, does not prohibit the erection of a four-family flat building two stories high. *Tillotson v. Gregory* (Mich.) *supra*.

A restriction that the buildings shall be used for residence purposes only does not preclude the erection of an apartment house. *Struck v. Kohler* (Ky.) and *Teagan v. Keywell* (Mich.) *supra*.

In the latter case, the court says there is a clear distinction between a restriction that property shall be used for residence purposes only, and one where the restriction is confined to a dwelling house.

So, a restriction to residence purposes only does not prevent the erection of a fourteen-family apartment house if the building can be kept within the permitted size and style of architecture. *Casterton v. Plotkin* (1915) 188 Mich. 333, 154 N. W. 151.

And a covenant that the land shall be used for residence purposes only, and not for any trade or business, is not violated by the erection of a three-suite dwelling house with one entrance. *Re Robertson* (Ont.) *supra*.

A restriction to residence purposes only does not prevent the erection of a double or two-family house on the premises. *Hunt v. Held* (Ohio) *supra*. The contention was that the use of the term "only" prevented the erection of houses to accommodate more than one family. But the court says: "We are unable to see the distinction. . . . The word 'only,' in our opinion, does not change the meaning of the words 'residence purposes.' . . . The word 'residence,' as we view it, is equivalent to 'residential,' and was used in contradistinction to 'business.' If a building is

used as a place of abode, and no business carried on, it would be used for residence purposes only, whether occupied by one family or a number of families."

An agreement that premises shall be used for residence purposes only, and that no more than one residence building shall be located upon a lot, does not prohibit the erection of a four-suite apartment house. *Arnoff v. Williams* (Ohio) *supra*.

And in the case of a covenant that buildings erected should be used for residence or dwelling purposes only, and not in any objectionable manner whatever, it was held that a two-family or flat house is not legally objectionable, though perhaps less desirable in a fine residence section; and that such a building is certainly not a violation of the covenant for residence or dwelling purposes only. *McDonald v. Spang* (1907) 55 Misc. 332, 105 N. Y. Supp. 617.

In *Maine v. Mulliken* (1913) 176 Mich. 443, 142 N. W. 782, the covenant restricted the use of the property to residence purposes only, and defendant placed a structure on it which he used for manufacturing purposes, and when objection was made he announced the purpose of changing it into a four-family flat, and the court held that, if used for this purpose, there would be no ground for complaint.

But in *Burton v. Stapely* (1904) 4 Ohio N. P. N. S. 65, 17 Ohio Dec. 1, it was held that a covenant to use premises for residence purposes only, and not for various kinds of business named, is violated by the erection of a three-story apartment house intended to accommodate from fifteen to twenty families, the court interpreting the term "residence" to mean a "private dwelling," because it was thought that those terms were used as synonyms in *Linwood Park Co. v. Van Dusen* (1900) 63 Ohio St. 183, 58 N. E. 576. It is added that there is no difference between a tenement house and an apartment house, except that one is for poor people and the other is for well-to-do people. Hence, the court concluded that if the erec-

tion of a tenement house would violate this covenant, so also would an apartment house.

The common pleas decision in *Burton v. Stapely* (Ohio) *supra*, was reversed in the circuit court (see 4 Ohio N. P. N. S. 73) upon the ground that the covenant to use the premises for residence purposes only had, as its chief purpose, the exclusion therefrom of all business of every kind; and inasmuch as the only kind of business possible in connection with the apartment house in question, the renting of apartments, was not to be done on the premises, the apartment house would not violate the covenant. And although this holding was reversed in (1906) 74 Ohio St. 461, 78 N. E. 1120, and the common pleas decision above referred to affirmed without opinion, yet, in view of the fact that the covenant expressly prohibited various kinds of business named, and in view of the very words used, the construction put upon it by the circuit court would seem to be the proper one. It is also borne out by the construction put upon similar covenants in other jurisdictions, as shown above. And the mere fact that, in the *Linwood Park Co. Case*, the covenant read, "for the purposes of a private dwelling or residence only," would not appear to sustain the opinion of the common pleas.

b. Dwelling house or houses.

A covenant against any building except "a dwelling house," or "one dwelling house," or "a dwelling," is generally interpreted to forbid any building except one designated for a single family; and therefore such a covenant will be broken by the erection of a double house or a block of flats.

Massachusetts.—*Powers v. Radding* (1916) 225 Mass. 110, 113 N. E. 782.

Michigan.—*Harris v. Roraback* (1904) 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391; *Bagnall v. Young* (1908) 151 Mich. 69, 114 N. W. 674; *Schadt v. Brill* (1913) 173 Mich. 647, 45 L.R.A.(N.S.) 726, 139 N. W. 878; *Kingston v. Busch* (1913) 176 Mich. 566, 142 N. W. 754; *Misch v.*

Lehman (1918) 178 Mich. 225, 144 N. W. 556; *Rosenzweig v. Rose* (1918) 201 Mich. 681, 167 N. W. 1008.

Missouri.—*Sanders v. Dixon* (1905) 114 Mo. App. 229, 89 S. W. 577; *Thompson v. Langan* (1913) 172 Mo. App. 64, 154 S. W. 808.

New Hampshire. — *Gillis v. Bailey* (1845) 17 N. H. 18.

England. — *Rogers v. Hosegood* [1900] 2 Ch. 388, 69 L. J. Ch. N. S. 652, 48 Week. Rep. 659, 83 L. T. N. S. 186, 16 Times L. R. 489.

A restriction that but one dwelling shall be erected upon the lot, in deeds of lots in a residence district, defines the use to which the dwelling shall be put, and not simply its form, so that a house cannot be erected under one roof to accommodate more than one family. *Powers v. Radding* (Mass.) *supra*.

Also a covenant that no more than one message or dwelling house shall be erected on one plot is broken by a block of residential flats, thirty or forty in number, eight on each floor, with a single public entrance and staircase, giving separate entrances through them to each flat. *Rogers v. Hosegood* (Eng.) *supra*.

In that case it was held that the erection not only involved a breach of a covenant that no more than one message or dwelling house should be erected or standing on a plot, and that such message should be adapted for and used as and for a private residence, but also violates a covenant that every house to be erected on the premises or any part thereof should at all times thereafter be adapted for and used as and for a private residence only.

A condition in a conveyance of lots on a tract of residence property, that no building other than a dwelling house shall be erected on a lot prohibits the construction of a double house on the lot, although it is under one roof, with a single front entrance. *Schadt v. Brill* (1913) 173 Mich. 647, 45 L.R.A.(N.S.) 726, 139 N. W. 878. The contemplated house in that case was to be divided vertically into two dwellings, with entrances from a single front hall. The court says,

defendant figures on building two houses in a suite together,—a pair,—a house multiplied by two,—composed of two equivalent or corresponding parts, containing the same portion of measure as to size, strength, etc., repeated. A double house is one step from a private home dwelling towards the apartment house. If a dwelling house in the connection in which it is used does not mean a house designed and constructed for the dwelling of a single family on each lot, a treble or quadruple house on each lot, designed for three or four families, if under one roof, and with a single entrance, would be a departure from a single dwelling only in the degree of physical difference, and not in violation of any legal restriction. Either this restriction means one dwelling for a single family on each lot, or there is no restriction except one house on each lot, designed to be a dwelling for as many families or persons as the owner sees fit.

And a covenant not to occupy the premises except for one dwelling house prohibits a two-story building designed for two families, one on each floor, with separate entrances and cellars. *Harris v. Roraback* (1904) 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391. It appeared in this case that no such building had been erected in the vicinity at the time the deed was made. The court says a building planned and designed for two or more dwellings cannot properly be described as one dwelling house.

And a covenant reciting its object to be that buildings might not be crowded together, providing that only one single dwelling house shall be erected upon each lot, is violated by a building two stories high, to accommodate six families, although constructed with doors affording communication from one tenement to another through all parts of the building; this provision for internal communication was deemed a mere subterfuge to evade the force and effect of the covenant, the court stating that the building was substantially a block of six houses. *Gillis v. Bailey* (1845) 17 N. H. 18.

Upon another appeal, this decision was reaffirmed, the case being reversed, however, on another point in (1850) 21 N. H. 149. In the later opinion, it was said that the restriction gave a right to erect a dwelling house intended and calculated for the convenient accommodation of only one family, and the court declared that, although the building erected in that case might have been "a house" or a "dwelling house," it was not "a single dwelling house."

In *Rosenzweig v. Rose* (1918) 201 Mich. 681, 167 N. W. 1008, the covenant was that the grantee would not occupy the premises except for a dwelling house, and he attempted to put upon it a twenty-four-family flat. The court said it needs no argument to demonstrate that the erection of such a building would destroy the privacy of a neighborhood and make it much less desirable as a residential district, and, if such a flagrant violation of the building restrictions were permitted, the practical result would be the cancelation of all the restrictions imposed upon the entire subdivision.

Likewise, a covenant not to erect any dwelling house of less than a certain value means that no building shall be erected except a single dwelling house, and prohibits the erection of a "duplex" or two-family residence. *Kingston v. Busch* (1913) 176 Mich. 566, 142 N. W. 754.

Also a covenant against anything but a two-story dwelling house means one two-story dwelling house designed and used for a single dwelling, and prohibits a two-story flat or dwelling house building designed and intended for two families. *Bagnall v. Young* (1908) 151 Mich. 69, 114 N. W. 674.

In like manner, a covenant that, for a certain period, no dwelling house shall be erected to contain more than two tenements, or be constructed for more than two families, is violated by the construction of a house three stories high, containing seventeen rooms, and available for three families, although it is not to be used for more than two families until after the

time limited expires. *Ivarson v. Mulvey* (1901) 179 Mass. 141, 60 N. E. 477.

But where there had been a considerable number of two-family houses erected, and the restriction was not to erect any building other than a dwelling house and its appropriate buildings, the court declined to enjoin the erection of what was termed "a modern high-class apartment house," the apartment house being three stories high, and most of the buildings on the restricted tract being three stories high. *Underwood v. Herman & Co.* (1913) 82 N. J. Eq. 353, 89 Atl. 21. The court referred to the doctrine that restrictions should be strictly construed against the restrictor, and said: The grantors in their covenant made no attempt by language to define the meaning of a "dwelling house and its appropriate buildings," but allowed each grantee, in the practical adaptation of the land to his personal requirements, to construe the language of the covenant to meet the personal exigency. In this manner language of an uncertain and indefinite character received a practical interpretation upon the land by the grantees, presumably with the acquiescence of the grantors and prior grantees.

And in *Hamnett v. Born* (1915) 247 Pa. 418, 93 Atl. 505, it was held that a restriction that no more than one dwelling house shall be erected or maintained on each 40 feet of land is not transgressed by a duplex house designed for the occupancy of two families under one roof, so arranged as to furnish each family with a complete and independent apartment having independent and separate entrances after the common front entrance has been passed.

So, a covenant in deeds of a subdivision of city property, inserted so that buildings or structures upon the property might harmonize and tend to beautify the entire neighborhood and advance values, which provides that nothing but a church or dwelling house and the necessary outbuildings shall ever be erected upon any part of the land, is not violated by a four-

story apartment house, each apartment being suitable only for separate use as a housekeeping apartment. *Johnson v. Jones* (1914) 244 Pa. 386, 52 L.R.A.(N.S.) 325, 90 Atl. 649.

And *Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co.* (1915) 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444, held that limiting the use of a lot to a dwelling house does not exclude an apartment house. The court says it seems very clear that the simple term "dwelling house," used in the covenant, is broad enough to include and permit an apartment house. Where a covenant in plain and complete language limits the use of real estate to the erection of a certain and general class of buildings by reference to their fundamental purposes, the law will not still further extend the restriction by enforcing it against all but a limited variety of buildings which happened to be in use when the covenant was made.

A provision that only a single dwelling house shall be erected upon a lot does not prevent the erection of a duplex house. *Rohrer v. Trafford Real Estate Co.* (1918) 259 Pa. 297, 102 Atl. 1050.

In *Bolin v. Tyrol Invest. Co.* (1918) 273 Mo. 257, L.R.A.1918C, 869, 200 S. W. 1059, it is held that an apartment house, with its apartments, is a dwelling house within a covenant that a grantee shall not construct upon the property a dwelling house less than two stories in height, or more than one such dwelling on each 50-foot frontage. The court states that the only contention upon which the grantor rests his case is that each apartment in this house is a house within the meaning of the restriction. This implies the absurdity that one house, if it be an apartment house, is six houses, and does mortal violence to the dictionary definition of the word.

That case was followed in *Morrison v. Darr* (1918) — Mo. —, 201 S. W. 1147, but both cases were overruled in *MORRISON v. HESS* (reported herewith) ante, 433.

But a covenant against any building except "dwelling houses" is quite

different, and obviously much less restrictive in its meaning.

Thus, a covenant that only dwelling houses shall be built is not violated by the erection of a four-story tenement house designed for eight families. *Roth v. Jung* (1908) 79 App. Div. 1, 79 N. Y. Supp. 822.

Nor does a covenant to erect only first-class dwelling houses prohibit a six-story elevator apartment house, especially where the character of the neighborhood has radically changed (*Bates v. Logeling* (1910) 137 App. Div. 578, 122 N. Y. Supp. 251); or a seven-story apartment house (*Holt v. Fleischman* (1902) 75 App. Div. 593, 78 N. Y. Supp. 647). In the latter case the chief controversy was upon another point.

And a covenant to erect a substantial two-story dwelling house of a certain minimum cost does not prohibit a three-story building of a greater cost, with stores on the first floor and flats or apartments above; the court remarking that in no event would the erection of a flat or tenement house be a violation of the covenant, even if it meant to prohibit everything but dwelling houses. *Hurley v. Brown* (1899) 44 App. Div. 480, 60 N. Y. Supp. 846.

c. One dwelling or a single dwelling.

It is doubtful if there is any material distinction between a restriction to one dwelling on a lot and one dwelling house on a lot. But since the covenants have been passed upon in the different forms, the cases have been separately classified to facilitate the finding of the cases upon the particular covenant involved in any case in hand.

It has been held that a covenant against the erection of more than one dwelling on each lot prohibits a three-story apartment house or flat building containing seven separate suites on each floor, each with a separate entrance (*Thompson v. Langan* (1913) 172 Mo. App. 64, 154 S. W. 808); or a building containing four flats, two below and two above, standing on a continuous foundation under one roof, each flat having a separate

front entrance, and the whole building being bisected by a brick wall extending from the cellar floor to the roof (*Sanders v. Dixon* (1905) 114 Mo. App. 229, 89 S. W. 577). In the latter case, the court, in addition to the quotation made in *MORRISON v. HESS* (reported herewith) ante, 483, said: "Whether a building is one dwelling house or more depends on whether it was planned and constructed for plural homes, as much as on the actual use of it by several families for their homes. It may be occupied by two families and still be a single dwelling house; and likely its continuance never would be enjoined, although arranged for plural residences, if not thus used. . . . Now the edifice we are dealing with is so constructed as to be two houses, unless any building, however large, is one house if it rests on a continuous foundation and has a continuous roof. It is not a single two-story and attic building having two suites of separate apartments, one on the lower floor and one on the upper floor; but a double two-story and attic building of that sort, with a divisional wall running through it on the center line of the lot, from front to rear and from the cellar to the roof. On either side is a swelled or embayed front. The question is whether that building infringed the covenant against more than one dwelling. We concede that, in disposing of this question, we must resolve any doubt in favor of the free use of the property."

But in *Jamés v. Irvine* (1905) 141 Mich. 376, 104 N. W. 631, it was held that a covenant to erect only "a dwelling" does not prohibit the erection of a double house designed for two families, one on each floor, where other houses of the same character have been erected in the same subdivision without objection.

And a covenant for the erection of "only a single dwelling" means only one dwelling house, and does not prohibit a flat or apartment building four stories high. *Hutchinson v. Ulrich* (1893) 145 Ill. 836, 21 L.R.A. 391, 34 N. E. 556. Here other deeds by the same grantor contained covenants

which used the word "one" as synonymous with "single," and there were at the time flats and apartment houses in that vicinity, so that the grantor must have been familiar with them, yet no reference was made in this covenant to a "flat" or a "private residence," and this was deemed of importance.

d. One house.

A covenant against the erection of more than one house on each lot does not prohibit a structure planned for separate occupation by two families, one on the first and one on the second floor, or "flats" with separate entrances. Such a building may constitute two dwellings, but certainly does not constitute two houses. *Pank v. Eaton* (1905) 115 Mo. App. 171, 89 S. W. 586.

In the above case it is said that a covenant against more than one dwelling on a lot deals with the use of the premises, and is intended mainly to prevent plural occupancy of the lot; but a covenant against more than one house on a lot is not directed against plural use or occupancy, but against plural structures.

And a block of flats, two on each floor, and two floors, is a "house" within a covenant not to erect more than a stipulated number of houses upon certain premises, where there is nothing in the context to alter or cut down the popular interpretation of that term. "House" means the whole structure,—the physical erection,—and not the interior arrangement. *Kimber v. Admans* [1900] 1 Ch. (Eng.) 412, 69 L. J. Ch. N. S. 296, 82 L. T. N. S. 136, 16 Times L. R. 207, 48 Week. Rep. 322.

But, in a more recent case, it was held that a covenant against the erection of more than one house is violated by a double tenement house, one tenement on each floor, each distinct and complete in itself, and with no internal communication, and with separate approaches from the street. *Ilford Park Estates v. Jacobs* [1903] 2 Ch. (Eng.) 522, 1 B. R. C. 988, 72 L. J. Ch. N. S. 699, 89 L. T. N. S. 295, 19 Times L. R. 574. The court

says, the building constitutes two houses which are structurally separate in every respect, with separate approaches to the street, and no internal communication. It is quite different from a case where one building is erected, containing separate flats. In that case there is internal communication between the flats by means of a common staircase. In the present case, there is no internal communication whatever. It is merely a case of one house superimposed on another, from which it is divided horizontally, while in the ordinary case of semidetached houses the division is vertical.

Under a covenant that one house only shall be erected on each lot, an apartment house cannot be erected. *Arnoff v. Chase* (1920) — Ohio St. —, 128 N. E. 319. The court holds that the word "house" is used, both in literature and common usage, as the equivalent of the sort of a home technically known as a single-family residence.

e. One building.

A covenant that the improvement on a lot shall consist of only one building does not preclude the erection of an apartment house which shall cover several adjoining lots. *Struck v. Kohler* (1920) 187 Ky. 517, 219 S. W. 435. The court says if one residence building large enough to cover two lots was erected, it could not be said that there was more than one building on a lot.

In *Brigham v. H. G. Mulock Co.* (1908) 74 N. J. Eq. 287, 70 Atl. 185, it was held that a covenant forbidding more than one building to be erected upon each lot, for dwelling-house purposes, is violated by a double house under one roof. Such a structure was said to be as much two buildings for dwelling-house purposes as though separate roofs existed; the two dwellings might pass to separate owners, and the dividing wall become a party wall.

But in *Fortesque v. Carroll* (1910) 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79, where the covenant provided that not more than one building should be erected on each lot, it

was held, without reference to the *Brigham Case*, that a structure which is one building so far as its exterior walls, foundation, and roof are concerned, is not so clearly a violation of the covenant as to be enjoined, simply because it is so arranged internally and so provided with entrances as to serve for two residences.

The term "one building" should not be construed so as to mean "one building to be occupied as one residence;" the terms "building" and "residence" refer to different things, rest upon different considerations, and set up two totally distinct criteria by which to determine whether there has been a violation of the covenant. The word "building" normally connotes matters of construction; whereas the word "residence" directs attention solely to the use or mode of occupancy to which a building may be put. *Ibid.*

f. Detached dwelling house.

In *Re Robertson* (1911) 25 Ont. L. Rep. 286, 20 Ont. Week. Rep. 712, 8 Ont. Week. N. 431, it was held that a covenant that every residence erected upon the land should be a detached house is not violated by the erection of a three-suite dwelling house with one common entrance. This covenant deals only with the character of the physical structure, and not with the internal arrangement or purpose for which it is used.

But in *Pearson v. Adams* (1914) 50 Can. S. C. 204, Ann. Cas. 1915A, 416, it was held that an apartment house to accommodate six families is not, although it is under one roof, and constructed to have the external appearance of one house, permitted by a covenant that the lot shall be used only as a site for a detached brick or stone dwelling house, to cost at least \$2,000. Anglin, J., said in his opinion it would be a most extraordinary description of a modern apartment house, such as defendant proposes to erect, to call it a detached dwelling house,—a description that nobody would ever dream of using colloquially. The court thereby reversed (1913) 28 Ont. L. Rep. 154, where it appeared that the restriction was for a use for an isolated dwelling house,

and the court said: That the apartment house is a dwelling house no one can reasonably deny, and that it will be isolated is obvious. The number of persons living in it cannot, nor can the manner in which they live in it, change the obvious facts. "To call one isolated house within four walls under one roof, and with outer doors for one house only, several houses, merely because several persons may occupy different parts of that one isolated house, would, I cannot but think, amuse rather than convince the minds of ordinary people." And the court thereby reversed (1912) 27 Ont. L. Rep. 87, 3 Ont. Week. N. 1660, 7 D.L.R. 139, where the court held that the building in question could not be called a detached dwelling house.

And a covenant that no building shall be constructed or maintained other than for a single family or as a double or semidetached house prohibits the alteration of a one-family house already upon the premises into a three-story tenement house or "three decker," regardless of the extent to which the old building may enter into its construction. *Allen v. Barrett* (1912) 218 Mass. 86, 99 N. E. 575, Ann. Cas. 1913E, 820.

Restricting the use of a lot to the erection of detached dwelling houses on lots 50 feet or more permits the erection of semidetached two-family dwellings. *Liebman v. Hall* (1920) 110 Misc. 365, 180 N. Y. Supp. 514.

An apartment house with a vertical division wall extending the whole height of the building, dividing it into two equal parts, each part containing seven or eight apartments, with no opening through the division wall, and each half having an independent entrance, is a "pair of semidetached buildings," within a covenant that every pair of semidetached buildings erected upon the premises should have appurtenant thereto lands having a stipulated frontage upon a certain avenue, and accordingly such an apartment house must have the stipulated frontage. *Holden v. Ryan* (1912) 22 Ont. Week. Rep. 767, 3 Ont. Week. N. 1585, 4 D. L. R. 151.

But in *Harmon v. Burrow* (1919) 263 Pa. 188, 106 Atl. 310, it was held

that the erection of a duplex dwelling house does not violate a restriction which limits the grantee to the erection of a single building; "namely, a detached dwelling house."

g. Family residence.

A covenant not to erect any building less than three stories in height, the same to be in every way adapted for use as a family residence, and not to erect any one of a long list of objectionable manufacturing plants, does not prohibit the erection of a six-story apartment house. The evident object of such a covenant is to restrict to residence purposes. And a structure does not cease to be a family residence simply because more than one family reside therein. *Sonn v. Heilberg* (1899) 38 App. Div. 515, 56 N. Y. Supp. 341.

But a covenant that no building shall be constructed or maintained other than for a single family prohibits the alteration of a one-family house already upon the premises into a three-story tenement house or "three decker." *Allen v. Barrett*, 213 Mass. 86, 99 N. E. 575, Ann. Cas. 1913E, 820, *supra*.

h. Private residence or dwelling.

A private residence is held to mean a residence for one family only, and accordingly a covenant providing for a private residence only forbids a flat house.

Thus, a covenant against everything except a private residence is broken by the erection of a block of residential flats (*Rogers v. Hosegood* [1900] 2 Ch. (Eng.) 388, 69 L. J. Ch. N. S. 652, 83 L. T. N. S. 186, 16 Times L. R. 489, 48 Week. Rep. 659); and prohibits a two-family house arranged for one family on each floor (*Koch v. Gorruffio* (1910) 77 N. J. Eq. 172, 140 Am. St. Rep. 552, 75 Atl. 767).

A restriction to a first-class private residence prohibits a double or duplex house designed for two families, living separate, and it is immaterial whether the building is divided horizontally or vertically. *Walker v. Haslett* (1920) — Cal. App. —, 186 Pac. 622. The court says such a structure is as much two buildings for residence purposes

as though separate roofs existed; and, if sanctioned, would enable the owner of the lot to violate indirectly the covenant in the deed that any residence erected on the lot shall cost and be fairly worth \$5,000. The court further says the building is not a private residence or private dwelling. A house designed for the accommodation of more than one family cannot be deemed to be a private residence or a private dwelling.

Also a covenant against any building other than one for the use or purpose of a private dwelling prohibits a three-story frame flat house with five rooms on each floor, suitable for three families. *Skillman v. Smatheurst* (1898) 57 N. J. Eq. 1, 40 Atl. 855.

Likewise, a covenant to use premises for the purposes of a private dwelling or residence only is violated by using a structure thereon as a lodging house or tenement house. *Linwood Park Co. v. VanDusen* (1900) 68 Ohio St. 183, 58 N. E. 576.

In *Levy v. Schreyer* (1904) 177 N. Y. 293, 69 N. E. 598, there was a covenant against a tenement house or any house except private dwellings; a building of three stories was erected, each floor arranged to accommodate a separate family. Since the evident purpose of the grantor, as gathered from all the covenants, was to restrict the use of the land to attractive dwellings of a certain minimum cost, it was held that this building answered the requirements of the covenants so far as outside appearances and cost were concerned, and violated the covenants only in so far as the interior arrangement was concerned; and its use as a tenement house or for any other purposes than a private residence was enjoined, but an order for the destruction of the building was refused.

This decision modified the one in (1902) 71 App. Div. 616, 76 N. Y. Supp. 1018. On a former appeal (1898) 27 App. Div. 282, 50 N. Y. Supp. 584, this building had been held (two judges out of five dissenting) to violate the covenant on the theory that the covenant was one against construction, and not against use, and that therefore the manner in which the

owner proposed to occupy it was of no importance.

And in a still earlier decision in this case (1897) 19 Misc. 227, 43 N. Y. Supp. 199, it had been held that since this building was to be occupied by the defendant, his children and grandchildren, grouped in two families, it was not a "tenement house;" and since it was not open to the public, nor affected with any public use, it was no other than a "private dwelling."

If a flat is conceded to be a number of private dwellings, built one upon another, it violates a covenant for "a private dwelling," which contemplates a single private dwelling, not a bunch of private dwellings. *Smatheurst v. Smatheurst* (N. J.) *supra*.

A flat of three stories for three families is not a "private" dwelling, but is really a multiple house, designed for the accommodation of more than an individual and his household; if such a structure should be conceded to be a private dwelling, so must a flat twenty stories high, with forty or eighty apartments; but such a multiplication obviously destroys individuality, and creates community; it illustrates the distinction between privacy and publicity. *Ibid*.

A covenant for the erection of not more than one residence on a lot deals with the number of buildings to be constructed, and is intended to prevent plural structures. *Kenwood Land Co. v. Hancock Invest. Co.* (1913) 169 Mo. App. 715, 155 S. W. 861.

A two-family house is not a private residence, but a collection of apartments; and if two families are not prohibited by a covenant against anything but a private residence, where shall we stop? A family might be put in each room, and still the claim be made that the building was occupied as a private residence. *Koch v. Gorrufo* (1910) 77 N. J. Eq. 172, 140 Am. St. Rep. 552, 75 Atl. 767.

A covenant that there shall not be erected on said land any building other than a private dwelling house, that such dwelling house shall not be occupied by more than one family, is violated by the construction of a so-called duplex dwelling house. *Baker*

v. Lunde (1921) 96 Conn. 530, 114 Atl. 673.

1. Tenement house.

The rule is clearly settled that a covenant against the erection of a tenement house, made at a time when the only structures of that character were inferior buildings, rented to several families who were in lowly circumstances, does not prohibit the erection of a modern apartment house. This is not at all what must have been meant by the term "tenement house."

Thus, a covenant not to erect any one of several manufacturing establishments named, or tenement house, or any other trade, manufactory, business, or calling which may be dangerous, noxious, or offensive to the neighboring inhabitants, does not prohibit the erection of a modern apartment house, six or seven stories high, each apartment renting at a high rate, completely and elegantly equipped with every modern improvement, and designed to promote convenience, comfort, and sanitation. *Kitching v. Brown* (1905) 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241, affirming on this point (1904) 92 App. Div. 160, 87 N. Y. Supp. 75; *White v. Collins Bldg. & Constr. Co.* (1903) 82 App. Div. 1, 81 N. Y. Supp. 434; *Marx v. Brogan* (1906) 111 App. Div. 480, 98 N. Y. Supp. 88, reversed for lack of jurisdiction in (1907) 188 N. Y. 431, 81 N. E. 231, 11 Ann. Cas. 145.

Nor is such a covenant violated by the erection of an apartment house or "French flats." *Musgrave v. Sherwood* (1878) 54 How. Pr. (N. Y.) 338, reversing (1877) 53 How. Pr. 311, and being practically affirmed in (1881) 23 Hun, 669, although reversed on another point.

In (1877) 53 How. Pr. 311, it was deemed that the object of the covenant against a tenement house was to free the premises from the confusion and disquiet which must surround any building which is the abode of several distinct families; and, while the annoyance and discomfort arising from the apartment house here contemplated might be less than if it were to be the abode of the poorer classes, yet the court was of the opinion that the

difference would be in degree, and not in kind.

At least, a five-story flat or apartment house is not so clearly a violation of such a covenant as to warrant a preliminary injunction against its erection. *Boyd v. Kerwin* (1891) 15 N. Y. Supp. 721.

And a covenant against any slaughterhouse, coal yard, or cowpen, tenement house, tallow chandlery, etc., upon certain premises, is no obstacle to the building of a high-class apartment house, so as to furnish good grounds for objecting to the title on the part of a prospective purchaser who intends to erect such an apartment house thereon. *Ranger v. Lee* (1910) 66 Misc. 144, 121 N. Y. Supp. 328.

The fact that in such a covenant the term "tenement house" is in juxtaposition with uses which produce disagreeable odors or noises, or which attract to the neighborhood large crowds or undesirable persons, goes to show an intention to prohibit such a tenement house as was then known in that locality; that is, cheap, and rented to people of very limited means, and one which therefore might be "dangerous, noxious, or offensive to the neighboring inhabitants." The modern apartment house is a building entirely distinct from that sort of tenement house, is not now, and never has been, known by that name, and does not tend to produce any of the evils that it was clearly the intention of the parties to guard against. *White v. Collins Bldg. & Constr. Co.* (1903) 82 App. Div. 1, 81 N. Y. Supp. 434; *Boyd v. Kerwin* (N. Y.) *supra*.

The fact that a covenant forbidding the erection of a tenement house includes also a great many trades, industries, and callings that are dangerous, offensive, or noxious to the neighboring inhabitants, may afford a definition of the term "tenement house" much more exact and practical than any legislative or lexicographic definition; when classed with such a list of recognized nuisances, the term "tenement house," as used in such a covenant, must be taken to mean the abode of squalor, filth, disease, disorder, and

crime; especially when it appears that the only tenement house known in that locality at the time the covenant was entered into was of that kind; and therefore such a covenant cannot be construed to forbid the erection of an apartment house, which was then unknown, and which differs as much in every essential of a human abode from the then known tenement house, as the palace of a king differs from the hut of a peasant. *Kitching v. Brown* (1905) 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241.

In the last-named case, however, there was an emphatic dissent by three of the seven judges, upon the ground that, neither in any changed conditions of the neighborhood, nor in any legal distinction between the terms "tenement house" and "apartment house" was there any justification for denying equitable relief against the erection of the apartment house. And the very pertinent question is asked: If the legal meaning of "community house" is not to be given to the term "tenement house," where shall the line of distinction be drawn between the two kinds of tenement houses?

Of course, a tenement house with stores on the first floor, and each of the four other floors arranged for the accommodation of four families, violates a covenant not to erect a tenement house; but if any such tenement houses have already been erected in the neighborhood, a permanent injunction may not be granted, but the objector may be left to an action for damages. *Amerman v. Deane* (1892) 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741.

In one case it appeared that a covenant originally forbidding "any tenement house" was later modified by adding "not meaning, however, what is known as a flat or apartment house, provided that it be equal in class to" certain ones named. It was said that the covenant in its original form was one against use, and not against construction; but, as modified, it became one against construction, and not against use; so that the question then was as to whether the building contemplated was equal or inferior in

class to the ones named as the standard of construction. *Longworth v. Deane* (1897) 15 App. Div. 461, 44 N. Y. Supp. 423.

j. Flat, apartment, or tenement house.

ELTERICH v. LEICHT REAL ESTATE Co. (reported herewith) ante, 441, holds that a covenant against an apartment house will include a two-family flat.

• A covenant against the erection of any building of the character known as flats or tenement houses prohibits the alteration of a two-story house so as to adapt it to the occupancy of two families, one on each floor, with a single entrance,—what is known as a Queen Anne. *Godfrey v. Hampton* (1910) 148 Mo. App. 157, 127 S. W. 626.

The court holds that a covenant against a flat or tenement house is intended to prevent plural occupancy; that is, to prevent houses from being occupied by more than one family, each living by itself. The word "flat" has no technical legal meaning, and where the testimony as to its application to a particular structure is contradictory, the question is one of fact.

And a covenant not to erect any building that shall be used or occupied as a flat or tenement house prohibits the erection of a two-story and attic house, with one front entrance leading to separate hallways, arranged for two families, and with a complete housekeeping suite upon each floor. *Lignot v. Jaekle* (1906) 72 N. J. Eq. 233, 65 Atl. 221.

The court holds that a "flat" etymologically is a floor in a building. Later the use of the word became restricted to a floor completely equipped for housekeeping purposes. A building containing such floors, so equipped, each of which is called a "flat," is sometimes itself termed a "flat," but, more properly speaking, should be called a "flat house." Any building consisting of more than one story, in which building there are one or more suites of rooms on each floor, equipped for separate housekeeping purposes, is a "flat" or "flat house." "Tenement house," as here used, means a community house occupied by persons of small means,

the distinguishing characteristics of which are the use in common of certain facilities by people crowded into insufficient space, and deprived of many of the essentials of privacy, decency, and health. The fact that a "flat house," as it became more costly, came to be known as an "apartment house," cannot vary or alter the rights of the parties; and the only distinction suggested between an "apartment" and a "flat" is the amount of rent. But even if the distinction is a real one, it cannot be held that a charge of \$35 or \$40 a month rent turns what is otherwise a "flat" into an "apartment."

Also a covenant to occupy and use the premises for residence purposes only, expressly excluding use for flats and apartment houses, prohibits a "duplex house,"—a double house, two stories high, designed to accommodate one family on each floor. *Kenwood Land Co. v. Hancock Invest. Co.* (1913) 169 Mo. App. 715, 155 S. W. 861. The court holds that a covenant to use premises for residence purposes only, and forbidding flats and apartment houses, prohibits not only a building designed for an apartment house, or constructed with flats therein, but it also prohibits the use and occupancy of a house in such a way as to turn it into flats or make it an apartment house. Such a covenant is intended to prevent plural occupancy.

Likewise, a covenant against the erection of any buildings except dwelling houses, and against any tenement, apartment, or community house, is violated by the erection of a six-story modern apartment house, containing forty-two independent and separate suites of rooms, the covenant having been entered into at a time when such apartment houses were not unknown; but the form of the remedy against the violation may be affected by the fact that many such buildings have been erected in the neighborhood. *McClure v. Leaycraft* (1905) 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45, reversing (1904) 97 App. Div. 518, 90 N. Y. Supp. 233.

In *Miller v. Klein* (1913) 177 Mo. App. 557, 160 S. W. 562, the covenant was expressly against flats and apart-

ment houses, and the only question was whether there had been a waiver. The court held against such contention and enforced the covenant.

k. Miscellaneous.

A covenant that the land shall not be used for any purpose which might be deemed a nuisance is not violated by the erection of a three-suite dwelling house. *Re Robertson* (1911) 25 Ont. L. Rep. 286, 20 Ont. Week. Rep. 712, 3 Ont. Week. N. 431.

In the dissenting opinion by Britton, J., in *Pearson v. Adams* (1912) 27 Ont. L. Rep. 87, 3 Ont. Week. N. 1660, 7 D. L. R. 139, it was stated that in *Campbell v. Bainbridge* [1911] 2 Scot. L. T. 373, the prohibition was of "houses or buildings of any kind other than villas or dwelling houses with offices," and that it was held that the building of tenements was not prohibited. The lord president is quoted as saying that a tenement of dwelling houses is just a dwelling house, and that in ordinary parlance a set of flats could be called a dwelling house.

A structure available for three families violates a restriction that no dwelling house erected on the premises shall contain more than two tenements, or be constructed for more than two families, although the owner does not intend to use it for more than two. *Ivarson v. Mulvey* (1901) 179 Mass. 141, 60 N. E. 477.

III. Application of covenants to particular kinds of buildings.

a. In general.

Under the heading, "Construction of particular forms of covenants," the problem here presented has been discussed from the standpoint of the various forms of covenants with which the cases deal, the question there being: What buildings are permitted, and what buildings are prohibited, by this particular form of covenant? The purpose of this division of the note is briefly to restate the result of the inquiry from the standpoint of the various kinds of buildings alleged to be in violation of the covenants, the question here being: What covenants are violated, and what covenants are

not violated, by this particular kind of building?

b. Double house.

1. Divided horizontally.

Houses designed for the accommodation of two families, and no more, are here classified under the head "Double houses," no matter whether the courts or the parties called them double houses, flats, apartment houses, or tenements.

It has been held that a two-story house designed for the accommodation of two families, one on each floor, each distinct and complete in itself, and with separate approaches from the street, violates a covenant against the erection of more than one house (*Ilford Park Estates v. Jacobs* [1903] 2 Ch. (Eng.) 522, 1 B. R. C. 988, 72 L. J. Ch. N. S. 699, 89 L. T. N. S. 295, 19 Times L. R. 574); or a covenant not to occupy the premises except for one dwelling house (*Harris v. Roraback* (1904) 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391); or a covenant against anything but a two-story dwelling house, this being interpreted to mean a dwelling house designed for a single family (*Bagnall v. Young* (1908) 151 Mich. 69, 114 N. W. 674); or a covenant against anything but a private residence (*Koch v. Gorruffo* (1910) 77 N. J. Eq. 172, 140 Am. St. Rep. 552, 75 Atl. 767); or a covenant against flats or tenement houses (*Godfrey v. Hampton* (1910) 148 Mo. App. 157, 127 S. W. 626; *Lignot v. Jaekle* (1906) 72 N. J. Eq. 233, 65 Atl. 221); or a covenant against flats and apartment houses (*Kenwood Land Co. v. Hancock Invest. Co.* (1913) 169 Mo. App. 715, 155 S. W. 861).

A two-family apartment divided horizontally is within a covenant against the construction of an apartment house. *ELTERICH v. LEICHT REAL ESTATE CO.* (reported herewith) ante, 441.

But such a building does not violate a covenant that the buildings erected shall be used for residence or dwelling purposes only, and not in any objectionable manner whatever (*McDonald v. Spang* (1907) 55 Misc. 332, 105 N. Y. Supp. 617); or a covenant to

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erect only a dwelling (*James v. Irvine* (1905) 141 Mich. 376, 104 N. W. 631); or a covenant against more than one house on each lot (*Pank v. Eaton* (1905) 115 Mo. App. 171, 89 S. W. 586).

2. Divided vertically.

A double house divided vertically into two parts, each one designed for a separate family, violates a covenant against any building other than a dwelling house (*Schadt v. Brill* (1913) 173 Mich. 647, 45 L.R.A. (N.S.) 726, 139 N. W. 878); or a covenant forbidding more than one building upon each lot (*Brigham v. H. G. Mulock Co.* (1908) 74 N. J. Eq. 287, 70 Atl. 185).

3. Generally.

In the following cases, the statement of facts does not reveal whether the building in question was divided horizontally or vertically:

A "duplex" or two-family residence violates a covenant not to erect any "dwelling house" (*Kingston v. Busch* (1913) 176 Mich. 566, 142 N. W. 754); but in *Hamnett v. Born* (1915) 247 Pa. 418, 93 Atl. 505, it was held that a duplex house designed for the occupancy of two families under one roof, so arranged as to furnish each family with a complete and independent apartment, having independent and separate entrances after the common front entrance has been passed, does not transgress a restriction that no more than one dwelling house shall be erected or maintained on each 40 feet of land; and in *Fortesque v. Carroll*, (1910) 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79, it was held that a duplex does not violate a covenant that not more than one "building" shall be erected on each lot.

Duplex houses, whether divided vertically or horizontally, violate a covenant restricting the use of the lot to a first-class private residence. *Walker v. Haslett* (1920) — Cal. App. —, 186 Pac. 622.

In *Hunt v. Held* (1914) 90 Ohio St. 280, L.R.A.1915D, 543, 107 N. E. 765, Ann. Cas. 1916C, 1051, it does not definitely appear whether the two-family house was divided horizontally or vertically; but the implication

seems to be that it was vertically; and it was held that such building did not violate a covenant requiring use of the property for residence purposes only.

A duplex house does not violate a restriction to a single detached dwelling house. *Harmon v. Burow* (1919) 263 Pa. 188, 106 Atl. 310.

Nor does it violate a covenant limiting the use of property to a single dwelling house. *Rohrer v. Trafford Real Estate Co.* (1918) 259 Pa. 297, 102 Atl. 1050.

c. Flat house.

For the purposes of this classification, only those "flat houses" that were designed for the accommodation of more than two families are included in this subdivision; those designed for two families only, though termed "flats," are here classified as "double houses."

A flat house designed for the accommodation of more than two families violates a covenant against more than one dwelling on each lot (*Sanders v. Dixon* (1905) 114 Mo. App. 229, 89 S. W. 577); or a covenant that only one single dwelling house shall be erected upon each lot (*Gillis v. Bailey* (1845) 17 N. H. 18; *Harris v. Roraback* (1904) 137 Mich. 292, 109 Am. St. Rep. 681, 100 N. W. 391); or a covenant that no more than one message or dwelling house shall be erected, and that such message shall be adapted for a private residence only (*Rogers v. Hosegood* [1900] 2 Ch. (Eng.) 388, 69 L. J. Ch. N. S. 652, 83 L. T. N. S. 186, 16 Times L. R. 489, 48 Week. Rep. 659); or a covenant against any building other than for the use of a private dwelling (*Skillman v. Smatheurst* (1898) 57 N. J. Eq. 1, 40 Atl. 855); and, of course, such a building violates a covenant that no dwelling house shall be erected to contain more than two tenements or be constructed for more than two families (*Ivarson v. Mulvey* (1901) 179 Mass. 141, 60 N. E. 477).

And a block of flats is a "house" within the meaning of a covenant not to erect more than a stipulated number of "houses." *Kimber v. Admans* [1900] 1 Ch. (Eng.) 412, 69 L. J. Ch.

N. S. 296, 82 L. T. N. S. 136, 16 Times L. R. 207, 48 Week. Rep. 322.

But a flat house does not violate a covenant that the property shall be used for residence purposes only (*Tillotson v. Gregory* (1908) 151 Mich. 128, 114 N. W. 1025); even when arranged for four families (*Maine v. Mulliken* (1913) 176 Mich. 443, 142 N. W. 782), or for fourteen families (*Casterton v. Plotkin* (1915) 188 Mich. 333, 154 N. W. 151); or a covenant for the erection of "only a single dwelling," this phrase being taken to mean only one dwelling house, and there being at the time other flats and apartment houses in the vicinity (*Hutchinson v. Ulrich* (1893) 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556).

And a covenant to erect a substantial two-story dwelling house of a certain minimum cost does not prohibit a three-story building of a greater cost, with stores on the first floor and flats above. *Hurley v. Brown* (1899) 44 App. Div. 480, 60 N. Y. Supp. 846.

d. Apartment house.

A modern high-grade apartment house does not violate a covenant to use the premises for residence purposes only (*McMurtry v. Phillips Invest. Co.* (1898) 103 Ky. 308, 40 L.R.A. 489, 45 S. W. 96; *Teagan v. Keywell* (1920) — Mich. —, 180 N. W. 454; *Struck v. Kohler* (1920) 187 Ky. 517, 219 S. W. 435); or a covenant to erect only first-class dwelling houses (*Bates v. Logeling* (1910) 137 App. Div. 578, 122 N. Y. Supp. 251; *Holt v. Fleischman* (1902) 75 App. Div. 593, 78 N. Y. Supp. 647); or a covenant limiting the use of the lot to a dwelling house (Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. (1915) 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444); or a covenant that every residence erected shall be a detached house, that the land shall be used for residence purposes only, and not for any purpose which might be deemed a nuisance (*Re Robertson* (1902) 25 Ont. L. Rep. 286, 20 Ont. Week. Rep. 712, 3 Ont. Week. N. 431); or a covenant not to erect any building except for use as a family residence (*Sonn v. Heilberg* (1899) 38 App. Div. 515, 56

N. Y. Supp. 341); or a covenant not to erect any one of several manufacturing establishments named, or any tenement house, or any other trade, manufactory, business, or calling which may be dangerous, noxious, or offensive to the neighboring inhabitants (*Kitching v. Brown* (1905) 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241, affirming on this point (1904) 92 App. Div. 160, 87 N. Y. Supp. 75; *White v. Collins Bldg. & Constr. Co.* (1903) 82 App. Div. 1, 81 N. Y. Supp. 434; *Marx v. Brogan* (1906) 111 App. Div. 480, 98 N. Y. Supp. 88, reversed for lack of jurisdiction in (1907) 188 N. Y. 431, 81 N. E. 231, 11 Ann. Cas. 145; *Musgrave v. Sherwood* (1878) 54 How. Pr. (N. Y.) 338, reversing (1877) 53 How. Pr. 311, and being practically affirmed in (1881) 23 Hun, 669, although reversed on another point; *Boyd v. Kerwin* (1891) 15 N. Y. Supp. 721); or a covenant against a tenement house (*Ranger v. Lee* (1910) 66 Misc. 144, 121 N. Y. Supp. 328).

A four-story apartment house, each apartment being suitable only for separate use as a housekeeping apartment, is not a violation of a covenant in deeds of a subdivision of city property, inserted so that buildings or structures upon the property might harmonize and tend to beautify the entire neighborhood and advance values, which provides that nothing but a church or dwelling house and the necessary outbuildings shall ever be erected upon any part of the land. *Johnson v. Jones* (1914) 244 Pa. 386, 52 L.R.A.(N.S.) 325, 90 Atl. 649.

But an apartment house violates a covenant against the erection of more than one dwelling on each lot (*Thompson v. Langan* (1913) 172 Mo. App. 64, 154 S. W. 808); or which restricts the use of the property to one house only (*Arnoff v. Chase* (1920) 101 Ohio St. 331, 128 N. E. 319); and a covenant that the lands are to be used only as a site for detached dwelling houses (*Pearson v. Adams* (1912) 27 Ont. L. Rep. 87, 3 Ont. Week. N. 1660, 7 D. L. R. 139); and, of course, it violates a covenant against the erection of any buildings except dwelling houses, or any tenement, apartment, or community house (*McClure v.*

Leaycraft (1905) 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45, reversing (1904) 97 App. Div. 518, 90 N. Y. Supp. 233).

And in *Burton v. Stapely* (1904) 4 Ohio N. P. N. S. 65, 17 Ohio Dec. 1, it was held that such an apartment house violates a covenant to use the premises for residence purposes only, and this was affirmed without opinion in (1906) 74 Ohio St. 461, 78 N. E. 1120. But the circuit court, which was reversed by the supreme court, was of the opposite opinion. See II. a, and see *McMurtry v. Phillips Invest. Co.* (Ky.) *supra*.

Also, an apartment house with a vertical division wall extending the whole height of the building, dividing it into two equal parts, each part containing seven or eight apartments, is a "pair of semidetached buildings," within the meaning of a covenant that every pair of semidetached buildings erected upon the premises shall have appurtenant thereto lands having a stipulated frontage upon a certain avenue. *Holden v. Ryan* (1912) 22 Ont. Week. Rep. 767, 3 Ont. Week. N. 1585, 4 D. L. R. 151.

e. Tenement house.

Buildings designed for the accommodation of only two families, even though designated as tenement houses by the courts, are here treated under the head "Double house," *supra*.

A tenement house violates a covenant that no building shall be constructed or maintained other than for a single family, or as a double or semidetached house (*Allen v. Barrett* (1912) 213 Mass. 36, 99 N. E. 575, Ann. Cas. 1913E, 820); and a covenant to use the premises for the purposes of a private dwelling or residence only (*Linwood Park Co. v. Van Dusen* (1900) 63 Ohio St. 183, 58 N. E. 576); and, of course, it violates a covenant not to erect a tenement house (*Amerman v. Deane* (1892) 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741).

But a tenement house does not violate a covenant that only dwelling houses shall be built. *Roth v. Jung* (1903) 79 App. Div. 1, 79 N. Y. Supp. 822.

In *Levy v. Schreyer* (1904) 177 N. Y. 293, 69 N. E. 589, the covenant pro-

vided that no tenement house should be built or any house except private dwellings, and a building of three stories was erected, each floor being arranged to accommodate a separate family. It was held that this building met the requirements of the covenant so far as outward appearances and cost were concerned, and violated the covenant only with respect to the interior arrangement, and an injunc-

tion was granted against any use of the building except for private residences, but the destruction of the building itself was not ordered.

f. Detached dwelling house.

A semidetached dwelling is forbidden by a restriction to detached dwelling houses on lots of 50 feet or more. *Liebman v. Hall* (1920) 110 Misc. 365, 180 N. Y. Supp. 514. H. P. F.

HOMER G. MULLHOLLAND et al., Appts.,
v.
VERNON PATCH.

Michigan Supreme Court—April 3, 1919.

(205 Mich. 490, 171 N. W. 422.)

Partnership — to deal in real estate options — necessity of writing.

1. An agreement to secure options on real estate and afterwards sell them and divide the profits is not required to be in writing under the Statute of Frauds.

[See note on this question beginning on page 484.]

—sufficiency of evidence to establish.

2. No partnership is shown by an agreement to get options on farms and sell them, and divide the proceeds, where no partnership name is adopted,

no funds are contributed, and there is no agreement as to losses, and no provision made as to the term of continuance of the undertaking.

[See 20 R. C. L. 823 et seq.]

APPEAL by plaintiffs from a decree of the Circuit Court for Oakland County, in Chancery (Rockwell, J.), in favor of defendant in a suit to obtain a copartnership accounting. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Charles S. Matthews for appellants.

Messrs. Perry & Lynch for appellee.

Bird, Ch. J., delivered the opinion of the court:

This bill was filed to obtain a copartnership accounting. Plaintiffs charge that they had an oral partnership agreement with defendant "to go out and get options on farms and sell them." Defendant denies that any copartnership agreements existed between them. The conflicting claims of the parties were heard by the chancellor, and he reached the conclusion that, if there were a copartnership agreement, it was an oral copartnership agree-

ment to deal in real estate, and therefore void under the holding of this court in *Nester v. Sullivan*, 147 Mich. 493, 9 L.R.A.(N.S.) 1106, 111 N. W. 85, 1033. The oral copartnership agreement involved in that case was held to be void under the Statute of Frauds, because the agreement not only contemplated, but actually involved, the holding of title to real estate. In this respect it differs from the present controversy. The agreement in the present case involved nothing more than the taking of options on real estate and afterwards selling the options, and, as a matter of fact, that was all that was done under the agreement in

the one transaction out of which this controversy arose. If that were all that was contemplated by the claimed agreement, it was not void under §§ 11,977 and 11,981, 3 Compiled Laws of 1915. Carr v. Leavitt; 54 Mich. 540, 20 N. W. 576; Britton v. Smith, 165 Mich. 222, 130 N. W. 599; McGavock v. Ducharme, 192 Mich. 98, 158 N. W. 173.

Partnership—
to deal in real
estate options—
necessity of
writing.

In the first case cited, in considering a similar agreement, it is said: "This surely was not a contract 'for the sale of any lands, or any interest in lands,' within the meaning of the Statute of Frauds. How. Stat. § 6181. That statute contemplates a transaction between parties contracting with each other as principals, and this was not such a transaction."

While we do not think the case should have been disposed of on the ground stated, we are impressed that the decree should be affirmed on the ground that the testimony does not make out a copartnership agreement. The substance of the talks out of which it is claimed the agreement arose is that: "We were to go out and get options on farms and sell them. . . . We were to get options, work together to sell the farms, and divide the profits equally."

It is not claimed that the copartnership was given a name, or that it had any funds with which to purchase the options, or that there was any arrangement between the parties that any one of them should advance funds for that purpose.

There appeared to be no agreement with reference to the losses, if any were incurred. Nothing appears as to the term for which it should continue. It had no place of business and no books were kept, and the only option taken was not taken in the name of a partnership, but was taken in the name of defendant and paid for by him. Very few of the indicia usually surrounding the relation of copartners were present. We think the testimony relied upon to establish the agreement was too meager and indefinite to accomplish its purpose. The most that can be said of the agreement is that plaintiff Stoney and defendant Patch were interested together in another enterprise, and they agreed that if they could secure some options and dispose of them they would divide the profits, and afterward it is claimed that plaintiff Mullholland was taken into the deal.

—sufficiency of
evidence to
establish.

The bill must be dismissed, but without prejudice to the plaintiffs to take such steps as are consistent with the law and practice upon the law side of the court.

The decree will be affirmed, with costs of both courts to the defendant.

NOTE.

The general question of the applicability of the Statute of Frauds to joint adventures or partnerships to deal in real estate is treated in the annotation following *HOGG v. GEORGE*, post, 484.

JAMES M. HOGG

v.

ROBERT L. GEORGE, Admr., etc., of Ora Haley, Deceased.

Wyoming Supreme Court—August 5, 1921.

(— Wyo. —, 200 Pac. 96.)

Contract — Statute of Frauds — joint adventure in purchase of real estate.

1. A contract for joint adventure in the purchase and sale of real estate

and division of the profits is not within a statute making void every agreement or contract for the sale of real estate which is not in writing, so as to defeat a suit for accounting of profits.

[See note on this question beginning on page 484.]

Trial — question for jury — existence of joint adventure.

2. Where the existence of the relation of joint adventurers is in issue, and there is substantial evidence tending to prove that the parties intended to join their efforts in furtherance of the enterprise for their joint profit, the question of such existence is for the jury.

Joint adventure — necessity of specifying rights and duties.

3. To justify a finding of joint adventure it is not necessary that the rights and duties of the parties to the contract shall be particularly specified or defined.

— consideration — what is.

4. The consideration for a contract of joint adventure may be a promise, express or implied, to contribute capital or labor to the enterprise.

— implication of agreement to share losses.

5. An agreement to share losses in the same proportion as profits will be implied in case of a joint adventure.

[See 15 R. C. L. 505.]

— facts to support finding.

6. An agreement to join in the purchase of an option on a ranch may be found to be a joint adventure, and not a brokerage contract, although one party has no money to put into the enterprise, and merely assists in purchasing the option and subsequently in finding a purchaser for the property.

Contract — by fiduciary to secure principal's property without disclosing necessary information.

7. An agreement whereby one sustaining a fiduciary relation to a property owner undertakes to induce him to part with the property without informing him of conditions bearing upon its value, for a share of the profits, is unenforceable.

[See 6 R. C. L. 719.]

Fraud — profiting by fiduciary.

8. There is a presumption of fraud in every case where a fiduciary profits by a transaction with the principal, who confides in him.

[See 12 R. C. L. 427.]

Evidence — burden of overcoming presumption of fraud in transaction by fiduciary.

9. A fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other to know in order to enable him to judge of the value of his property.

[See 12 R. C. L. 427.]

Fraud — transaction in relation of confidence — when fraudulent.

10. In order to raise a presumption of fraud in a transaction between persons bearing relations of trust and confidence to each other, it must appear that there was confidence reposed on the one side and accepted on the other, which results in dependence by the one party and influence by the other.

Pleading — invalidity of contract — public policy.

11. Under an answer totally denying the existence of a contract sought to be enforced, evidence may be considered tending to show that the contract relied on was contrary to public policy, although that fact is not specifically pleaded.

Contract — illegal — completion — accounting.

12. That the transaction, under a contract invalid as against public policy, is fully completed, will not sustain an action for accounting and division of profits.

Trial — instruction — caution in receiving testimony.

13. The rule as to caution in receiving testimony of verbal admissions cannot be applied by the court, in its instructions to the jury, to testimony to prove a verbal contract between the parties.

Joint adventure — presumption as to equal division of profits.

14. Joint adventures in a transaction to purchase a parcel of real estate for sale at a profit are presumed to share equally in the profits, in the absence of evidence to the contrary.

[See 15 R. C. L. 502.]

— effect of unequal contributions.

15. The mere fact that one party to a joint adventure contributes all the money, while the other contributes only services, does not destroy the presumption that the profits are to be equally divided.

[See 15 R. C. L. 502.]

Appeal — request upon erroneous theory — instruction for adversary on such theory.

16. One asking an instruction upon a theory not involved in the case cannot complain if an instruction upon that theory is given for his adversary.

Trial — instruction — “presumption of fact.”

17. The term “presumption of fact” should not be employed in the instruction of juries.

— division of profits of joint adventure.

18. The jury should not be left, by the instructions in an action for division of the profits of a joint adventure, to divide them other than equally, in the absence of evidence that such division was intended.

CROSS WRITS of error to the District Court for Laramie County (Mentzer, J.) to review a judgment in favor of plaintiff in an action brought to recover one half the alleged profits of a joint adventure in the purchase and resale of ranch property, plaintiff assigning as error the amount of the judgment recovered by him, and defendant assigning as error the refusal of the court to direct a verdict in his favor. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Corthell, McCollough, & Corthell, for plaintiff:

Plaintiff was entitled to one half the profits, if he was entitled to anything.

23 Cyc. 459; 3 Kent, Com. 13th ed. 28; 22 Am. & Eng. Ency. Law, 101, 102; Parsons, Partn. 258; Paul v. Cullum, 132 U. S. 539, 33 L. ed. 430, 10 Sup. Ct. Rep. 151; Stein v. Robertson, 30 Ala. 286; Brewer v. Browne, 68 Ala. 210; Saunders v. McDonough, 191 Ala. 119, 67 So. 591; Griggs v. Clark, 23 Cal. 427; Norton v. Gordon, 16 Ill. 37; Farr v. Johnson, 25 Ill. 522; Ligare v. Peacock, 109 Ill. 94; Moore v. Bare, 11 Iowa, 198; Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260, 17 Ann. Cas. 699; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Randle v. Richardson, 53 Miss. 176; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005; Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738; Lind v. Webber, 36 Nev. 623, 50 L.R.A. (N.S.) 1046, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202; Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705; Ratzer v. Ratzer, 28 N. J. Eq. 136; Ryder v. Gilbert, 16 Hun, 163; Jones v. Jones, 36 N. C. (1 Ired. Eq.) 332; Taylor v. Taylor, 6 N. C. (2 Murph.) 70; State ex rel. Worthy v. Brower, 93 N. C. 344; Gius v. Coffinberry, 39 Or. 414, 65 Pac. 358; Campbell's Gas Burner Co. v. Hammer, 78 Or. 612, 153 Pac. 475; Frazer v. Linton, 183 Pa.

186, 38 Atl. 589; Rankin v. Black, 1 Head, 650; Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054; Zech v. Bell, 94 Wash. 344, 162 Pac. 363.

The jury having found a verdict in favor of the plaintiff for a sum greatly less than that to which he was entitled upon the uncontradicted evidence, it was the duty of the court to set aside such verdict.

Kester v. Wagner, 22 Wyo. 513, 145 Pac. 748; Gustafson v. Gustafson, 92 Minn. 139, 99 N. W. 631; Melzner v. Raven Copper Co. 47 Mont. 351, 132 Pac. 552; Wheeling Mold & Foundry Co. v. Wheeling Steel & I. Co. 62 W. Va. 288, 57 S. E. 826; Nading v. Denison & P. R. Co. 22 Tex. Civ. App. 173, 54 S. W. 412; Taunton Mfg. Co. v. Smith, 9 Pick. 11; Ray v. Jeffries, 86 Ky. 367, 5 S. W. 867, 15 Am. Neg. Cas. 216; Thompson v. Burtis, 65 Kan. 674, 70 Pac. 603; Dunn v. Blue Grass Realty Co. 163 Ky. 384, 173 S. W. 1122; Hileman v. Maxwell, 97 Neb. 14, 149 N. W. 44; Albers v. Chicago, B. & Q. R. Co. 95 Neb. 506, 145 N. W. 1013; St. Louis & S. F. R. Co. v. Model Laundry, 42 Okla. 501, 141 Pac. 970; James v. Hood, 19 N. M. 234, 142 Pac. 162; Carrier v. Donovan, 88 Conn. 37, 89 Atl. 894; Florida East Coast R. Co. v. Hayes, 66 Fla. 589, 64 So. 274; Johnson v. Domer, 76 Wash. 677, 136 Pac. 1169; Clark v. New York, N. H. & H. R. Co. 35 R. I. 479, 87 Atl. 206.

If there had been illegal incidents to the joint adventure in which the

parties had been engaged, and which resulted in the proceeds remaining in the hands of Haley, the defense would not be available to him, and there would be no justification for withholding from plaintiff the moneys belonging to him.

Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Union P. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391; *Wann v. Kelly*, 5 Fed. 584; *Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172; *Gilliam v. Brown*, 43 Miss. 641; *Andrews v. New Orleans Brewing Asso.* 74 Miss. 362, 60 Am. St. Rep. 509, 20 So. 837; *Peters v. Grim*, 149 Pa. 163, 34 Am. St. Rep. 599, 24 Atl. 192; *McDonald v. Lund*, 13 Wash. 413, 43 Pac. 348.

Messrs. Clark & Haggard and C. P. Arnold for defendant.

Kimball, J., delivered the opinion of the court:

James M. Hoge sued Ora Haley for \$22,752.50, claimed as one half the profits of a joint adventure in the purchase and resale of ranch property. A trial by jury resulted in a verdict for plaintiff for \$2,547. The plaintiff brings error and the defendant cross error. Pending the proceedings in error, Ora Haley died, and Robert L. George, administrator with the will annexed of his estate, was substituted by stipulation as defendant in error.

The plaintiff, the defendant, and one Timothy Ross had had business relations of different kinds with each other for a number of years prior to 1907. In the summer of that year Ross bought of the Riverside Live Stock Company all its cattle and sheep on the Riverside ranch, with the use of the ranch until May, 1908, and later, in September, 1907, entered into a contract with said company, the owner of the ranch, for its purchase at the price of \$110,000, of which \$1,000 was paid down, the balance to be paid in instalments. In the same contract Ross agreed, also, to buy the company's horses and hay. In the summer or fall of the same year Ross sold to Hoge a one-half interest in a part of the sheep, which were thereafter, for several months,

owned jointly by Ross and Hoge, under the control of the latter, and kept, for a part of the time at least, upon the Riverside ranch.

In November, 1907, Ross went to Pennsylvania, where he was seriously sick for several weeks, and did not return to Wyoming until April, 1908. During his absence from Wyoming, Hoge, in addition to the services which he rendered as manager of the sheep business in which they were jointly interested, and without any legal duty, but as a friend and neighbor, gave aid and advice in the caring for other property belonging to Ross. Hoge learned that a payment of \$5,000 on the land purchase would become due January 1, 1908, and that, if the payments were not made when due, the rights of Ross under the contract would be forfeited. Realizing that Ross would not be able to make the payment, Hoge went to Haley, explained the situation, and got from him \$9,500, which was paid to the Riverside Live Stock Company in satisfaction of the \$5,000 due upon the ranch, and \$4,500 on the hay. Shortly afterward Hoge suggested to Haley that he could make some money by taking over the Ross contract, but Haley declined to act on the suggestion.

Following these events the demand in that vicinity for ranch property increased, and values advanced. Haley sold his own ranch in that county, and Ross, still in Pennsylvania, was negotiating with parties of Waynesburg, in that state, to take over his land-purchase contract for a sum that would allow him a profit of \$5,000 on the transaction. The agents of the Waynesburg parties came to Wyoming, where they examined the lands under the guidance of Mr. Hoge. A few days after they had left Wyoming, Haley, then in Denver, wrote Hoge as follows:

"Laramie, Wyo., March 8, 1908.

"Hon. Jas. M. Hoge,

"Laramie.

"Dear Sir:—

"I wish you would wire me c/o the

Tremont Hotel, Denver, when Mr. Ross arrives, so I can arrange to meet him and talk over the disposition of the Riverside and if he has not sold to those Waynesburg parties can't we get it and handle it in some way to make some money out of it? If not too late don't let him sell it to those people for a song or a small margin, for the way its contracted as I understand it we can have good long time to work on and I think we can make some good easy money to get it. I think I can find buyers soon or we could cut it up.

"Yours truly,
"Ora Haley."

Hoge did not reply in writing to this letter. His testimony as to his conversation with Haley soon afterwards was as follows:

About two days after I received the letter Mr. Haley come to Laramie and telephoned me, and I met him at his house and we had a talk. I told Mr. Haley that I had received his letter, and I would be glad to join him in the purchase of that option. I thought there was money in it, and would be glad to enter into an agreement with him to purchase the option.

Q. Was anything said in that conversation about furnishing the money?

A. Yes. I told Mr. Haley I wouldn't be able to put up the money part of it on the start; that I would have to rely upon him; and he answered back it was all right; that the payments on the Riverside ranch were so easy that if he was a younger man he would take hold of the thing, expecting under a sure belief that he could make the payments out of the profits of the ranch year by year, and that he believed he could put his hand on the man that would give us \$5.50 an acre for it.

Q. Did he mention any of the proposed buyers?

A. No; he didn't.

Q. Well, what further conversation occurred, if any?

A. Then we talked on, and he expressed a fear that if Mr. Ross came

to Laramie, and got onto the feeling regarding real estate, he would be harder to trade with, so we arranged that I should work on the outside and secure it and turn it over to him.

Q. Was any particular plan made about meeting Mr. Ross?

A. Yes; we agreed to meet Mr. Ross in Denver on his way out, and trade with him before he got to the Laramie plains.

Q. At whose suggestion was that?

A. Mr. Haley's.

At this time Hoge and Haley did not know whether or not Ross had sold to the Waynesburg parties, and after the conversation Hoge telegraphed Ross, requesting him, if not already bound, to wait. It was then decided that Haley would offer Ross \$10,000 profit for his rights under the contract. This offer was communicated by Hoge to Ross by wire, and accepted in like manner by the latter. The telegrams thus exchanged were not in evidence, and it appears that the parties did not understand that they constituted a binding contract. Hoge then arranged with Ross for a meeting in Denver to close the transaction. The meeting, as so arranged, was had, and Hoge testified that he there said to Ross, "If you feel under any obligation to me, you will repay me by turning the property over to Mr. Haley;" and, on being asked by Ross what he was to be charged for Hoge's services to him, replied: "I have no right to charge you anything, because I have been working against you." Afterwards, at the same meeting in Denver, Ross and Haley agreed upon the terms of the transfer, in accordance with the previous offer by wire, but the contract was not signed until a day or two later (April 10), at Laramie.

The result of the transfer was that Haley was substituted for Ross as purchaser in the contract to buy the Riverside ranch for the sum of \$110,000, which, with the \$10,000 profit paid to Ross, made the total cost of the ranch to Haley \$120,000.

Hoge advanced no part of the money required to meet the terms of the contract with Ross, and was not a party to any of the instruments concerning the future payments, under the contract of purchase to which Haley thus became a party.

After he had succeeded to the rights of Ross, Haley took possession of the ranch, which he used for his personal advantage until possession was delivered to the next purchaser, without any recognition of any right of Hoge to participate in the benefits of such use. However, Hoge was largely instrumental in finding the purchaser to whom sale was made for the sum of \$165,000 in the latter part of July, less than four months after the rights of Ross had been transferred to Haley. Thus, without considering small items, the profit to Haley was \$45,000, of which Hoge sought by this suit to recover one half.

We shall first consider the questions raised by the defendant's cross petition in error.

It is contended that the trial court erred in refusing to direct a verdict in defendant's favor, for the reason that the evidence was insufficient to establish a contract of joint adventure between the plaintiff and defendant. The relation of joint adventurers is controlled largely by the principles of the law of partnership, yet a joint adventure and partnership are not identical. Some of the distinctions between the two are noticed in the following cases: *Reece v. Rhoades*, 25 Wyo. 91, 165 Pac. 449; *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130; *Nelson v. Lindsey*, 179 Iowa, 862, 162 N. W. 3; *Keyes v. Nims*, — Cal. App. —, 184 Pac. 695; *Donahue v. Haskamp*, 109 Wash. 562, 187 Pac. 346; *Harvey v. Sellers* (C. C.) 115 Fed. 757; *Sanders v. Newman*, — Wis. —, 181 N. W. 822. A joint adventure has been defined as an enterprise undertaken by several persons jointly. 23 Cyc. 452. Other definitions, similar in meaning and alike in their simplicity, may be found in *National Surety Co. v. Winslow*, 143 Minn. 66, 173 N. W. 181; *Fletcher v.*

Fletcher, 206 Mich. 153, 172 N. W. 436, 440; *McRee v. Quitman Oil Co.* 16 Ga. App. 12, 84 S. E. 487. Where the existence of the relationship is in issue, and there is substantial evidence tending to prove that the parties intended to join their efforts in furtherance of the enterprise for their joint profit, the question is pre-eminently one for a jury. *Van Tine v. Hilands* (C. C.) 131 Fed. 124; *Brady v. Colhoun*, 1 Penr. & W. 140.

Trial—question for jury—existence of joint adventure.

We have stated the evidence sufficiently, we think, to show that there was substantial ground for a finding that the parties to this action intended to, and did, join their efforts in the venture of buying and reselling the Riverside ranch, and that they were to share the profits. To justify such a finding it was not necessary that the rights and duties of the parties to the contract of joint adventure should have

Joint adventure—necessity of specifying rights and duties.

been more particularly specified or defined. In *Goss v. Lanin*, 170 Iowa, 57, 152 N. W. 43, cited by this court in *Reece v. Rhoades*, supra, it was said: "It is true that it is not necessary that there should be a specific, formal agreement to enter into a joint enterprise, or that the interests of the parties should be definitely settled in such agreement, or that there should be a formal agreement as to sharing in the profits. If there be a joint enterprise proven, either by direct evidence of a mutual agreement to that end, or by proof of facts and circumstances from which it is made to appear that such enterprise was in fact entered into, the law fixes their rights."

Viewed in the light of this statement of the law of joint adventure, we do not think the contract relied upon by plaintiff was too indefinite to be enforced. The consideration for such a contract may be, as in partnership contracts, the promise, express or implied, to

—consideration—what is.

contribute capital or labor to the enterprise. *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705. It is not difficult to find evidence of such a promise by the plaintiff in this case, and it is not disputed that he did in fact contribute his services, both in the acquisition of the property which was the subject of the venture, and in procuring the purchaser to whom the profitable sale was made. The absence of any agreement in regard to the proportions in which the profits should be shared is supplied by a presumption to which we shall presently refer. If the contract be criticized because it does not appear that the plaintiff assumed any liability for losses, the answer is that an agreement would be implied, if there had been losses,

—implication of
agreement to
share losses.

that they should be shared in the same proportion as the profits. *Van Tine v. Hilands*, supra; note to *Brotherton v. Gilchrist*, 115 Am. St. Rep. 433; *Johnson Bros. v. Carter*, 120 Iowa, 355, 94 N. W. 850; 1 *Lindley*, Partn. 12.

It is urged that the contract here must be construed to be nothing

—facts to sup-
port finding.

more than one of brokerage. While the cases cited on this point are authority upon the proposition that a contract of brokerage, rather than of partnership, may be the result of a transaction whereby one person is to be paid for his services out of the profits, nothing is said in them which persuades us that, under the evidence in the case at bar, the question was not a proper one for submission to the jury to decide the fact as to whether the parties intended a joint venture.

We have not set forth all the evidentiary facts from which it is argued by counsel that the relation of joint adventurers was not intended by the parties, such as the fact that the plaintiff did not assert any right to the land between the time of purchase and of resale, and that, when demanding a settlement, the language which he used was more consistent with a claim for services

rendered than with that of a partner or one having a joint interest. These matters were properly before the jury, with whom, no doubt, they had their weight; but we cannot say that they should necessarily have controlled the verdict. It is admitted that none of the words, "partners," "partnership," or "joint adventures," was employed by the parties, but if the jury believed that defendant, a few days after writing the letter of March 8, agreed to plaintiff's proposal "to join him in the purchase of that option," the intention of the parties was as clear to them, no doubt, as if some word with technical legal meaning had been used to define the relationship.

Some of the cases applying the principles of joint adventure to contracts similar to the one under consideration are: *Flower v. Barnekoff*, 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370; *Tyler v. Waddingham*, 58 Conn. 375, 8 L.R.A. 657, 20 Atl. 335; *Kayser v. Naugham*, 8 Colo. 232, 6 Pac. 803; *Koyer v. Willmon*, 150 Cal. 785, 90 Pac. 135; *Simpson v. Tenney*, 41 Kan. 561, 21 Pac. 634; *Smith v. Imhoff*, 89 Wash. 418, 154 Pac. 793; *Hines v. Johnston*, 95 Ga. 629, 23 S. E. 470; *Frazer v. Linton*, 183 Pa. 186, 38 Atl. 589. It has often been held that persons who simply buy land to sell again for their mutual profit are not technically partners; but this, as we have already seen, is not exactly the question. There may be no technical partnership, but the rights and obligations are akin to those of partners. *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C, 689; *Jones v. Patrick* (C. C.) 140 Fed. 403; *Butler v. Union Trust Co.* 178 Cal. 195, 172 Pac. 601. Compare the cases of *Norton v. Brink*, 75 Neb. 566, 7 L.R.A. (N.S.) 945, 121 Am. St. Rep. 822, 106 N. W. 688, 110 N. W. 669, and *Kohl v. Munson*, 97 Neb. 170, 149 N. W. 314, in neither of which was a partnership proved. In the former the plaintiff had contributed neither money nor services to the enterprise, and a recovery was denied; in the latter the plaintiff had con-

tributed something to the venture, and a recovery was allowed.

The next contention in support of the cross petition in error is that the contract was void under the Statute of Frauds (§ 4719, Wyo. Comp. Stat. 1920), which reads as follows: "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: . . . Fifth. Every agreement or contract for the sale of real estate, or the lease thereof, for more than one year."

In *Dale v. Hamilton*, 5 Hare, 369, 67 Eng. Reprint, 955, 16 L. J. Ch. N. S. 126, 11 Jur. 163, though Vice Chancellor Wigram, who decided the case, thought it worked a virtual repeal of the Statute of Frauds, it was held that a partnership agreement to be jointly interested in a speculation in land could be proved by parol, and, such an agreement being proved, one of the parties to it could establish his interest in land, the subject of the partnership, without any written evidence. The decision of this point, as shown in the same case on appeal (2 Phill. Ch. 266, 41 Eng. Reprint, 945, 16 L. J. Ch. N. S. 397, 11 Jur. 574), was not necessary under the facts; it was not noticed in the opinion, though cited in the argument, in the later case of *Caddick v. Skidmore*, 2 DeG. & J. 52, 44 Eng. Reprint, 907, 27 L. J. Ch. N. S. 153, 3 Jur. N. S. 1185, 6 Week. Rep. 119, 13 Mor. Min. Rep. 383, where a different conclusion was reached, and it is said by Lindley in his work on Partnership (page 82) to be a decision difficult to reconcile with sound principle. It was contrary to an earlier decision by Judge Story in *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019; and in the later cases in this country we find a distinct conflict of the authorities, with *Dale v. Hamilton* and *Smith v. Burnham*, the leading cases upon the opposite sides. If our Statute of Frauds were as comprehensive as the English statute (29 Car. II. chap. 3), and we were then

to consider a case where the plaintiff, relying upon an oral contract of joint adventure, sought to recover an interest in the land which was the subject of the enterprise, the task of discerning, upon view of the conflicting authorities, the true principle, would be more difficult than we conceive it to be under our statute in the case at hand.

The Statute of Frauds of this state, so far as it is here drawn in question, refers only to contracts "for the sale of real estate," omitting the words "or any interest in or concerning the same," found in the corresponding provision of § 4 of the English statute. Giving to the word "sale," as used in the statute, the broadest meaning that reason will permit, it would be a most strained construction to say that the plaintiff here is seeking to recover upon a contract for the sale of real estate.

As was said by Judge Earl in *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550: "Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the Statute of Frauds? No estate or interest in land has been granted, assigned, or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case, neither conveys nor assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an

estate in lands without a writing. . . . This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the Statute of Frauds certainly can present no obstacle to relief."

This language may have been dicta in the case from which it is taken, but it has had the influence of authority, as shown by the decisions where it is cited or quoted with approval. *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; *McElroy v. Swope* (C. C.) 47 Fed. 380; *Garth v. Davis*, 120 Ky. 106, 85 S. W. 692; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Hirbourn v. Reeding*, 3 Mont. 15, 11 Mor. Min. Rep. 514; *Babcock v. Read*, 99 N. Y. 609, 1 N. E. 141; *Case v. Seger*, 4 Wash. 492, 30 Pac. 646; *Richards v. Grinnell*, 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Kilbourn v. Latta*, 5 Mackey, 304, 60 Am. Rep. 373; *Thompson v. McKee*, 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755; *Bates v. Babcock*, 95 Cal. 479, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; *Speyer v. Desjardins*, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; *Flower v. Barnekoff*, supra.

These are a few of the many cases where it has been held that contracts similar to the one relied upon by the plaintiff in this case, being neither contracts to buy nor to sell real estate as between the parties, are not within the Statute of Frauds. Some of these cases do not, we think, meet the reasoning of Judge Story in *Smith v. Burnham*, supra, for he did not hold that the partnership contract which he was considering was one for the sale of land, or for the sale of an interest in or concerning lands, but that it was a declaration or creation of a trust or confidence in lands, not arising or resulting by implication of law, and, as such, required to be in writing by the provisions of a statute similar to § 7 of the English statute. The decision in *Schultz v. Waldons*, 60 N.

J. Eq. 71, 47 Atl. 187, was upon like grounds. We have in this state no such statute, and no point is made that the contract in this case is void or unenforceable as an attempt to declare or create a trust without a writing. Without pursuing further the subject of oral trusts, we suggest in passing that under the present laws it is probable that trusts in lands may be declared or created in this state as at common law. *Peebles v. Reading*, 8 Serg. & R. 484; *Murphy v. Hubert*, 7 Pa. 420; *Gardner v. Rundell*, 70 Tex. 453, 7 S. W. 781.

A different question would be presented if the plaintiff were seeking to recover an interest in the lands which had been acquired in the course of the joint enterprise, instead of his share of profits which have arisen from the sale of them. Even though the contract be one which is in contravention of the statute, yet, when the transactions affecting the interests in the land have been completed, so that the court need not enforce anything with reference to the land itself, it has been held that the rights of the parties resulting from their dealings may be enforced. *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288, and cases cited. See *Jones v. Patrick*, 140 Fed. 403, and *Zwicker v. Gardner*, 213 Mass. 95, 42 L.R.A.(N.S.) 1160, 99 N. E. 949; *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359.

We therefore hold that, when profits have accrued from the purchase and resale of real estate in pursuance of an oral contract of joint adventure, the Statute of Frauds of this state will not affect the right of one of the parties to the contract to recover his share of such profits, even though all the money were furnished by the other party, who took and transferred, in his name alone, the title to the land.

The next questions for consideration center around the proposition stated in an instruction, in which

Contract—
Statute of
Frauds—joint
adventure in
purchase of real
estate.

we have numbered the three principal sets of facts mentioned and quote: "You are instructed that if you shall find from the evidence (1) that there was an agreement between the parties whereby the plaintiff was to have some share in the land or in the profits from the sale thereof, and (2) that the only consideration, or a substantial part of the consideration, on the part of the plaintiff for such contract, was his agreement to induce Ross to sell his option, and to withhold from Ross the information, and the opportunity to secure information, that a change in conditions had made his option valuable, and you shall further find (3) that at that time the plaintiff occupied a confidential relation of trust with Ross with respect to this land, and was under a duty to disclose to Ross all material facts with respect to land and the market therefor, such consideration was immoral and could not constitute a valid consideration for such contract, and such contract was unenforceable."

We believe the principle of law is stated correctly. It is the familiar doctrine of constructive trusts that

—by fiduciary to secure principal's property without disclosing necessary information.

there is a presumption of fraud in every case where a fiduciary profits by a transaction with the person who confides in him. To overcome the presumption it must

Fraud—profiting by fiduciary.

be shown that he who seeks to uphold the contract communicated to the other, not only the fact of his interest in the transaction, but all information he had

Evidence—burden of overcoming presumption of fraud in transaction by fiduciary.

which it was important for the other to know in order to enable him to judge of the value of his property. *Tate v. Williamson*, L. R. 1 Eq. 528, 14 L. T. N. S. 163, 14 Week. Rep. 449, s. c. L. R. 2 Ch. 55, 15 L. T. N. S. 549, 15 Week. Rep. 321; 2 Pom. Eq. Jur. § 956; 3 Williston, Contr. § 1499. A contract is illegal if its object or

tendency is to cause unfaithful conduct by a fiduciary. 3 Williston, Contr. § 1737; 13 C. J. 415; *Ridgely v. Keene*, 134 App. Div. 647, 119 N. Y. Supp. 451; *Skirvin v. Gardner*, 36 Okla. 613, 129 Pac. 729; *Fuller v. Dame*, 18 Pick. 472, 481; *Bollman v. Loomis*, 41 Conn. 581; *Thomas v. Caulkett*, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154; *Simon v. Garlitz*, 63 Tex. Civ. App. 172, 133 S. W. 461. If the facts stated in the instruction were established, the contract in question had the object or tendency which the law forbids, and was illegal. The defendant claims that said facts were established so conclusively by the plaintiff's own testimony, and by other evidence which was undisputed by him, that the trial court should have directed a verdict for defendant upon this ground, as was requested by appropriate motions at the trial. The failure so to direct a verdict is the third and last claim of error raised by the cross petition in error.

The facts which we have numbered (1) in the instruction are, of course, advanced by the plaintiff as the basis of his right to recover. Those numbered (2) are, in our opinion, established by plaintiff's own testimony, from which it appears that he and the defendant knew of a change in conditions on the Laramie plains, where the land was situated, which increased the value of the Ross contract; that Ross did not know of those conditions; that it was understood that plaintiff and defendant should conceal them from Ross; and that they were so concealed. It does not appear clearly what those conditions were, but it is quite evident that the information to be withheld was not a mere opinion as to value, but a state of facts which would come to the knowledge of Ross if he should visit the Laramie plains. In regard to the facts in group (3) we are of a different opinion, and cannot agree that a fiduciary relation between Hoge and Ross with reference to the land con-

tract was conclusively established by the evidence.

It is undisputed that Ross and Hoge were close friends, and there was between them, no doubt, the trust and confidence which is the essence of such friendship. But that fiduciary relationship which is the foundation of the rule which we are now considering must be one from which the law infers or presumes the exercise of undue influence. In cases of trustee and beneficiary, principal and agent, and the like, the relations are essentially fiduciary, and the inference or presumption follows of course. This is not such a case, as it is conceded that Hoge was not the agent of Ross with reference to the ranch property in question. However, the application of the rule is not confined to those definite instances, but is invoked in a variety of less definite confidential and trust relations. 2 Pom. Eq. Jur. § 956. For establishing the fiduciary relationship in the latter class of cases there seems to be no fixed test, but it must appear, as a fact, that there was confidence reposed on

Fraud—transaction in relation of confidence—when fraudulent.

the one side and accepted on the other, with a resulting dependence by the one party and influence by the other. Cowee v. Cornell, 75 N. Y. 91, 99, 31 Am. Rep. 428; McKnatt v. McKnatt, 10 Del. Ch. 392, 93 Atl. 367; Beach v. Wilton, 244 Ill. 413, 91 N. E. 492. The fact that such relation existed must be established by evidence, and the burden is upon the party asserting it. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257.

Counsel call especial attention to that portion of § 1737 of Williston on Contracts where it is stated that "probably any contract for reward, to influence by apparently disinterested advice the conduct of a third person, is similarly obnoxious to public policy, even when neither party at the time bears a fiduciary relation to the person to be influenced."

The authorities cited in support of this, and of the similar statement

in 2 Page on Contracts, 2d ed. § 881, are, as indicated by the text, cases where the party to be influenced was not informed of the interest in the transaction of the party who undertook to exercise the influence. In this case Hoge testified that he did make to Ross statements which were sufficient to impart notice of his interest.

We cannot agree that it was established by undisputed evidence that a fiduciary relation, as contemplated by the law on this subject, existed between Hoge and Ross with reference to the ranch property in question. On the other hand, we are of opinion that there was evidence from which the jury might have found such a relation, and therefore the question was properly submitted to them. If the fiduciary relation had been found to exist, the case presented no question of overcoming the presumption of fraud, because, as we have shown, the undisputed evidence negated the possibility of the full disclosure necessary for that purpose; and obviously in the face of that evidence, it could not be classed among those cases cited in support of an exception to the rule (31 Cyc. 1449) holding that a fiduciary may profit by a transaction in which he acted merely to bring the parties together.

The plaintiff in error complains of this instruction, because the issue of illegality of the contract was not made by the pleadings. It is true that this defense was not pleaded by defendant, but the contract was wholly denied by his answer, and when, in such a case, evidence appears which tends to show that the contract relied upon

Pleading—invalidity of contract—public policy.

determine its character. Kennedy v. Lonabaugh, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133.

It is further contended that, if it be conceded that the contract of joint adventure in question was contrary to public policy, yet, the illegal transaction being completed, there

is no reason why the defendant should be permitted to retain all the proceeds. This contention, we think, is also settled against the plaintiff by *Kennedy v. Lonabaugh*, supra, which was a suit for an accounting and division of profits under a partnership contract, where it was held that, as the contract was illegal, no relief could be granted. It is argued that that case should be distinguished because there the partnership business was contrary to a Federal statute; but we are cited to no authority which would justify the distinction, and are of the opinion that, if the contract in the case at bar were illegal because of a vicious tendency, the reason for denying a recovery would apply with the same force as in a case where the transaction was prohibited by the written law. It is true that *Kennedy v. Lonabaugh* was an equity case, and the rule, as there announced, was stated as a doctrine of courts of equity. It is suggested that it should not be invoked in an action at law. We find no authority for any such limitation of the rule. See 13 C. J. 492; 1 Lindley, Partn. 105. The ancient maxims expressing it are maxims of the common law of contracts. *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839; *Broom*, Legal Maxims, 7th Eng. ed. 554-563. It would be singular, indeed, if relief might be denied to a partner seeking an accounting in equity, and granted to him, if no accounting were necessary, when he sues at law for a balance due.

The plaintiff contends that there was error in giving the following instruction: "Testimony in regard to verbal statements should be received with great caution; the evidence, consisting as it does in mere repetition of oral statements, is subject to much imperfection and mistake, in consequence of the person speaking not having clearly expressed his own meaning, or in consequence of the witness having misunderstood him. It frequently

happens, also, that the witness, by unintentionally altering a few of the expressions actually used, gives an effect to the statement completely at variance with what the party did in fact say. This kind of testimony should be scanned closely, particularly when a long time has elapsed since the conversation. Where statements are deliberately made and precisely identified, or where the precise words are shown, or proved, by intelligent and reliable witnesses, they often lead to a satisfactory conclusion. When a witness can only give what he thinks is the substance of what was said, the weight to be given to such testimony depends largely upon the strength of memory, intelligence, and integrity of the witness."

It is conceded by counsel that the only evidence to which the instruction was applicable was that of Hoge as to the terms of the contract between himself and Haley, and, inasmuch as the jury found that there was a contract, it is suggested that the instruction, even if erroneous, worked no prejudice; but we pass that suggestion without discussion, as it is necessary that we rule upon the propriety of the instruction, for guidance in further proceedings in the case.

If we assume, as we do, that the instruction could have been applied only to the testimony of plaintiff as to the conversation in which he claimed the contract was made, we find no authority for it. The first two sentences of the instruction employ the language of § 200 of Greenleaf on Evidence, but so changed that the instruction applies to all "verbal statements," whereas Greenleaf's text had reference to "verbal admissions" only. In other texts, where we find discussions of the propriety of similar instructions, it is apparently assumed that, when given, they should apply only to such admissions. 38 Cyc. 1742; 2 Thompson, Trials, § 2431. The word "admissions," as here used, may be defined as concessions or acknowledgments made by a party, of

the existence or truth of certain facts. Bouvier's Law Dict. They are those statements which would otherwise be hearsay. *Castner v. Chicago, B. & Q. R. Co.* 126 Iowa, 581, 102 N. W. 499. The promise upon which the suit is based is not an admission in this sense, but is a fact to be proved like any other issuable fact. *Thomas v. Paul*, 87 Wis. 607, 58 N. W. 1031; *Thompson v. Purdy*, 45 Or. 197, 77 Pac. 113, 83 Pac. 139. Statements in the nature of admissions, which are also admissible in evidence as part of the *res gestæ*, may not be disparaged by such an instruction. *Dixon v. Russell*, 156 Wis. 161, 145 N. W. 761; *John v. Pierce*, — Wis. —, 178 N. W. 297. The cases which we have cited are from those states where such cautionary instructions have been approved when limited to testimony of verbal admissions, and, still confining the citations to cases from such states, we note the following authorities, which illustrate further the limitation stated: *Raleigh & G. R. Co. v. Allen*, 106 Ga. 572, 32 S. E. 622; *Gleason v. Denson*, 65 Or. 199, 132 Pac. 530; *Martin v. Algona*, 40 Iowa, 392; *State v. Jackson*, 103 Iowa, 702, 73 N. W. 467; *Blume v. Chicago, M. & St. P. R. Co.* 133 Minn. 348, 158 N. W. 418, Ann. Cas. 1918D, 297; *Haven v. Markstrum*, 67 Wis. 493, 30 N. W. 720; *Chrestensen v. Harms*, 38 S. D. 360, 161 N. W. 343. In Georgia, a statute provides that "all admissions shall be scanned with care" (*Parks's Anno. Code*, § 5784), and, in Oregon, that "oral admissions ought to be viewed with caution" (*L. O. L.* § 868).

Thus, the cases from those states where a similar instruction is upheld when applicable only to oral admissions either directly or inferentially support the view that it should never be made applicable to testimony of the oral contract upon which the suit is based. Hence, we hold that the instruction should not have been given. Whether such an

instruction should be given in any case is a point upon which the authorities are divided, and which we cannot decide in this case, as it is not presented by the record.

To guide the jury in determining the interests of the parties in the profits of the venture, the plaintiff requested the following instruction: "When two persons undertake a joint enterprise for mutual profit, it is to be presumed that their interests in the profits are equal, unless there is evidence from which an understanding for a different division may be implied. Inequality of interest does not necessarily result from unequal contributions, or from the fact that one of the parties contributes all of the money, while the other contributes only service."

That instruction was refused, and the one upon that subject given at the request of defendant was as follows: "You are instructed that if you find that the parties entered into any agreement of partnership, or joint adventure, relative to the Riverside ranch, you must find and determine the relative interests of the parties in that transaction. These relative interests are not fixed by law, but wholly by the agreement of the parties themselves. If there is an express agreement fixing the relative rights and interests of the parties, that express agreement must prevail. If there is no express agreement upon this point, it is ordinarily presumed that the parties are to share equally; but it sometimes is to be inferred that the parties are to share in proportion to their respective contributions to the enterprise. These presumptions are not presumptions of law, but are presumptions of fact, and the jury must determine whether there was any express agreement between the parties as to their respective shares in the land or in the profits thereof, and if there was no such express agreement it is the duty of the jury to determine, from all of the words and acts of the parties at the time the agreement was made, and the conditions surrounding the same,

Trial-instruction—caution in receiving testimony.

what the respective interests of the parties were to be."

The plaintiff contends that this latter instruction was misleading to the jury and prejudicial to his rights, and also that the verdict, by which he was awarded less than one tenth of the amount he claimed, was not supported by the evidence. These two contentions are somewhat interwoven and may be discussed together.

We think it is well settled that partners shall share equally in profits, unless there be an express or implied contract for a different division. Story, Partn. § 24; Parsons, Partn. § 258; 1 Lindley, Partn. 348-351; 3 Kent, Com. 28, 29; 30 Cyc. 451, 693, 696; 22 Am. & Eng. Enc. Law, 101, 102; Gould v. Gould, 6 Wend. 263; Paul v. Cullum, 132 U. S. 539, 33 L. ed. 430, 10 Sup. Ct. Rep. 51; Turnipseed v. Goodwin, 9 Ala. 372; Griggs v. Clark, 23 Cal. 427; Roach v. Perry, 16 Ill. 37; Moore v. Bare, 11 Iowa, 198; Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260, 17 Ann. Cas. 699; Ratzer v. Ratzer, 28 N. J. Eq. 136; Ryder v. Gilbert, 16 Hun, 163; Taylor v. Taylor, 6 N. C. (2 Murph.) 70; Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054. This presumption of equality of interest applies to a joint adventure, or partnership in a single transaction. 23 Cyc. 459; Frazer v.

Joint adventure—presumption as to equal division of profits.

Linton, 183 Pa. 186, 38 Atl. 589; Rankin v. Black, 1 Head, 650; Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738; Lind v. Webber, 36 Nev. 623, 50 L.R.A.(N.S.) 1046, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202; Gius v. Coffinberry, 39 Or. 414, 65 Pac. 358. A different view of the rule upon this subject was announced in Thompson v. Williamson, 7 Bligh, N. R. 432, 5 Eng. Reprint, 833, a decision under Scotch law, where it was stated that there was no presumption of law that partnership shares were to be equal; that the presumption was only one of fact, which the jury might or might not follow; and that,

even though there was no evidence of a contract for unequal shares, the jury should be permitted, upon consideration of all the facts and circumstances, to decide what the interests of the parties should be. The decision in that case was contrary to the opinion of Lord Eldon expressed in the earlier case of Peacock v. Peacock, 16 Ves. Jr. 49, 19 Eng. Rul. Cas. 549, 10 Revised Rep. 138, and has not been followed in the later English cases. See 1 Lindley, Part. 348-350, and cases cited.

Thompson v. Williamson has never been followed by the courts of this country, and we find it approved only in a separate opinion by Hoffman, J., in Hasbrouck v. Childs, 3 Bosw. 105. Its reasoning did not meet the approval of Judge Story, whose discussion of this subject in his work on Partnership, § 24, and note, is the most thorough that we have seen. We are convinced by it, and the other authorities which we have cited, that the presumption of equality is a true presumption, of which there is in reality only one kind, properly referred to either as a "presumption" or "presumption of law." The effect of the particular presumption, in a case of this kind, is to invoke the rule of law requiring the jury to reach the conclusion to which it points,—that is, equality of interest,—in the absence of evidence to the contrary; that is, in the absence of evidence from which an agreement for an unequal interest may be implied.

This principle is stated with precision in the first sentence of the instruction requested by plaintiff. The second sentence is a statement similar in substance to the language used frequently by text-writers and judges when explaining this rule, and we believe it was a proper statement to go to the jury in this case, as a warning against the danger of undertaking to compare and weigh the value of the respective contributions to the enterprise. See 1 Lindley, Partn. 349; Bates, Partn. § 181; Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260, 17 Ann. Cas. 699;

Rankin v. Black, 1 Head, 655;
Broadfoot v. Fraser, 73 Vt. 313, 50
Atl. 1054; Miller v. Hale, 96 Mo.

—effect of
unequal con-
tributions.

App. 427, 70 S. W.
258. We are of
opinion, therefore,

that plaintiff's instruction stated the
law correctly.

Counsel for plaintiff now contends
that the case did not turn upon any
question of the relative interests of
the parties to the venture, but upon
the question whether plaintiff had
any interest at all, and that there
was no evidence whatever to over-
come the presumption of equality.
However, at the trial, the plaintiff
did not ask the court to instruct up-
on that theory, but, by requesting
the instruction which we have quot-
ed, consented that the jury should
decide whether or not there was any
evidence of an implied agreement
for unequal interests, and conse-
quently, if the instruction given up-
on that subject was the same in

Appeal—request
upon erroneous
theory—instruc-
tion for
adversary on
such theory.

meaning as the in-
struction which he
requested, the error,
if any, in submit-
ting that issue to the

jury, was invited. That such was
the case is earnestly urged by coun-
sel for defendant, who argue that
the instruction given is nothing
more than an affirmative converse
of the negative statements contained
in the instruction asked by plaintiff.
We are of opinion, however, that the
instructions are dissimilar, and that
the one given utterly fails to inform
the jury of the true effect of the pre-
sumption in question.

In considering this point it should
be borne in mind that there was no
evidence whatever of an express
contract as to the division of the
profits; that the plaintiff claimed an
equal share by virtue of the pre-
sumption, and though he proceeded
at the trial upon the theory that the
jury might be permitted to decide
whether there was any evidence to
overcome it, he was at liberty to
argue to the jury that there was not,
and to insist that the presumption
should control the verdict.

Passing, then, to the examination
of the instruction which was given
by the court, we find that the jury
were told that, in the absence of an
express agreement upon this point,
it is "ordinarily" presumed that the
parties are to share equally. What,
then, are those cases in which equal-
ity is not presumed? Looking for
the answer to this inquiry, the jury
are confronted by the statement
that "it sometimes is to be inferred
that the parties are to share in pro-
portion to their respective contribu-
tions." Nowhere are they told that
the presumption of equality should
control unless there be evidence
from which to imply, or infer, an
agreement for unequal shares; and,
left without this guide, they may
very naturally have understood that
equality should not be presumed in
any case where the contributions ap-
peared to them to be unequal.

The presumption of equality and
the inference of inequality are, then,
positively classified as presumptions
of fact. The phrase "presumptions
of fact" is of frequent occurrence in
the books, but it is now well under-
stood that, accurately speaking,
there is no such thing as a "pre-
sumption" of fact (4 Wigmore, Ev.
§ 2491), and the term should be dis-
carded as useless
and confusing.

Trial—instruc-
tion—presump-
tion of fact.

When used, it can
mean only inferences of fact, or
mere arguments which may or may
not be acted upon by the jury, who,
under our system of jury trials,
need not usually be instructed in
regard thereto. This classification
of the presumption of equality as a
"presumption of fact," if under-
stood by the jury, eliminated from
the case all questions of any true
presumption, or presumption of law.

The instruction then informs the
jury that it is their duty "to deter-
mine . . . what the respective
interests of the parties were to be."
This closing language, considered in
connection with the rest of the in-
struction, may have been taken by
the jury as an invitation to measure
the interests by the value of the

contributions, which could only lead to that vague speculation which it is the object of the presumption to eliminate from a case of this kind. If they accepted it as a direction only to determine what the contract of the parties was, the instruction is then deficient, in that it fails to state what, if anything, should control the

—division of
profits of joint
adventure.

verdict, in the absence of any evidence from which a contract could be implied. In effect, they were required to follow the rule announced in *Thompson v. Williamson*, *supra*, which, as we have seen, is at variance with the other cases both in England and this country. The cases *Re McConnell* (D. C.) 197 Fed. 438, and *Fleischmann v. Gottschalk*, 70 Md. 523, 17 Atl. 384, cited by defendant as precedents upholding an unequal division of profits, are entirely consistent with our view of the law. In the former case, one of the parties to the venture was held to be entitled to a return of his capital, which was used in the venture, with interest, and the net profits were then divided equally. In the *Fleischmann* Case it was held that the evidence warrant-

ed the inference that the parties had agreed to an unequal division, and the decree, carrying out that agreement, was approved.

In the case at bar the verdict, which is satisfactory to neither party, might not have been reached if the jury had been instructed as requested by plaintiff upon this subject.

It is claimed that the error in this instruction was emphasized by other instructions from which the jury may have inferred that the plaintiff, to entitle him to a recovery, was required to prove an express contract for an equal share of the profits. We do not deem it necessary to analyze the language which is the subject of this complaint, nor to discuss its probable effect, as our views upon the presumption involved will, no doubt, be sufficient guide in instructing upon this subject at another trial.

Because of the error mentioned, the judgment must be reversed and the case remanded for a new trial. It is so ordered.

Potter, Ch. J., and Blume, J., concur.

ANNOTATION.

Applicability of Statute of Frauds to joint adventure or partnership to deal in real estate.

- I. Scope, 484.
- II. Introduction, 485.
- III. Majority rule:
 - a. Rationale, 485.
 - b. Application to particular facts, 491.
 - c. Remedies available, 493.
- IV. Minority rule, 497.

I. Scope.

The present annotation is confined to cases where a joint adventure or partnership to deal in real estate is conceded or proved to have been intended by the parties, and the question is whether or not a parol agreement to carry out such a purpose is within the Statute of Frauds. This limitation, of necessity, excludes cases where the agreements were not treated as creating "partnerships" or

"joint adventures," as, for instance, where they were regarded as creating trusts. Likewise, the annotation is limited to cases where the partnership, or joint enterprise or adventure, was formed to deal in real estate as a commercial proposition; that is, to speculate by buying and selling real estate, or interests therein, for profit. Thus, are excluded cases which, while they involve the three elements of real estate, parol partnership, or joint enterprise, and the Statute of Frauds, do not turn upon the effect of the fact that the primary purpose of the agreement was to buy and sell real estate for profit. This eliminates decisions where the holding or acquiring of real estate is merely incidental to the

carrying on of the business for which the partnership was formed, as well as the cases where the agreement was to purchase and divide the land, or to purchase, and work, and divide the proceeds of the land.

The annotation is also confined primarily to cases where the partnership was formed to make future purchases and sales of lands owned by strangers to the contract. This excludes partnerships formed for the purpose of selling real estate already owned by one or more of the contracting parties, as distinguished from agreements to share in the profits of sales of lands thereafter to be acquired. Cases of the former class have been held, in some instances at least, to be clearly distinguishable from those of the latter. See, for example, *Burgwyn v. Jones* (1912) 118 Va. 511, 41 L.R.A. (N.S.) 120, 75 S. E. 188, Ann. Cas. 1913E, 564.

II. Introduction.

Since it is well settled that an ordinary partnership may be formed by parol, and may purchase and hold real estate as partnership property, which will be regarded in all respects as other partnership property, there would seem to be no reason why a parol partnership formed for the express purpose of dealing in lands should be invalid. However, as is pointed out in *HOGG v. GEORGE* (reported herewith) ante, 469, there is some conflict of opinion, although the same is more apparent than real because of the fact that it is the result, not so much of conflicting principles, but of the different ends sought by the litigants. As to the real conflict among the cases involving parol partnerships formed for the purpose of buying real estate for sale and profit, the great weight of authority tends to negative the operation of the Statute of Frauds.

Generally speaking, it may be said that as a rule all suits recognizing the existence of the partnership, and seeking relief which may be legitimately sought by a partner, are upheld, while, on the other hand, parol contracts for an interest in land are ignored and suits brought to enforce them dis-

missed, although they may constitute part of a partnership agreement.

With respect to "joint adventures" or "joint enterprises" to deal in real estate, they generally are regarded as governed by the same rules applicable in the case of partnerships.

III. Majority rule.

a. Rationals.

As previously indicated, the decided weight of authority is to the effect that a parol partnership agreement, or joint enterprise, entered into by two or more persons for the purpose of carrying on the business of purchasing and selling real estate, or interests therein, for speculation, the profits to be divided among the parties, is not within the provisions of the Statute of Frauds relating to the sale of land or an interest in lands; in other words, that such an agreement may be entered into and become effectual, although not in writing. The following cases support this rule:

United States.—*McElroy v. Swope* (1891) 47 Fed. 380; *Jones v. Patrick* (1905) 140 Fed. 403.

Arkansas.—*McClintock v. Thweatt* (1903) 71 Ark. 323, 73 S. W. 1093; *Beebe v. Olentine* (1911) 97 Ark. 390, 134 S. W. 936.

California.—*Coward v. Clanton* (1889) 79 Cal. 27, 21 Pac. 359, overruling *Gray v. Palmer* (1858) 9 Cal. 616; *Bates v. Babcock* (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 138, 30 Pac. 605, also disapproving the *Gray Case*; *Gorham v. Heiman* (1891) 90 Cal. 346, 27 Pac. 289; *Brown v. Spencer* (1912) 163 Cal. 589, 126 Pac. 493; *Arnold v. Loomis* (1915) 170 Cal. 95, 148 Pac. 518; *Scott v. Jungquist* (1918) 179 Cal. 7, 175 Pac. 412; *Ingram v. Johnston* (1918) 38 Cal. App. 234, 176 Pac. 54.

Colorado.—*VonTrotha v. Bamberger* (1890) 15 Colo. 1, 24 Pac. 883.

Connecticut.—*Bunnel v. Taintor* (1823) 4 Conn. 568.

District of Columbia.—*Kilbourn v. Latta* (1886) 5 Mackey, 304, 60 Am. Rep. 373, reversed on another point in (1893) 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201.

Illinois.—*Morrill v. Colehour* (1876) 82 Ill. 618; *Wallace v. Carpenter*

(1877) 85 Ill. 590; *Speyer v. Desjardins* (1892) 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; *Goldstein v. Nathan* (1895) 158 Ill. 641, 42 N. E. 72; *Van Housen v. Copeland* (1899) 180 Ill. 74, 54 N. E. 169, affirming (1898) 79 Ill. App. 139; *Fitch v. King* (1917) 279 Ill. 62, 116 N. E. 624; *Allison v. Perry* (1888) 28 Ill. App. 396, affirmed in (1889) 130 Ill. 9, 22 N. E. 492; *Frankenstein v. North* (1898) 79 Ill. App. 669; *Eaton v. Graham* (1902) 104 Ill. App. 296; *Smith v. Hart* (1912) 179 Ill. App. 98; *Greenleaf v. Feinberg* (1918) 210 Ill. App. 271.

Indiana.—*Holmes v. McCray* (1875) 51 Ind. 358, 19 Am. Rep. 735; *Robinson v. Horner* (1911) 176 Ind. 226, 95 N. E. 561.

Iowa.—*Richards v. Grinnell* (1884) 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Pennybacker v. Leary* (1884) 65 Iowa, 220, 21 N. W. 575; *Blythe v. Cummings* (1920) — Iowa, —, 176 N. W. 688.

Kansas.—*Tenney v. Simpson* (1887) 37 Kan. 353, 15 Pac. 187; *Jones v. Davies* (1899) 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Duncan v. Johnson* (1913) 89 Kan. 21, 130 Pac. 655; *Bird v. Wilcox* (1919) 104 Kan. 799, 180 Pac. 774.

Kentucky.—*Garth v. Davis* (1905) 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692; *Vaught v. Hogue* (1908) 32 Ky. L. Rep. 1061, 107 S. W. 757; *Goodwin v. Smith* (1911) 144 Ky. 41, 137 S. W. 789; *United Min. Co. v. Morton* (1917) 174 Ky. 366, 192 S. W. 79.

Maine.—*Dudley v. Littlefield* (1842) 21 Me. 418.

Maryland. — *Bruns v. Spalding* (1900) 90 Md. 349, 45 Atl. 194; *Morgart v. Smouse* (1906) 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 Ann. Cas. 1140.

Massachusetts. — *Trowbridge v. Wetherbee* (1865) 11 Allen, 361.

Minnesota.—*Hodge v. Twitchell* (1885) 33 Minn. 389, 23 N. W. 547, as explained in *Newell v. Cochran* (1889) 41 Minn. 374, 43 N. W. 84, which also expressly passed upon the point. And see *Stern v. Harris* (1889) 40 Minn. 209, 41 N. W. 1036; *Fountain v. Menard* (1893) 53 Minn. 443, 39 Am. St. Rep. 617, 55 N. W. 601; *Stitt*

v. Rat Portage Lumber Co. (1906) 98 Minn. 52, 107 N. W. 824; *Sonnesyn v. Hawbaker* (1914) 127 Minn. 15, 148 N. W. 476; *Hammel v. Feigh* (1919) 143 Minn. 115, 173 N. W. 570.

Missouri. — *Sloan v. Paramore* (1914) 181 Mo. App. 611, 164 S. W. 662. And see *Springer v. Cabell* (1847) 10 Mo. 640, and *Hunter v. Whitehead* (1868) 42 Mo. 524.

Montana.—See *Hirbour v. Reeding* (1877) 3 Mont. 15, 11 Mor. Min. Rep. 514.

Nebraska.—*Greusel v. Payne* (1921) — Neb. —, 185 N. W. 336.

New Hampshire.—*Pitman v. Hodge* (1891) 67 N. H. 101, 36 Atl. 605.

New York.—*Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349, quoted in *HOGGE v. GEORGE* (reported herewith) ante, 469; *Williams v. Gillies* (1878) 75 N. Y. 197; *Babcock v. Read* (1885) 99 N. Y. 609, 1 N. E. 141, affirming (1884) 18 Jones & S. 126; *Ostrander v. Snyder* (1893) 73 Hun, 378, 26 N. Y. Supp. 263, affirmed on opinion below in (1896) 148 N. Y. 757, 43 N. E. 988; *Buckley v. Doig* (1907) 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263; *Bailey v. Weed* (1899) 36 App. Div. 611, 55 N. Y. Supp. 253; *Burkhardt v. Walsh* (1900) 49 App. Div. 634, 64 N. Y. Supp. 779; *Pounds v. Egbert* (1907) 117 App. Div. 756, 102 N. Y. Supp. 1079; *Rauch v. Donovan* (1908) 126 App. Div. 52, 110 N. Y. Supp. 690; *Wormser v. Meyer* (1877) 54 How. Pr. 189; *Guibert v. Saunders* (1887) 10 N. Y. S. R. 43; *Larkin v. Martin* (1904) 46 Misc. 179, 93 N. Y. Supp. 198.

Oklahoma.—*Thompson v. McKee* (1914) 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755.

Oregon. — *Flower v. Barnekoff* (1890) 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370.

Pennsylvania. — *Meason v. Kaine* (1869) 63 Pa. 339; *Everhart's Appeal* (1884) 106 Pa. 349; *Howell v. Kelly* (1892) 149 Pa. 473, 24 Atl. 224. And see *Benjamin v. Zell* (1882) 100 Pa. 33.

Rhode Island.—*Moran v. McDevitt* (1912) — R. I. —, 83 Atl. 1013.

South Dakota.—*Davenport v. Buchanan* (1894) 6 S. D. 376, 61 N. W. 47.

Tennessee.—Harben v. Congdon (1860) 1 Coldw. 221.

Utah.—Knauss v. Cahoon (1891) 7 Utah, 182, 26 Pac. 295; Coffin v. McIntosh (1893) 9 Utah, 315, 34 Pac. 247.

Vermont.—Bruce v. Hastings (1868) 41 Vt. 380, 98 Am. Dec. 592.

Virginia.—Williams v. Kendrick (1906) 105 Va. 791, 54 S. E. 865; Miller v. Ferguson (1907) 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 138; Burgwyn v. Jones (1912) 113 Va. 511, 41 L.R.A.(N.S.) 120, 75 S. E. 188, Ann. Cas. 1913E, 564.

Washington.—Case v. Seger (1892) 4 Wash. 492, 30 Pac. 646; Smith v. Imhoff (1916) 89 Wash. 418, 154 Pac. 793.

West Virginia.—Bond v. Taylor (1910) 68 W. Va. 317, 69 S. E. 1000; Floyd v. Duffy (1910) 68 W. Va. 339, 33 L.R.A.(N.S.) 833, 69 S. E. 993. And see Mankin v. Jones (1910) 68 W. Va. 422, 69 S. E. 981.

Wyoming.—HOGE v. GEORGE (reported herewith) ante, 469.

England.—Dale v. Hamilton (1846) 5 Hare, 369, 67 Eng. Reprint, 955, 16 L. J. Ch. N. S. 126, 11 Jur. 163, on appeal in (1847) 2 Phill. Ch. 266, 41 Eng. Reprint, 945, 16 L. J. Ch. N. S. 397, 11 Jur. 574.

Canada.—Archibald v. McNerhanie (1899) 29 Can. S. C. 564, affirming (1898) 6 B. C. 260; Bindon v. Gorman (1913) 4 Ont. Week. N. 839, 10 D. L. R. 431, reversed on question of fact in (1913) 24 Ont. Week. Rep. 769, 4 Ont. Week. N. 1505, 12 D. L. R. 240; Leslie v. Hill (1913) 28 Ont. L. Rep. 48, 4 Ont. Week. N. 685, 11 D. L. R. 506, affirming (1911) 25 Ont. L. Rep. 144, 20 Ont. Week. Rep. 490.

This is generally put upon the theory that the validity of an agreement to share in the profits of contemplated speculative deals in real estate does not involve an estate, or interest in real estate, within the meaning of the Statute of Frauds.

United States.—Jones v. Patrick (1905) 140 Fed. 408.

California.—Coward v. Clanton (1889) 79 Cal. 27, 21 Pac. 359; Bates v. Babcock (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605.

Connecticut.—Bunnell v. Taintor (1823) 4 Conn. 568.

Illinois.—Van Housen v. Copeland (1899) 180 Ill. 74, 54 N. E. 169.

Iowa.—Pennybacker v. Leary (1884) 65 Iowa, 220, 21 N. W. 575.

Kansas.—Tenney v. Simpson (1887) 37 Kan. 353, 15 Pac. 187.

Kentucky.—Garth v. Davis (1905) 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692; Goodwin v. Smith (1911) 144 Ky. 41, 137 S. W. 789; United Min. Co. v. Morton (1917) 174 Ky. 366, 192 S. W. 79.

Maine.—Dudley v. Littlefield (1842) 21 Me. 418.

Maryland.—Morgart v. Smouse (1906) 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 Ann. Cas. 1140.

Michigan.—See Thompson v. Hurson (1918) 201 Mich. 685, 167 N. W. 926.

Minnesota.—Sonnesyn v. Hawbaker (1914) 127 Minn. 15, 148 N. W. 476; Hammel v. Feigh (1919) 143 Minn. 115, 173 N. W. 570.

Missouri.—Sloan v. Paramore (1914) 181 Mo. App. 611, 164 S. W. 662.

New Hampshire.—Pitman v. Hodge (1891) 67 N. H. 101, 36 Atl. 605.

New York.—Chester v. Dickerson (1873) 54 N. Y. 1, 13 Am. Rep. 550; Babcock v. Read (1885) 99 N. Y. 609, 1 N. E. 141; Ostrander v. Snyder (1893) 73 Hun, 378, 26 N. Y. Supp. 263, affirmed on opinion below in (1896) 148 N. Y. 757, 43 N. E. 988.

Oklahoma.—Thompson v. McKee (1914) 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755.

Oregon.—Flower v. Barnekoff (1890) 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370.

Pennsylvania.—Howell v. Kelly (1892) 149 Pa. 473, 24 Atl. 224. See also Benjamin v. Zell (1882) 100 Pa. 33.

Rhode Island.—Moran v. McDevitt (1912) — R. I. —, 83 Atl. 1013.

South Dakota.—Davenport v. Buchanan (1894) 6 S. D. 376, 61 N. W. 47.

Tennessee.—Harben v. Congdon (1860) 1 Coldw. 221.

Virginia.—Miller v. Ferguson (1907) 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 138.

Washington.—Smith v. Imhoff (1916) 89 Wash. 418, 154 Pac. 793.

In Bates v. Babcock (1892) 95 Cal.

484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605, the court said: "An agreement of this character cannot be said to contravene the provisions of the Statute of Frauds. It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense, the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement—that sense in which the beneficiary, under a trust for the sale of real estate, and payment to him of the proceeds of the sale, has an interest in the land; but it is only a pecuniary interest resulting from the sale, and a right to have the land sold, rather than an interest in the land itself. The Statute of Frauds does not prevent parol proof for the purpose of showing an interest in lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired, in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the Statute of Frauds an instrument of fraud. A bill for the conveyance of the lands could not be maintained under such an agreement, but by reason of the acts of the parties thereunder an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity. It is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the

existence of such a partnership, the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships." So, in *Pennybacker v. Leary* (1884) 65 Iowa, 220, 21 N. W. 575, supra, the court said: "Defendant insists, and pleads as a defense in his answer, that as the contract was for the purchase of an interest in lands, and was wholly oral, it cannot be enforced under the Statute of Frauds. The contract, to be truly stated, amounted to a parol agreement for the creation of a partnership, the object of which was to acquire and sell certain lands. The part of the agreement obligating the parties to purchase the land was but an incident of the contract of partnership. It provided for the subject and manner of investment of the capital of the firm. It was simply an agreement that the firm would buy the lands. By this agreement neither party bought or sold lands. It was not an agreement for the purchase and sale of lands. It was nothing more than an agreement that the firm should buy lands of another, which should be held as firm property. It was not, therefore, an agreement or contract under which an interest in, or title to, lands was attempted to be transferred. It simply provides what interest the parties shall have therein, when the lands shall be acquired, as provided by the contract. Surely, if two persons agree to enter into a partnership for the purchase and sale of dry goods, and therein specify the manner of the contribution of the capital of the firm, and the goods to be purchased therewith, and the persons of whom they shall be purchased, the contract could not be regarded as creating or transferring any property or interest in the goods intended to be purchased. There is no distinction in principle between that case and this. We conclude that the contract in question is not within the contemplation of our Statute of Frauds, which provides that no evidence of a contract 'for the creation or transfer of any interest in lands, except leases for a term not exceeding one year,' is competent, 'unless it be in writing, and signed by the party

to be charged, or by his lawfully authorized agent.” In *Moran v. McDevitt* (1912) — R. I. —, 83 Atl. 1013, supra, the court stated the rule and the reason therefor, as follows: “While it is true that some authorities hold that partnerships formed for the buying and selling of land must be evidenced by articles in writing, and cannot be proven by parol, on the ground that if one partner makes a purchase of land in his own name, but which is intended for the benefit of the firm, to allow the other partner or partners, under the mere form of a partnership agreement, the same being evidenced only by parol, to take advantage of that contract, would be to allow him to acquire an interest in land by parol, directly in opposition to the Statute of Frauds. The great weight of authority, however, seems to be that such agreements of copartnership can be proven by parol, and are not in violation of the Statute of Frauds, and such authorities base their reasoning on the ground that such contracts do not contemplate any transfer of land from one partner to the other, or the creation of any interest or estate therein,—do not, as between the parties, in any way affect the title to realty so bought for copartnership purposes,—but that the subject-matter of the contract is the profits or losses to be derived from the sale of said land. This seems to us to be the better reasoning, and the rule which this court should follow.” Again, in *Garth v. Davis* (1905) 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692, supra, the court said: “An agreement to become partners in dealing in real estate is neither a contract to buy, nor a contract to sell, real estate, as between the parties to it. So far as the formation of the copartnership is concerned, the title to real estate is nowise affected by the making of the agreement. The terms of the agreement, the mutual undertakings by the partners, as between themselves, as to what each will contribute, and the interests of each in the profits of their undertaking, are matters not necessarily affected by the statute. The most numerous, and what seem to us the best-reasoned, authorities, hold

that such contract need not be in writing if to be begun and may end within a year, although as a fact it may not be terminated for more than a year.” And in *Thompson v. McKee* (1914) 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755, supra, the court discussed the question as follows: “That an ordinary partnership agreement is valid, though not reduced to writing, can scarcely be questioned. Nor can it be doubted that the settlement of the partnership accounts, and a proper division of the assets among the members of the firm, was an appropriate function of the court below, sitting as a court of equity. It clearly appearing that the agreement between the parties did not have for its object the sale of real property, or any interest therein, by or to the plaintiff or defendants, or either of them, but contemplated only a division of the profits or losses growing out of the purchase and subsequent sale of the land to others, the same is not such a contract as is embraced within the provisions of the Statute of Frauds, and required to be in writing and signed by the party to be charged. We, therefore, conclude that a partnership agreement, as in the instant case, may be formed orally for the purpose of dealing in lands as well as for dealing in personal estate, or engaging in any other occupation or business, it being, like any other partnership contract, an agreement to share in the profits and losses of the business; and the existence of such partnership and the interest of the members of the firm may be established by parol evidence.” And again, in *Dudley v. Littlefield* (1842) 21 Me. 418, supra, Whitman, Ch. J., said: “We do not see why there may not be a copartnership in buying and selling land, as well as in any other vendible property. It is an agreement merely to share in the profit and loss of negotiations. The rules for transferring land may be different from those for the transfer of personal estate; but that can make no difference in the result, as to profit and loss. Copartners in trade often connect the purchase and sale of real estate with their other negotiations, and the profit and loss relative thereto

go into the general account thereof; the only difference being that a different form is used in transferring real estate from that which is requisite in the transfer of personal property." And in *Coward v. Clanton* (1889) 79 Cal. 27, 21 Pac. 359, *supra*, the court said: "The contract, as between the parties to it, does not in any way affect the title to real estate, nor does the present controversy between the parties [action for dissolution and accounting] involve any such question. The subject-matter of the contract was the profits to be realized from the sales made."

And it has been said that equity will regard real estate, when bought pursuant to a parol partnership agreement to deal in lands, as personal property among the partners in the speculation, so as to remove the transaction of the partners from the inhibition of the provisions of the Statute of Frauds relating to sales of real property.

Illinois.—*Morrill v. Colehour* (1876) 82 Ill. 618; *Speyer v. Desjardins* (1892) 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; *Van Housen v. Copeland* (1899) 180 Ill. 74, 54 N. E. 169; *Frankenstein v. North* (1898) 79 Ill. App. 669.

Indiana.—*Holmes v. McCray* (1875) 51 Ind. 358, 19 Am. Rep. 735.

Iowa.—*Richards v. Grinnell* (1884) 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668.

Kansas.—*Tenney v. Simpson* (1887) 37 Kan. 353, 15 Pac. 187; *Jones v. Davies* (1899) 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484.

Kentucky.—*Garth v. Davis* (1905) 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692.

Oregon.—*Flower v. Barnekoff* (1890) 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370.

Virginia.—*Miller v. Ferguson* (1907) 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 138.

Canada.—*Archibald v. McNerhanie* (1899) 29 Can. S. C. 564, affirming (1898) 6 B. C. 260.

In *Speyer v. Desjardins* (1892) 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283, *supra*, the court said: "The real estate of a partnership is treated and

administered in equity, as between partners and for all the purposes of the partnership, as personal property and partnership assets. From its status in equity, of being stock in trade and partnership assets, it is readily deducible that it is immaterial whether the legal title to the partnership land is in all the partners, or in one, or in some number less than the whole; that it is not material whether the partnership was already established and engaged in its business when the land was acquired and brought into the partnership stock, or whether the partnership was established and the land acquired and put in contemporaneously, or whether the partnership was established for the express and special purpose of dealing in and making profit out of the very land itself which is in question; and that the facts of the existence of the partnership, and that the lands were acquired and used for partnership purposes, being shown by parol, it is immaterial whether such partnership was formed by written articles or by parol." And in *Archibald v. McNerhanie* (1899) 29 Can. S. C. 564, *supra*, the chief justice of the Canadian supreme court said: "I take it to be established now that a partnership may always be proved by parol, and if it turns out that the assets consist of lands, or interests in land, bought for the purpose of being sold again, such lands will be treated as any other property not coming within the statute. The principle is this,—all assets of a partnership are considered as personalty, and that upon an application of the doctrine of equitable conversion, for ultimately, in order to a winding up of the partnership, everything must be sold and converted into money. This is applied to other questions besides that of the applicability of the Statute of Frauds; for instance, in a partnership for dealing in land, the lands acquired are not considered as realty going to the heir of one of the partners, but as belonging to the personal representative, for whom a court of equity treats the heirs as a trustee."

And in the following cases the courts emphasized the point that, in

the class of partnerships and joint adventures under consideration, the lands were to be purchased for resale as a speculation, rather than to be held for permanent investment or use: *Tenney v. Simpson* (1887) 37 Kan. 353, 15 Pac. 187; *Jones v. Davies* (1899) 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Thompson v. McKee* (1914) 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755.

And a distinction was drawn in *Bailey v. Weed* (1899) 86 App. Div. 611, 55 N. Y. Supp. 253, between cases where the partnership involved conveyances between the partners, and cases where the titles, etc., are taken and conveyed by one partner, and the others merely share in the profits and losses; or, in other words, between partnerships dealing in realty for speculation, and partners buying and holding realty for investment or use. It was declared that oral partnerships formed for the first-mentioned purpose are not invalidated by the Statute of Frauds. And in *Pounds v. Egbert* (1907) 117 App. Div. 756, 102 N. Y. Supp. 1079, the court said: "A partnership agreement not within the Statute of Frauds, because by it no estate or interest in lands is created, granted, or assigned, must not be confused with such an agreement which does involve the creation, granting, or assigning of such an estate or interest. The individual partners do not own an estate in the partnership real property. Irrespective of where the title happens to be, such property, until the needs of the copartnership are satisfied, is treated as personal property. An agreement to form a copartnership to deal in lands does not, therefore, involve any element violative of the Statute of Frauds; but if such agreement also provides for a conveyance of real property from one partner to another, or to the copartnership, it then provides for the creation of an estate or interest in lands, and comes directly within the Statute of Frauds. The ground upon which partnership agreements to deal in land have been sustained, as well as the plain words of the statute, requires the conclusion that the mere fact that an agreement happens to provide for a copartnership

will not save it from the Statute of Frauds, if it also attempts to create, grant, or assign an estate or interest in lands."

Dale v. Hamilton (1846) 5 Hare, 369, 67 Eng. Reprint, 955, 16 L. J. Ch. N. S. 126, 11 Jur. 163, on appeal in (1847) 2 Phill. Ch. 266, 41 Eng. Reprint, 945, 16 L. J. Ch. N. S. 397, 11 Jur. 574, which upheld a parol agreement for the joint buying, improving, and selling of lands for profit, as against the contention that it was invalidated by the Statute of Frauds, is usually regarded as the leading case in favor of the prevailing doctrine. In this case the distinction taken in argument, and apparently acted upon by the court, was this: If the allegation is of an agreement to transfer an interest in the land, the statute applies; if the allegation is that the land is to be resold at the joint risk for profit or loss, the statute does not apply.

b. Application to particular facts.

The general rule that a parol partnership or joint adventure to deal in real estate and to share profits is not within the Statute of Frauds has been applied to—

—partnership to engage in the general business of buying and selling real estate for profit:

California.—*Coward v. Clanton* (1889) 79 Cal. 27, 21 Pac. 359; *Bates v. Babcock* (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; *Arnold v. Loomis* (1915) 170 Cal. 95, 148 Pac. 518;

District of Columbia.—*Kilbourn v. Latta* (1886) 5 Mackey, 304, 60 Am. Rep. 373, reversed on another point in (1898) 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201;

Illinois.—*Fitch v. King* (1917) 279 Ill. 62, 116 N. E. 624; *Smith v. Hart* (1912) 179 Ill. 98;

Maine.—*Dudley v. Littlefield* (1842) 21 Me. 418;

Minnesota.—*Hodge v. Twitchell* (1885) 33 Minn. 389, 23 N. W. 547; *Hammel v. Feigh* (1919) 143 Minn. 115, 173 N. W. 570;

Nebraska.—*Greusel v. Payne* (1921) — Neb. —, 185 N. W. 386;

New York.—*Buckley v. Doig* (1907)

188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263; *Bailey v. Weed* (1899) 36 App. Div. 611, 55 N. Y. Supp. 253; *Pounds v. Egbert* (1907) 117 App. Div. 756, 102 N. Y. Supp. 1079; *Wormser v. Meyer* (1877) 54 How. Pr. 189;

Oklahoma.—*Thompson v. McKee* (1914) 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755;

Canada.—*Bindon v. Gorman* (1913) 4 Ont. Week. N. 839, 10 D. L. R. 431, reversed on question of fact in (1913) 24 Ont. Week. Rep. 769, 4 Ont. Week. N. 1505, 12 D. L. R. 240;

—partnerships to deal generally in real estate of a certain kind, *Ingram v. Johnston* (1918) 38 Cal. App. 234, 176 Pac. 54 (“industrial property”); *Thompson v. Hurson* (1918) 201 Mich. 685, 167 N. W. 926 (partnerships to purchase houses, move them to other tracts, and sell same for division of profits); *Harben v. Congdon* (1860) 1 Coldw. (Tenn.) 221 (mineral lands); *Archibald v. McNerhanie* (1899) 29 Can. S. C. 564, affirming (1898) 6 B. C. 260 (“mining claims”);

—partnership to engage in the general business of procuring oil and gas leases from landowners, and then selling the leases, *Bird v. Wilcox* (1919) 104 Kan. 799, 180 Pac. 774;

—partnership to deal solely in options on real estate, *MULLHOLLAND v. PATCH* (reported herewith) ante, 467, distinguishing *Nester v. Sullivan* (1907) 147 Mich. 493, 9 L.R.A.(N.S.) 1106, 111 N. W. 85, modified in (1907) 147 Mich. 508, 111 N. W. 1033, which arrived at a contrary conclusion on the ground that in the earlier case the agreement not only contemplated, but actually involved, the holding of real estate;

—partnerships to buy and sell specific real estate for speculation:

Arkansas.—*McClintock v. Thweatt* (1903) 71 Ark. 323, 73 S. W. 1093; *Beebe v. Olentine* (1911) 97 Ark. 390, 134 S. W. 936;

California.—*Bates v. Babcock* (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; *Scott v. Jungquist* (1918) 179 Cal. 7, 175 Pac. 412;

Connecticut.—*Bunnel v. Taintor* (1823) 4 Conn. 568;

Illinois.—*Morrill v. Colehour* (1876) 82 Ill. 618; *Allison v. Perry* (1888) 28 Ill. App. 396, affirmed in (1889) 130 Ill. 9, 22 N. E. 492; *Frankenstein v. North* (1898) 79 Ill. App. 669;

Indiana.—*Holmes v. McCray* (1875) 51 Ind. 358, 19 Am. Rep. 735; *Robinson v. Horner* (1911) 176 Ind. 226, 95 N. E. 561;

Iowa.—*Richards v. Grinnell* (1884) 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Pennybacker v. Leary* (1884) 65 Iowa, 220, 21 N. W. 575; *Blythe v. Cummings* (1920) — Iowa, —, 176 N. W. 688;

Kansas.—*Tenney v. Simpson* (1887) 37 Kan. 353, 15 Pac. 187; *Jones v. Davies* (1899) 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; *Duncan v. Johnston* (1913) 89 Kan. 21, 130 Pac. 655;

Kentucky.—*Vaught v. Hogue* (1908) 32 Ky. L. Rep. 1061, 107 S. W. 757.

Minnesota.—*Newell v. Cochran* (1889) 41 Minn. 374, 43 N. W. 84; *Sonnesyn v. Hawbaker* (1914) 127 Minn. 15, 148 N. W. 476 (holding that it is unimportant that the contract relates only to a single piece of land, since the character of the contract and the relationship it creates between the parties depend upon its terms, and not upon the magnitude or extent of the transactions covered); *Hammel v. Feigh* (1919) 143 Minn. 115, 173 N. W. 570. And see *Stern v. Harris* (1889) 40 Minn. 209, 41 N. W. 1036;

Missouri.—*Sloan v. Paramore* (1914) 181 Mo. App. 611, 164 S. W. 662;

New Hampshire.—*Pitman v. Hodge* (1891) 67 N. H. 101, 36 Atl. 605;

New York.—*Chester v. Dickerson* (1873) 54 N. Y. 1, 13 Am. Rep. 550, affirming (1868) 52 Barb. 349; *Babcock v. Read* (1885) 99 N. Y. 609, 1 N. E. 141; *Ostrander v. Snyder* (1893) 73 Hun, 378, 26 N. Y. Supp. 263, affirmed on opinion below in (1896) 148 N. Y. 757, 43 N. E. 988; *Burkhardt v. Walsh* (1900) 49 App. Div. 634, 64 N. Y. Supp. 779; *Rauch v. Donovan* (1908) 126 App. Div. 52, 110 N. Y. Supp. 690; *Guibert v. Saunders* (1887) 10 N. Y. S. R. 43;

Oklahoma.—*Thompson v. McKee* (1914) 43 Okla. 243, L.R.A.1915A, 521, 142 Pac. 755;

Pennsylvania.—*Meason v. Kaine* (1869) 63 Pa. 339; *Everhart's Appeal* (1884) 106 Pa. 349;

South Dakota.—*Davenport v. Buchanan* (1894) 6 S. D. 376, 61 N. W. 47;

Utah.—*Knauss v. Cahoon* (1891) 7 Utah, 182, 26 Pac. 295; *Coffin v. McIntosh* (1893) 9 Utah, 315, 34 Pac. 247;

Vermont.—*Bruce v. Hastings* (1868) 41 Vt. 380, 98 Am. Dec. 592;

Washington.—*Smith v. Imhoff* (1916) 89 Wash. 418, 154 Pac. 793;

Wyoming.—*HOGG v. GEORGE* (reported herewith) ante, 469;

England.—*Dale v. Hamilton* (1846) 5 Hare, 369, 67 Eng. Reprint, 955, 16 L. J. Ch. N. S. 126, 11 Jur. 163, on appeal in (1847) 2 Phill. Ch. 266, 41 Eng. Reprint, 945, 16 L. J. Ch. N. S. 397, 11 Jur. 574;

—partnerships to buy land, erect a building or buildings thereon, and sell the same, the profits to be divided, *Van Housen v. Copeland* (1899) 180 Ill. 74, 54 N. E. 169, affirming (1898) 79 Ill. App. 139; *Fountain v. Menard* (1893) 53 Minn. 443, 39 Am. St. Rep. 617, 55 N. W. 601;

—partnerships to purchase, develop, and sell real estate and divide the profits, *Morgart v. Smouse* (1906) 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 Ann. Cas. 1140; *Trowbridge v. Wetherbee* (1865) 11 Allen (Mass.) 361; *Flower v. Barnekoff* (1890) 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370; *Moran v. McDevitt* (1912) — R. I. —, 83 Atl. 1013; *Miller v. Ferguson* (1907) 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 138; *Floyd v. Duffy* (1910) 68 W. Va. 339, 33 L.R.A. (N.S.) 883, 69 S. E. 993;

—verbal agreement to share in the profits of a contemplated speculation in mining property, *Jones v. Patrick* (1905) 140 Fed. 403. And see *United Min. Co. v. Morton* (1917) 174 Ky. 366, 192 S. W. 79;

—contract between real estate brokers to co-operate in buying and selling an option upon a certain mine for a share of the commissions, *Gorham v. Heiman* (1891) 90 Cal. 346, 27 Pac. 289;

—parol partnership to procure option on and sell certain tract of

coal lands, *Howell v. Kelly* (1892) 149 Pa. 473, 24 Atl. 224; *Williams v. Kendrick* (1906) 105 Va. 791, 54 S. E. 865;

—partnership to secure and sell a certain lease for oil and gas, *Goodwin v. Smith* (1911) 144 Ky. 41, 137 S. W. 789. And see *Leslie v. Hill* (1913) 28 Ont. L. Rep. 48, 4 Ont. Week. N. 685, 11 D. L. R. 506, affirming (1911) 25 Ont. L. Rep. 144, 20 Ont. Week. Rep. 490.

c. Remedies available.

It follows, from the rule that a partnership to speculate in real estate merely amounts to a valid agreement for the division of profits rather than for an interest in land, that a copartner may pursue the appropriate legal or equitable remedy to recover his proportionate share of such profits. See the following cases:

United States.—*Jones v. Patrick* (1905) 140 Fed. 403.

California.—*Bates v. Babcock* (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 183, 30 Pac. 605.

Colorado.—*Von Trotha v. Bamberger* (1890) 15 Colo. 1, 24 Pac. 883.

Kentucky.—*Vaught v. Hogue* (1908) 32 Ky. L. Rep. 1061, 107 S. W. 757.

Maryland.—*Morgart v. Smouse* (1906) 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 Ann. Cas. 1140 (holding, however, that an action at law cannot be maintained until there has been a settlement or statement of account between the partners).

Massachusetts.—*Trowbridge v. Wetherbee* (1865) 11 Allen, 361 (holding that, where the transaction for which the partnership was formed has been closed, an action at law may be maintained to recover a copartner's share of the profits).

Minnesota.—*Sonnesyn v. Hawbaker* (1914) 127 Minn. 15, 148 N. W. 476.

Missouri.—See *Hunter v. Whitehead* (1868) 42 Mo. 524.

Nebraska.—*Greusel v. Payne* (1921) — Neb. —, 185 N. W. 336. See *Norton v. Brink* (1906) 75 Neb. 566, 106 N. W. 68, reversed on other grounds on rehearing in (1906) 75 Neb. 575, 7 L.R.A. (N.S.) 945, 121 Am. St. Rep. 822, 110 N. W. 669, which holds that profits

may be recovered where the contract has been fully performed).

Pennsylvania.—Everhart's Appeal (1884) 106 Pa. 349 (holding that recovery may be had where realty has been resold at a profit); *Howell v. Kelly* (1892) 149 Pa. 473, 24 Atl. 224 (holding that, where the partnership agreement concerns a single transaction in real estate which has been closed at a profit, assumpsit may be maintained by one partner against the other for a division of such profit).

Utah.—*Coffin v. McIntosh* (1893) 9 Utah, 315, 34 Pac. 247 (holding same as preceding case).

Vermont.—*Bruce v. Hastings* (1868) 41 Vt. 380, 98 Am. Dec. 592 (holding same as *Howell v. Kelly* (Pa.) supra).

Virginia.—*Miller v. Ferguson* (1907) 107 Va. 249, 122 Am. St. Rep. 840, 57 S. E. 649, 13 Ann. Cas. 138.

Washington.—*Smith v. Imhoff* (1916) 89 Wash. 418, 154 Pac. 793.

Wyoming.—*HOGUE v. GEORGE* (reported herewith) ante, 469.

Canada.—*Archibald v. McNerhanie* (1899) 29 Can. S. C. 564, affirming (1898) 6 B. C. 260.

Conversely, it has been held that, where a loss has been sustained, a partner who has advanced the money may recover pro rata from the other partners. *Babcock v. Read* (1885) 99 N. Y. 609, 1 N. E. 141, affirming (1884) 18 Jones & S. 126; *Wormser v. Meyer* (1877) 54 How. Pr. (N. Y.) 189.

And it has been held (*Meason v. Kaine* (1869) 63 Pa. 339) that, where the partnership is limited to a single transaction, a partner who has advanced the purchase money may maintain an action against his copartner to recover a proportionate share of such purchase money. In *Jones v. Davies* (1899) 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484, it was held that the assignee of a partner who was familiar with the partnership affairs, and actively participated therein by contributing regularly, over a long period, to a fund for the payment of interest on unpaid purchase money on lands which the partnership had bought, was liable as a partner for the payment of the purchase money remaining unpaid.

And where one partner has misrepresented the amount which he had to pay for the real estate for the purchase of which the partnership was formed, it has been held that the defrauded partner may maintain an action for damages to which the Statute of Frauds does not constitute a defense. The court in *Davenport v. Buchanan* (1894) 6 S. D. 376, 61 N. W. 47, in so holding, said: "The contention of counsel for respondent is, and the apparent theory upon which the court dismissed the case was, that the contract between plaintiff and defendant, being for the sale of real property, and the same, or some memorandum thereof, not being in writing and signed by the party to be charged, was void under § 3544 of the Compiled Laws, which relates to contracts for the sale of real property. In our opinion, the statute has no application to an arrangement between two persons to become special partners in the purchase of certain real property for the purpose of speculation, under an agreement that each shall pay an equal amount of the purchase price, and share equally in the profits arising from future sales, less a certain per cent in the way of commission to the partner finding a purchaser. No agreement for the sale of real property, or for the creation of an interest therein, or a transfer thereof from one of the parties to the other, was contemplated, but the evident object of each was to fix the terms of a copartnership agreement, by which their subsequent transactions in relation to the joint purchase and sale of the real property described in the complaint would be governed; and to declare such a contract invalid because not written, and to hold that one of the parties thereto, in violation of the good faith by which the acts of one toward the other must be characterized, may, with impunity, violate the terms of such contract, and, by fraudulent and false representations concerning the purchase price of the property, obtain and keep, as alleged in the complaint, money belonging to the other, would require us to construe a statute designed to prevent frauds into a double and keen-edged

instrument of fraud. We therefore conclude that a contract like the present agreement between plaintiff and defendant may be oral, and its terms may be established by parol evidence, when the same become material, in an action to recover money alleged to have been fraudulently obtained thereunder by one partner from the other."

And an accounting may be had in equity.

Arkansas.—*McClintock v. Thweatt* (1903) 71 Ark. 323, 73 S. W. 1093; *Beebe v. Olentine* (1911) 97 Ark. 390, 134 S. W. 936.

California.—*Bates v. Babcock* (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; *Gorham v. Heiman* (1891) 90 Cal. 346, 27 Pac. 289.

Connecticut.—*Bunnel v. Taintor* (1823) 4 Conn. 568.

District of Columbia.—*Kilbourn v. Latta* (1886) 5 Mackey, 304, 60 Am. Rep. 373, reversed on another point in (1893) 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201.

Illinois.—*Van Housen v. Copeland* (1899) 180 Ill. 74, 54 N. E. 169, affirming (1898) 79 Ill. App. 139; *Allison v. Perry* (1888) 28 Ill. App. 396, affirmed in (1889) 130 Ill. 9, 22 N. E. 492; *Smith v. Hart* (1912) 179 Ill. App. 98.

Iowa.—*Richards v. Grinnell* (1884) 63 Iowa, 44, 50 Am. Rep. 727, 18 N. W. 668; *Blythe v. Cummings* (1920) — Iowa, —, 176 N. W. 688.

Kansas.—*Bird v. Wilcox* (1919) 104 Kan. 799, 180 Pac. 774.

Maryland.—*Morgart v. Smouse* (1906) 103 Md. 463, 115 Am. St. Rep. 367, 63 Atl. 1070, 7 Ann. Cas. 1140.

Minnesota.—*Newell v. Cochran* (1889) 41 Minn. 374, 43 N. W. 84; *Hammel v. Feigh* (1919) 143 Minn. 115, 173 N. W. 570. And see *Stern v. Harris* (1889) 40 Minn. 209, 41 N. W. 1036 (business for which partnership was formed was at an end and the partnership assets reduced to money).

Nebraska.—*Greusel v. Payne* (1921) — Neb. —, 185 N. W. 336.

New York.—*Ostrander v. Snyder* (1893) 73 Hun, 378, 26 N. Y. Supp. 263, affirmed on opinion below in (1896) 148 N. Y. 757, 43 N. E. 988; *Pounds v. Egbert* (1907) 117 App. Div. 756, 102

N. Y. Supp. 1079; *Rauch v. Donovan* (1908) 126 App. Div. 52, 110 N. Y. Supp. 690; *Guibert v. Saunders* (1887) 10 N. Y. S. R. 43.

Rhode Island.—*Moran v. McDevitt* (1912) — R. I. —, 83 Atl. 1013.

Tennessee.—*Harben v. Congdon* (1860) 1 Coldw. 221.

Utah.—*Knauss v. Cahoon* (1891) 7 Utah, 182, 26 Pac. 295.

West Virginia.—*Floyd v. Duffy* (1910) 68 W. Va. 339, 33 L.R.A.(N.S.) 833, 69 S. E. 993.

Canada.—*Bindon v. Gorman* (1913) 4 Ont. Week. N. 839, 10 D. L. R. 431, reversed on question of fact in (1913) 24 Ont. Week. Rep. 769, 12 D. L. R. 240, 4 Ont. Week. N. 1505. See also *Leslie v. Hill* (1913) 28 Ont. L. Rep. 48, 4 Ont. Week. N. 685, 11 D. L. R. 506, affirming (1911) 25 Ont. L. Rep. 144, 20 Ont. Week. Rep. 490.

So, it has been held that a suit for the dissolution or winding up of the partnership, and for an accounting and division of profits, may be maintained.

United States.—*McElroy v. Swope* (1891) 47 Fed. 380.

California.—*Coward v. Clanton* (1889) 79 Cal. 27, 21 Pac. 359.

Indiana.—*Holmes v. McCray* (1875) 51 Ind. 358, 19 Am. Rep. 735.

Maryland.—*Bruns v. Spalding* (1900) 90 Md. 349, 45 Atl. 194.

Minnesota.—*Fountain v. Menard* (1893) 53 Minn. 443, 39 Am. St. Rep. 617, 55 N. W. 601.

New York.—*Bailey v. Weed* (1899) 36 App. Div. 611, 55 N. Y. Supp. 253; *Burkhardt v. Walsh* (1900) 49 App. Div. 634, 64 N. Y. Supp. 779.

Oklahoma.—*Thompson v. McKee* (1914) 43 Okla. 243, L.R.A. 1915A, 521, 142 Pac. 755.

Oregon.—*Flower v. Barnekoff* (1890) 20 Or. 132, 11 L.R.A. 149, 25 Pac. 370.

England.—*Dale v. Hamilton* (1846) 5 Hare, 369, 67 Eng. Reprint, 955, 16 L. J. Ch. N. S. 126, 11 Jur. 163, on appeal in (1847) 2 Phill. Ch. 266, 41 Eng. Reprint, 945, 16 L. J. Ch. N. S. 397, 11 Jur. 574.

And it has been held that one of the parties to a parol partnership or joint adventure to deal in real estate may maintain a suit in equity to establish

his interest, not only in property unsold, but in the profits arising from that actually sold, but not accounted for. *Ingram v. Johnston* (1918) 38 Cal. App. 234, 176 Pac. 54. And in *Arnold v. Loomis* (1915) 170 Cal. 95, 148 Pac. 518, where the title to the property was taken in the name of a third person, it was held that one partner could maintain a suit against the other partner and such third person to compel the latter to execute a conveyance of plaintiff's interest to him, or to sell the land under order of court and distribute the proceeds in equal parts to the copartners.

And in *Morrill v. Colehour* (1876) 82 Ill. 618, it was said that, had the one who took the title failed to make the sales as contemplated by the parties, he could, no doubt, have been compelled to do so, or another would have been appointed for the purpose by the court.

And it has been held that an action may be maintained by a copartner for breach of the contract of partnership by the other, in failing to purchase property according to the agreement. *Sloan v. Paramore* (1914) 181 Mo. App. 611, 164 S. W. 662.

And in *Fitch v. King* (1917) 279 Ill. 62, 116 N. E. 624, where at the time a partnership was dissolved it owned several pieces of real estate, it was held that one copartner could maintain a bill against another copartner, in whose name the title stood, for a settlement of the partnership affairs.

It has been declared that, if the one taking title disposes of the lands at a profit, a resulting trust as to such profits arises in favor of the other, which may be enforced in equity. *Wallace v. Carpenter* (1877) 85 Ill. 590.

And in *Duncan v. Johnson* (1913) 89 Kan. 21, 130 Pac. 655, where land was purchased, title being taken in the name of one partner, for speculation, but remained unsold, it was held that the Statute of Frauds did not preclude an action by the other partner to be adjudged the owner of an undivided one half thereof, and for an accounting.

And in *Hodge v. Twitchell* (1885) 33 Minn. 389, 23 N. W. 547, it was held that one of the members of a partnership formed, by oral agreement, for the purchase and sale of real estate, may maintain an action to establish an interest in real estate bought by another partner in fraud of the complainant's rights under the partnership agreement.

And it has been held that where the partnership has been dissolved, and there remains partnership real estate unsold, the partners become tenants in common of such remaining realty, so that a copartner may maintain a suit for partition thereof. *Tenney v. Simpson* (1887) 37 Kan. 353, 15 Pac. 187. In reaching this conclusion the court said: "It is further urged that Simpson was not to have any interest in the land, but only an interest in the proceeds of the sale of lots. This is very technical, but giving it all the force to which it may be entitled, and still it can make no difference under the further facts of the case; for before the commencement of this action, the sale of the lots was discontinued and the partnership dissolved at the instance of the other parties, and the partnership debts paid; and always, upon the dissolution of a partnership and the full payment of the partnership debts, the partners become tenants in common with regard to any and all real estate still belonging to the copartnership. 1 Washb. Real Prop. 423, subd. 4. Viewing this case in any light we may, it is clear that M. Shepard Bolles holds four tenths of the property in controversy in trust for Simpson. When the deed was first executed to him he held the property in trust for the partnership; Simpson's interest therein, after paying the debts, being four tenths. When the partnership was terminated he then held the property in trust for the individual partners in proportion to their respective interests in the partnership."

But, even admitting that a money judgment for profits may be obtained, it has been held that a decree for specific performance, affecting the title to real estate bought pursuant

to a parol partnership agreement to deal therein, cannot be had. *Von Trotha v. Bamberger* (1890) 15 Colo. 1, 24 Pac. 883.

And it has been held that where the oral partnership is formed to buy and sell real estate for speculation, and property has been bought, but remains unsold, one copartner cannot maintain a suit for partition thereof, even in jurisdictions which uphold the validity of such agreements; at least, where it does not appear that the petitioning copartner is entitled to demand a present sale of lands and final settlement of the partnership. *Pennybacker v. Leary* (1884) 65 Iowa, 220, 21 N. W. 575.

And it has been held that, while a partnership agreement for division of profits arising from the sale of lands bought for speculation, pursuant to a parol partnership agreement to buy and sell real estate, may be enforced by recovery of profits earned by a carrying out of the partnership purpose, one partner cannot establish an interest in lands bought under the agreement, but remaining unsold, as against the defense of the statute requiring agreements relating to interests in lands to be in writing. *Everhart's Appeal* (1884) 106 Pa. 349. This was upon the theory that an interest in profits was not an interest in lands itself, within the meaning of the statute, since the profits were personalty; but that the same could not be said of lands which had been purchased pursuant to the agreement, and remained unsold.

IV. Minority rule.

As stated supra, II., there is some authority to the effect that a partnership agreement, or joint adventure, to engage in the business of buying and selling real estate, is a contract respecting an interest in lands so as to render it void under the Statute of Frauds, unless in writing, etc., or unless sufficiently performed to take the same out of the statute.

United States.—*Smith v. Burnham* (1838) 3 Sumn. 435, Fed. Cas. No. 13,019; *Re Warren* (1847) 2 Ware, 322, Fed. Cas. No. 17,191 (holding, 18 A.L.R.—32.

however, that the rule does not apply as between third persons); *Young v. Wheeler* (1888) 34 Fed. 98; *McKinley v. Lloyd* (1904) 128 Fed. 519.

Alabama.—*Rowland v. Boozer* (1846) 10 Ala. 690.

California.—*Gray v. Palmer* (1858) 9 Cal. 616 (this case, however, was expressly disapproved and in effect overruled in *Coward v. Clanton* (1889) 79 Cal. 23, 21 Pac. 359, and *Bates v. Babcock* (1892) 95 Cal. 484, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605).

Kentucky.—*Parker v. Bodley* (1815) 4 Bibb, 102 (but see, contra, *Garth v. Davis* (1905) 120 Ky. 106, 117 Am. St. Rep. 571, 85 S. W. 692, *Vaught v. Hogue* (1908) 32 Ky. L. Rep. 1061, 107 S. W. 757, and *Goodwin v. Smith* (1911) 144 Ky. 41, 137 S. W. 789).

Michigan.—*Nester v. Sullivan* (1907) 147 Mich. 493, 9 L.R.A. (N.S.) 1106, 111 N. W. 85, modified in (1907) 147 Mich. 508, 111 N. W. 1033; *Morrison v. Meister* (1920) — Mich. —, 180 N. W. 395 (holding that a partnership agreement to buy and sell lands generally falls within the Statute of Frauds, and this is true when but one transaction is involved, and where it may be treated as a joint adventure); *MULLHOLLAND v. PATCH* (reported herewith) 468 (holding that the rule does not apply to an agreement to deal in options in real estate). But compare *Thompson v. Hurson* (1918) 201 Mich. 685, 167 N. W. 926.

New Jersey.—*Schultz v. Waldons* (1901) 60 N. J. Eq. 71, 47 Atl. 187. See this case as set out infra, this subdivision.

Ohio.—*Coffinberry v. Blakeslee* (1915) 22 Ohio C. C. N. S. 34.

Wisconsin.—*Bird v. Morrison* (1860) 12 Wis. 139; *Clarke v. McAuliffe* (1892) 81 Wis. 104, 51 N. W. 83; *McMillen v. Pratt* (1895) 89 Wis. 612, 62 N. W. 588; *Seymour v. Cushman* (1898) 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769; *Smith v. Putnam* (1900) 107 Wis. 155, 82 N. W. 1077, rehearing denied in (1900) 107 Wis. 169, 83 N. W. 288; *Scheuer v. Cochem* (1905) 126 Wis. 209, 4 L.R.A. (N.S.) 427, 105 N. W. 573; *Langley v. Sanborn* (1908) 135 Wis. 178, 114

N. W. 787; *Huntington v. Burdeau* (1912) 149 Wis. 263, 135 N. W. 845; *Steuerwald v. Richter* (1914) 158 Wis. 597, 149 N. W. 692.

The leading case on this side of the question is *Smith v. Burnham* (Fed.) *supra*, wherein Story, Ch. J., very fully considered the question, and, although holding that the agreement in suit did not evidence a partnership, but a trust, proceeded to decide that a parol agreement for dealing in lands was within the Statute of Frauds. In reaching this conclusion he repudiated the theory that the several interests of the parties attach only to the proceeds, and declared that the agreement, if good at all, attached also to the lands at the time of purchase, and that it then was an agreement respecting and for an interest in lands such as the statute required to be in writing. The argument, in part, was as follows: "We come, in the next place, to the consideration of the important point whether a parol contract of this sort, for a partnership in speculations in land, to be bought and sold on joint account, is not within the true intent of the Statute of Frauds. It seems to me that it must be so considered, both upon principle and authority. . . . Upon principle, how stands this case? It insists upon a parol copartnership for the purchase and sale of lands for the joint account of the partners. If so, this is clearly the case of a parol contract respecting an interest in lands. It was contemplated, according to the very structure of the bill itself, that upon every purchase made under the supposed contract of partnership the plaintiff should have an interest in the lands purchased, to the extent of one moiety, or his share in the partnership. Now, if the purchase was made in the name of Burnham as to one moiety, it was to be in trust for the plaintiff. By the Statute of Frauds all estates made or created by parol, and not put in writing, and signed by the party making or creating the same, are mere estates at will. And all grants and assignments, as well as all declarations or creations of trusts or confidences

in lands, are also to be manifested and proved by some writing, signed by the party, who is by law enabled to grant, assign, or declare such trust, otherwise the same are utterly void and of no effect. And all contracts for the sale of lands, or of any interest in or concerning the same, are also required to be in writing; otherwise no action is maintainable thereon. There is an exception of trusts and confidences which arise or result by the implication or construction of law, or are to be transferred or extinguished by an act or operation of law. Now, taking these clauses together or separately, the same conclusion would seem to follow, as to the parol agreement in the present case. If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement, and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments; but that it is the case of the declaration or creation of a trust or confidence in lands, not arising or resulting by implication or operation of law. . . . It has been ingeniously argued that the interest of the plaintiff is in a moiety of the profits, or proceeds of the sale, and not in the land itself; and that, therefore,—at least, when the land has been sold by the defendant,—the agreement attaches to the moiety of the proceeds. But the agreement, if good at all, attaches also to the land at the time of the purchase; and it is then an agreement for an interest by way of trust in the land, a sort of springing trust; and it is in virtue of this trust estate, and of this only, that any right can attach to the moiety of the proceeds. The right to follow the proceeds is a right which, if it exists at all, flows from the interest in the lands, and the trust created in favor of the plaintiff. It is not collateral, but direct. Indeed, the bill puts the

agreement as one of a copartnership for 'purchasing and selling lands,' by means of a capital to be furnished by the partners, the profits and losses to be equally shared by them. Then, again, it is suggested that the agreement is not within the Statute of Frauds, because it did not so much contemplate an interest in the lands purchased, as an interest in the contracts to convey lands obtained by the defendant for the partnership, and the profits made on the sale thereof. But it is a sufficient answer to this suggestion, that such is not the agreement set up in the bill. It is not an agreement to purchase contracts for the conveyance of lands to be sold for the partnership, but an agreement for the purchase and sale of lands for the partnership. But if the bill had stated the agreement to be as the argument has supposed, it would not have changed the legal posture of the case. A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands; and makes the vendor a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third person or otherwise, is clearly a sale of an interest in the lands within the Statute of Frauds. . . . A partnership to buy contracts for the sale of lands is a partnership for the purchase of an equitable interest in those lands. If the transactions are to be carried on by and in the name of one partner, the partnership is to create a trust for the other in those contracts; and consequently, if the agreement for the partnership is by parol, it is to create such trust by parol. This would bring the case within the purview of the Statute of Frauds."

Applying the rule that a parol partnership or joint adventure to deal in real estate is within the Statute of Frauds, validity has been denied to, —

—partnership to engage in the general business of buying and selling real estate, *Re Warren* (1847) 2

Ware, 322, Fed. Cas. No. 17,191; *Rowland v. Boozer* (1846) 10 Ala. 690; *Huntington v. Burdeau* (1912) 149 Wis. 263, 135 N. W. 845;

—partnerships to engage in certain speculative transactions in real estate, *Parker v. Bodley* (1815) 4 Bibb. (Ky.) 102; *Coffinberry v. Blakeslee* (1915) 22 Ohio C. C. N. S. 34; *Clarke v. McAuliffe* (1892) 81 Wis. 104, 51 N. W. 88; *Scheuer v. Cochem* (1905) 126 Wis. 209, 4 L.R.A.(N.S.) 427, 105 N. W. 573; *Langley v. Sanborn* (1908) 135 Wis. 178, 114 N. W. 787;

—partnership to buy contracts for the sale of land, *Smith v. Burnham* (1838) 8 Sumn. 435, Fed. Cas. No. 13,019;

—partnerships to purchase and dispose of timberlands, *McKinley v. Lloyd* (1904) 128 Fed. 519; *Smith v. Putnam* (1900) 107 Wis. 155, 82 N. W. 1077, rehearing denied in (1900) 107 Wis. 169, 83 N. W. 288. And see *McMillen v. Pratt* (1895) 89 Wis. 612, 62 N. W. 588, and *Seymour v. Cushway* (1898) 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769.

In *Nester v. Sullivan* (1907) 147 Mich. 493, 9 L.R.A.(N.S.) 1106, 111 N. W. 85, modified in (1907) 147 Mich. 508, 111 N. W. 1033, it was held that an oral agreement to purchase and sell real estate in partnership, and divide the profits, with the understanding that each person shall have an interest in the property, is, although applying to a series of transactions, invalid under the Statute of Frauds, where no performance takes place except the payment of the necessary incidental expense, the one advancing money for any parcel of land taking the title thereto. In *MULLHOLLAND v. PATCH* (reported herewith) ante, 468, it was said that the agreement in this case contemplated and actually involved the holding of real estate. And see this case, as set out supra, III. a. And compare *Chase v. Angell* (1906) 148 Mich. 1, 118 Am. St. Rep. 568, 108 N. W. 1105.

In *Schultz v. Waldons* (1901) 60 N. J. Eq. 71, 47 Atl. 187, it was held that where there is no previous partnership or joint enterprise between

two parties, and they agree by parol that one of them shall purchase and take title in his own name to a single piece of real estate, and hold the same for the benefit of both, and the other party contributes no money to the enterprise, the Statute of Frauds prevents the latter from successfully claiming an interest in the land.

It has been held that a sale by one member of a partnership dealing in real estate, of a portion of his interest, relates to an interest in and concerning lands within the meaning of the Statute of Frauds. *Black v. Black* (1854) 15 Ga. 445.

And an agreement between partners that the one taking the title to realty purchases shall not resell at less than an agreed price has been held to be invalid under the Statute of Frauds, since, if valid, it would limit the power of sale, and so narrow the title of the partner in whose name the property stands, and this notwithstanding the agreement for division of the profits be upheld. *Pitman v. Hodge* (1891) 67 N. H. 101, 36 Atl. 605.

Of course, where the parol agreement is held void under the Statute of Frauds, an action cannot be maintained to protect or enforce any rights arising from the alleged relationship. *Smith v. Burnham* (1838) 3 Sumn. 435, Fed. Cas. No. 13,019 (bill for dissolution and accounting); *Re Warren* (1847) 2 Ware, 322, Fed. Cas. No. 17,191 (holding generally that one cannot take advantage of the contract, since otherwise he would acquire an interest in land by parol); *Young v. Wheeler* (1888) 34 Fed.

98 (suit to compel conveyance of interest); *McKinley v. Lloyd* (1904) 128 Fed. 519 (suit to establish interest in land); *Rowland v. Boozer* (1846) 10 Ala. 690 (action on note representing share of profits); *Parker v. Bodley* (1815) 4 Bibb (Ky.) 102 (bill to compel sale of a share of the property bought but not resold); *Nester v. Sullivan* (1907) 147 Mich. 493, 9 L.R.A.(N.S.) 1106, 111 N. W. 85, modified in (1907) 147 Mich. 508, 111 N. W. 1033; *Coffinberry v. Blakeslee* (1915) 22 Ohio C. C. N. S. 34 (action for accounting); *Clarke v. McAuliffe* (1892) 81 Wis. 104, 51 N. W. 83 (suit for dissolution and accounting); *McMillen v. Pratt* (1895) 89 Wis. 612, 62 N. W. 588 (action at law for damages for breach of partnership agreement); *Scheuer v. Cochem* (1905) 126 Wis. 209, 4 L.R.A.(N.S.) 427, 105 N. W. 573 (suit for dissolution and accounting); *Langley v. Sanborn* (1908) 135 Wis. 178, 114 N. W. 787 (holding the same as *McMillan v. Pratt* (Wis.) supra).

But where the contract has been fully performed, that takes it out of the statute so as to permit recovery of a share of the profits. *Smith v. Putnam* (1900) 107 Wis. 155, 82 N. W. 1077, rehearing denied in (1900) 107 Wis. 169, 83 N. W. 288; *Huntington v. Burdeau* (1912) 149 Wis. 263, 135 N. W. 845; *Steuerwald v. Richter* (1914) 158 Wis. 597, 149 N. W. 692.

Of course, to be available as a defense, the statute must be pleaded. *Patterson v. Ware* (1846) 10 Ala. 444.

G. J. C.

DELLO STEELE, Appt.,

v.

STATE OF INDIANA.

Indiana Supreme Court — November 15, 1921.

(— Ind. —, 132 N. E. 739.)

Trespass — criminal — subtenant.

1. A subtenant cannot be prosecuted for a criminal trespass under a

statute providing for prosecution of whoever, being unlawfully upon the land of another, shall refuse to depart upon notification.

[See note on this question beginning on page 503.]

Landlord and tenant — right to sublet.

2. A tenant has a right to sublet in the absence of anything in the lease forbidding him to do so.

[See 16 R. C. L. 729, 871.]

Trespass — criminal — extent of remedy.

3. Disputed rights in real property cannot be tried under a statute relating to criminal trespass.

APPEAL by defendant from a judgment of the Circuit Court for Gibson County (Kister, J.) convicting him of criminal trespass. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Thomas Duncan and Hovey C. Kirk, for appellant:

Defendant having been put into possession of lot 11, as described and mentioned in the affidavit by the lessee, his holding over as such sublessee is considered as the holding over of the lessee.

Brewer v. Knapp, 1 Pick. 332; Dimock v. Van Bergen, 12 Allen, 551.

Defendant, as sublessee of the original lessee, acquired an estate in the land in controversy.

Washington Natural Gas Co. v. Johnson, 10 Am. St. Rep. 564, note.

As there is no restriction against subletting in the lease of the property in controversy to Mrs. Williams, she had the legal right to sublet a part of the premises to defendant.

Mitchell v. Young, 80 Ark. 441, 7 L.R.A.(N.S.) 221, 117 Am. St. Rep. 89, 97 S. W. 454, 10 Ann. Cas. 423; Jones, Land. & T. § 431.

The machinery of the criminal law cannot be set in motion to redress merely private grievances, or to settle questions of property rights between defendant and another.

Barlow v. State, 120 Ind. 56, 22 N. E. 88; Hughes v. State, 103 Ind. 344, 2 N. E. 956, 5 Am. Crim. Rep. 373; Howe v. State, 10 Ind. 492; Windsor v. State, 13 Ind. 375; Palmer v. State, 45 Ind. 388; Dawson v. State, 52 Ind. 478; Lossen v. State, 62 Ind. 437; Ewbank, Indiana Trial Ev. p. 755, § 846.

There is no evidence of a notice to depart from this lot within the meaning of the law of trespass.

Ryan v. State, 5 Ind. App. 396, 31 N. E. 1127.

Messrs. U. S. Lesh, Attorney General, and Mrs. Edward Franklin White, for the State:

Defendant's occupancy until September 30th was lawful, but from

that time forward it became unlawful, and it was for such unlawful occupancy that he was ousted.

Manning v. State, 6 Ind. App. 259, 33 N. E. 253.

The province of the jury is invaded by an instruction which emphasizes and calls particular attention to certain evidence.

Barker v. State, 48 Ind. 163.

Travis, J., delivered the opinion of the court:

This was a prosecution for criminal trespass, as defined by § 2280, Burns's Anno. Stat. 1914. From a verdict of guilty by the jury defendant appeals.

The real estate involved in this prosecution consisted of a platted lot upon which was a dwelling house, all of which had been rented to one who, together with his wife, occupied the same. This tenant died in the month of August, and his widow continued as the occupant of the leased premises. She paid the rent after her husband's death for the months of August and September, and became the tenant of the owner thereof for said time. In the early part of September she took into the dwelling house with her the appellant and his family, and received rent from him for such occupancy. The owner of the property knew that the defendant was living in the house with his family with its tenant, and that the appellant was paying its tenant for such occupancy. The real tenant moved out of the dwelling house at the end of September, and notified the owner that it would have to look to ap-

pellant, who was now the occupant of the premises, for any further rent. Appellant went to the office of the owner, and sought to make a lease for the property, which was refused, but he continued as such occupant until the 20th day of November. November 9th an agent of the owner of the premises went to the house and told appellant, "I told him I wanted possession of the property." Thereafter this prosecution was begun upon an affidavit made by an agent and employee of the owner. Prior to the beginning of this prosecution an action in ejectment was begun by the owner of the property against the appellant, in the court which tried this cause.

The only error assigned is the overruling of the motion for a new trial. Of the twenty-seven errors alleged in the motion only three are pointed to in appellant's brief, the first of which is the only one considered necessary for a determination of this appeal, and which is: The verdict of the jury is contrary to law.

It is undisputed that appellant occupied said premises as a subtenant, and that he paid rent therefor to the tenant for the month of September, for which month the tenant had paid her rent to the owner. The appellant was lawfully upon the land described in the charge. This is the crux of this case. It is the foundation, or lack of foundation, for a criminal intent, which, to sustain a conviction, must be proven by competent evidence. The statute says: "Whoever . . . being unlawfully upon the . . . land of another shall be notified to depart,"

etc. Without a reservation for-bidding a tenant to sublet the premises or any part thereof, she had the right to sublet the same, and the appellant, being a

**Trespass—
criminal—
subtenant.**

there lawfully, which lawful occu-

pancy and possession cannot be made unlawful in the sense of making such occupancy a violation of the criminal statute of trespass, by being notified to depart from the premises, or to give up possession. If such occupancy and possession, once acquired legally, became unlawful by notice to depart or to give up possession of the land or premises, it is based upon the statutes which give the right of possession of real estate to the owner, which relates to a tenant holding over, or to an occupancy without paying rent, or to a forcible entry and detainer. If the original going upon the land and occupancy thereof were unlawful, the owner had a good remedy at law and an action for forcible entry and detainer. If being upon the land and the possession thereof were lawful, and no rent was being paid for the property by the occupant, or that the occupant had no lease therefor, still the owner had a good remedy at law in an action for ejectment.

The prosecution really turns out to be a suit for possession. The statute of the criminal law upon which this prosecution is based was not intended to be used as an aid to gain possession of real estate, or in ousting an occupant thereof who gained such occupancy lawfully, and who thereafter held over his rightful term without right. It is the well-settled law in this state, and of many other states, that it is an abuse of the penal statute relating to criminal trespass to use it to try disputed rights in real property. *Dawson v. State* (1876) 52 Ind. 478; *Myers v. State* (1921) — Ind. —, 130 N. E. 116. It is the opinion of the court, therefore, that the verdict is contrary to law.

The judgment is reversed and the cause remanded, with directions to grant a new trial, and for further proceedings in accord with this opinion.

**—criminal—
extent of
remedy.**

ANNOTATION.

Sublessee or assignee of lease as trespasser.

The reported case (*STEELE v. STATE*, ante, 500) appears to be a case of first impression on the question of the liability of a sublessee for trespass. In that case it is held that, without a reservation in a lease forbidding a tenant to sublet, a sublessee, lawfully in possession by permission of the tenant, cannot be held liable for criminal trespass, after

notice from the landlord to depart, under a statute providing that whoever, being unlawfully on the land of another, shall be notified to depart, and fail to do so, may be prosecuted for criminal trespass.

On the question of the liability of the assignee of a lease for trespass, no authority has been found.

L. F. C.

MERIJILDO DOMINGUEZ, Appt.,

v.

STATE OF TEXAS.

Texas Court of Criminal Appeals—June 24, 1921.

(— Tex. Crim. Rep. —, 234 S. W. 79.)

Criminal law — jurisdiction — person brought into country without extradition.

1. One seized under a mistake as to identity by United States soldiers, in the country of his residence, and carried into the United States, not having been kidnapped, cannot be tried there for offenses committed within the United States other than that for which he was seized, until he has voluntarily submitted himself to the jurisdiction, or consent to his trial, by the country of his residence, has been secured.

[See note on this question beginning on page 509.]

Courts — jurisdiction — person seized in foreign territory.

2. To determine the jurisdiction of the court to try one arrested by United States soldiers in the territory of another nation, the court will assume that the soldiers were acting in accord with permission extended by the government where the arrest was made.

Kidnapping — mistaking identity — effect.

3. The mistake of soldiers pursuing raiders across the boundaries of the nation into the territory of another nation with its acquiescence, as to the

identity of one found with the band, relieves his arrest and return to their own country from being a criminal kidnapping or abduction.

Treaty — part of supreme law of land.

4. A treaty is a part of the supreme law of the land, binding upon courts and available to persons having rights secured or recognized thereby, and may be set up as a defense to a criminal prosecution instituted in disregard thereof.

[See 26 R. C. L. 926; see note in 4 A.L.R. 1377.]

APPEAL by defendant from a judgment of the District Court for Val Verde County (Jones, J.) convicting him of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Boggess, Smith, & La Crosse, for appellant:

Defendant's original apprehension, subsequent detention, and trial, were in violation of and in contravention to the terms and provisions of the Treaty of Extradition between the United States of America and the United States of Mexico.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Blandford v. State, 10 Tex. App. 627; Arce v. State, 83 Tex. Crim. Rep. 292, L.R.A.1918E, 358, 202 S. W. 951.

Defendant is entitled to avail himself of the obligation of the treaty to the extent asserted in the plea.

Blandford v. State, 10 Tex. App. 627; United States v. Rauscher, supra; Mahon v. Justice, 127 U. S. 716, 32 L. ed. 288, 8 Sup. Ct. Rep. 1204; Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40.

Mr. J. Q. Henry, for the State:

When defendant was found by the civil authorities of Texas within its jurisdiction, and was delivered into the custody of such civil officers, and regularly indicted by the proper grand jury for murder of Glenn Nevill, was placed on trial for said offense in the regular way, and tried by due course of law, then the Texas court had jurisdiction of his person to try and dispose of the case without regard to how he may have come into or been brought into the jurisdiction of the state.

Ker v. Illinois, 119 U. S. 437, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; Ham v. State, 4 Tex. App. 666; Broekin v. State, 26 Tex. App. 124, 9 S. W. 735; Ex parte Davis, 51 Tex. Crim. Rep. 608, 12 L.R.A.(N.S.) 225, 103 S. W. 891; Re Johnson, 167 U. S. 126, 42 L. ed. 105, 17 Sup. Ct. Rep. 735; Ward v. State, 102 Tenn. 724, 52 S. W. 996; Mahon v. Justice, 127 U. S. 716, 32 L. ed. 288, 8 Sup. Ct. Rep. 1204; Arce v. State, 83 Tex. Crim. Rep. 292, L.R.A. 1918E, 358, 202 S. W. 951.

Mr. R. H. Hamilton, Assistant Attorney General, also for the State.

Morrow, P. J., delivered the opinion of the court:

Upon an indictment for murder, the appellant is condemned to confinement in the penitentiary for a period of ninety-nine years. In a preliminary plea he urged the want of jurisdiction over his person. It

appeared from the evidence and admission introduced in support of the plea that he was a native, a citizen, and resident of the Republic of Mexico; that he had been forcibly arrested therein and brought to the state of Texas by a detachment of the military forces of the government of the United States, by whom he was delivered, without his consent, to the civil authorities of the state of Texas.

A captain, who was in command of the company of soldiers of the United States who arrested the appellant, testified that by virtue of instructions from the War Department of the United States, his command, within a certain limit of time and space, was authorized to go into the territory of the United States of Mexico in pursuit of bandits; that upon such mission he took his command, on the 2d day of April, into Mexico, and, within the limits of the time and distance, captured appellant. The authority under which he was acting was denominated following a "hot trail," which term comprehended the pursuit of bandits across the border. It developed some time after his capture that the appellant was not one of the bandits pursued, though he was believed to be such at the time he was apprehended. Because he was not one of those who made the "hot trail" which was followed, the appellant, some days after his seizure and while he was in the state of Texas, where he had been brought by the soldiers mentioned, their custody of him was abandoned, and immediately thereupon, by prearrangement, he was taken charge of by Texas Rangers, and held under the charge which culminated in the conviction involved in this appeal.

Appellant insists that, not being one of those whom the United States soldiers were privileged to arrest while in the United States of Mexico, he was immune from prosecution until such time as he had been given the privilege of returning to his native country. In support of this view he refers to the principle that

a fugitive from justice, who has taken refuge in a foreign country and by that country surrendered upon the requisition of the United States government in virtue of a treaty of extradition, cannot lawfully be tried for an offense against the United States committed before he was extradited, and differing from that to answer which he was surrendered by the country of refuge. *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; *Johnson v. Browne*, 205 U. S. 309, 51 L. ed. 816, 27 Sup. Ct. Rep. 539, 10 Ann. Cas. 636; *Com. v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242, 2 Am. Crim. Rep. 201; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431, 4 Am. Crim. Rep. 203; *Blandford v. State*, 10 Tex. App. 627.

Against appellant's contention, the state advances the view that the appellant's apprehension was not under authority of the United States government, nor with the consent of that of Mexico, but that he was, in fact, abducted or kidnapped and brought forcibly from his native country into the United States contrary to his wishes; that in so doing his abductors acted under no warrant or right from any government, but were trespassers, and in punishing him for the offense committed in the state of Texas no violence is done to any treaty obligation or right.

Rauscher was indicted in the United States court for the offense of murder of one Janssen on the high seas within the jurisdiction of the United States. He took refuge in England, and upon the requisition of the United States was surrendered by the Kingdom of Great Britain that he might be tried for murder. The charge of murder was abandoned, and the prisoner was put upon trial under an indictment charging him with cruel punishment of Janssen. The acts upon which the two prosecutions were based were identical. The United States Supreme Court

decided that the prosecution must be abated, holding that, having obtained the custody of the accused from the Kingdom of Great Britain in order that he might be tried for murder, the United States was bound, under the treaty, to release the prisoner and suffer him, if he so desired, to depart from the United States upon the conclusion of the prosecution for murder. Many books and decisions are referred to in the opinion, among them one from our own state (*Blandford v. State*, 10 Tex. App. 640), in which the accused was surrendered by the Republic of Mexico to answer to the charge of theft committed in Travis county, Texas. Prior to his arrest, he had been indicted in the same county for embezzlement. This court sustained his claim that his trial for embezzlement could not lawfully proceed, for the reason that he had been surrendered by the Republic of Mexico to answer the charge of theft, and that to try him for a different offense committed before his arrest did violence to his rights under the treaty between the two countries, and was at variance with the implied obligation resting upon the United States government, that the accused would not be held to answer an offense committed before he was extradited, other than that which was named in the demand for his extradition.

Ker (*Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225) was convicted in the state court of Illinois for the offense of larceny. Before his conviction he presented his plea in abatement, in substance, setting up that while he was in Peru he was kidnapped and brought to the United States against his will. One Julian was put in possession of an extradition warrant issued by the President of the United States, authorizing him to receive from the authorities of Peru the person of Ker, the warrant having been issued in accord with the extradition treaty in force at the time in the two countries. Julian, having the papers in his possession,

upon his arrival at Lima, Peru, without presenting his papers or making any demand of the Peruvian government for the surrender of Ker, forcibly and by violence arrested him and placed him on board of a United States vessel, and there kept him confined, and finally brought him to San Francisco, in the state of California, where he found awaiting him a requisition to the governor of California, made by the governor of the state of Illinois. The soundness of the judgment of the court overruling this plea was affirmed by the supreme court of Illinois, and upon its challenge in the Supreme Court of the United States the ruling was upheld, the court drawing the distinction between that case and the case of the United States v. Rauscher, *supra*, upon the ground that in the latter case the accused came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. The court said:

"In the case before us, the plea shows that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act, nor profess to act, under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States.

"In the case of United States v. Rauscher, *supra*, and considered with this, the effect of extradition proceedings under a treaty was very fully considered, and it was there held that, when a party was duly surrendered, by proper proceedings,

under the Treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was that he should be tried for no other offense than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the Treaty of 1870-74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted by the verdict of a jury of embezzlement; for the statement in the plea is that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty.

"We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States he has failed to establish the existence of any such right. . . .

"It must be remembered that this view of the subject does not leave the prisoner or the government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping, and, on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its

laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would, without doubt, sustain the action. Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider."

The cases of Rauscher and Ker were decided by the Supreme Court of the United States about the same time, and we interpret them to hold that when a foreign country surrenders a fugitive from justice under an extradition treaty he can be tried in the demanding country alone for the offense named in the extradition proceedings, but when the fugitive is kidnapped or abducted in a foreign country and brought into one of the United States, and there tried for an offense against its laws, the judgment of conviction will not be overturned by the Supreme Court of the United States because he was kidnapped or abducted, but that the decision of the state court upon the effect of such acquisition of custody of his person will control. The primary inquiry, then, is into which of the classes, if either, the proof brings the appellant's arrest. The extradition treaty does not sanction, or purport to sanction, the entry of the soldiers of the United States of America to make an arrest in the Republic of Mexico.

The captain who conducted the expedition into Mexico and apprehended the appellant said: "I was acting under instructions issued by the War Department; we had a certain limit that we could go into Mexico for a certain length of time in pursuit of bandits, and I was within those limits at the time of Merijildo Dominguez's detention."

We have no more specific information touching the source and the scope of the authority upon which the soldiers acted. Their entry of Mexico for the purpose of appre-

hending offenders would have been a violation of Mexican territory contrary to the law of nations, in the absence of consent of the Mexican government. 15 R. C. L. p. 132, § 45. For the purpose of this decision it must be assumed that the instructions which proceeded from the War Department of the United

Courts—jurisdiction—person seized in foreign territory.

States were in accord with the permission extended by the Mexican government. The exact nature or classification of the privilege exercised by the War Department in sending its soldiers into Mexico for the purpose named is not certain, though it is doubtless referable to the so-called "comity of nations." 22 Cyc. 1732. The United States and Mexico were at peace, and the office the soldiers performed appears to have been analogous to that which pertains to the exercise by police officers of authority to make arrests without warrant. The police officers of the state of Texas having no authority as such beyond the bounds of the state, the privilege of pursuing offenders into Mexico was extended to and exercised by the military officers of the United States government and the soldiers under their command.

On the occasion in question, as we understand the record, having pursued and overtaken a band of raiders in a certain village of Mexico, they found appellant among them, and, acting upon the authority to arrest the raiders, they seized the appellant, believing him to be one of the raiders. In making the arrest, apparently, they were acting for the government, not as individuals. What was done was in virtue of the office. See *Mechem*, Pub. Off. § 284. Having no reference to their civil liability by reason of the mistake of fact, if it was such, as to the identity of the appellant, if it was made in good faith on adequate ground, no criminal responsibility ought to follow from it. In other words, if the apprehension of appellant was

due solely to an honest mistake of fact as to his identity, the act was not criminal kidnapping or abduction. Appellant having been seized by virtue of the authority of the United States government with the consent of the Mexican government, the United States government acquired no greater right than would have existed if appellant had been one of those in whose pursuit the Mexican territory was entered. If the principles applicable to treaty obligations control the privilege of entering the Mexican territory and seizing its citizens under the agreement in question, appellant, if he had been one of those who made the so-called "hot trail," would have been entitled to his release when he had answered the charge against him upon which his arrest was made. In other words, if he had been one of the raiders pursued, he could have been tried for the offense committed on the occasion of the raid which was followed, but could not have been then held and tried for an offense previously committed within the state of Texas. This would have been true even though he had not been a citizen of Mexico. He, having sought an asylum in Mexico, could be removed to the United States only in accord with the treaty of extradition. He being a citizen of Mexico, the United States of America had no absolute right to demand his return. By the express provisions of the treaty, the surrender of a citizen of Mexico is made discretionary with the Mexican Executive. We are aware of no precedent by which to determine whether the agreement involved in the instant case would fall under the same principle that would control a written treaty. The same moral obligation that would restrain the United States government from transgressing the implied limitations upon it, under its treaty with Mexico, would necessarily prevail with reference to the agreement resting upon the "comity of nations," and if the legal obligation

Kidnapping—mistaking identity—effect.

is the same, the appellant cannot be held for the offense which we are now considering, without the opportunity to return to his country, in order that it may there determine whether he shall be surrendered for trial under the treaty of extradition.

"Mr. Justice Story considers that the phrase 'comity of nations' is most appropriate, as indicating the foundation and extent of the obligation of the laws of one nation within the territories of another. The extraterritorial influence of laws is derived from the voluntary consent of the nation within which its application is proposed; and they are tacitly adopted *jure gentium*, in the absence of any positive rule, affirming, denying, or restraining their operation, unless they are repugnant to local policy or prejudicial to local interests." *Hanrick v. Andrews*, 9 Port. (Ala.) 9; 22 Cyc. p. 1732.

The treaty between the United States and Mexico, to which we have referred, contains the following:

"The government of the United States of America and the government of the United States of Mexico mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other."

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." Proclaimed April 24, 1899. [31 Stat. at L. 1818, 1822.]

This treaty, like others, is a part of the supreme law of the land, binding upon courts and available to persons having rights secured or recognized thereby, and may be set up as a defense to a criminal prosecution established in disregard thereof. *Foster v. Neil-*

Treaty—part of supreme law of land.

son, 2 Pet. 253, 7 L. ed. 415; 2 Rose's Notes (U. S.) 716; also Blandford v. State, 10 Tex. App. 640, from which we quote:

"If the Federal Constitution, or a treaty, inhibits the doing of a certain thing, no legislative or executive action is required to authorize the courts to decline to override these limitations or restrictions, 'for the palpable and all-sufficient reason that to do so would be not only to violate the public faith, but to transgress the supreme law of the land.'

"In view of these principles of law, we hold, then, that it is the duty of the courts of the state to take cognizance of, construe, and give effect to, the treaties of the Federal government made with other nations; and that under a proper construction of the treaty with Mexico the defendant could not be legally called upon to answer any other crime save that for which he was extradited."

Appellant, a citizen of Mexico, not having been kidnapped or abducted, had the right to resist trial for the offense charged in the indictment, until such time as he should voluntarily subject himself to the jurisdiction of the United States, or until the consent of the Mexican government to his trial should be obtained.

Criminal law—
jurisdiction—
person brought
into country
without
extradition.

By his plea in abatement, the appellant sought to avail himself of this privilege by bringing to the attention of the trial court the facts upon which he relied, seeking to have their truth determined and invoking the judgment of the court thereon. His plea, in our judgment, should have been considered, and, if found true, the prosecution abated.

The reversal of the judgment and remanding of the case is ordered.

Petition for rehearing denied November 2, 1921.

ANNOTATION.

Right to try one brought within jurisdiction illegally or as a result of mistake as to identity.

- I. Scope, 509.
- II. General rule, 509.
- III. Application of rule:
 - a. Unlawful arrest, 513.
 - b. Fraud or trickery, 516.
- IV. Mistake as to identity, 516.

I. Scope.

This note is confined to a discussion of the cases wherein is presented the question of the right to try an accused person whose presence in the jurisdiction has been secured by unlawful as distinguished from irregular means, or was the result of a mistake as to identity. It therefore includes all cases involving the right to try one brought within the jurisdiction of the court by force or fraud, or without legal authority, and excludes cases wherein jurisdiction is acquired by means of faulty or irregular extradition papers. It also excludes the right to try an extradited person

for a crime other than that for which he was extradited.

II. General rule.

Where a person accused of a crime is found within the territorial jurisdiction wherein he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means, such as kidnapping, unlawful force, fraud, or the like.

United States. — *Ker v. Illinois* (1886) 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Mahon v. Justice* (1888) 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; *Re Johnson* (1897) 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735; *Ex parte Brown* (1886) 28 Fed. 653; *Re Ezeta* (1894) 62 Fed. 964; *Ex parte Lamar* (1921) — A.L.R. —, 274 Fed. 160. See also *Cook v. Hart* (1892) 146 U. S. 183, 36

L. ed. 934, 13 Sup. Ct. Rep. 40; *Pettibone v. Nichols* (1906) 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; *Re Newman* (1897) 79 Fed. 622.

Arkansas.—See *Elmore v. State* (1885) 45 Ark. 243.

California.—*People v. Pratt* (1889) 78 Cal. 345, 20 Pac. 731.

Iowa. — *State v. Ross* (1866) 21 Iowa, 467; *State v. Day* (1882) 58 Iowa, 678, 12 N. W. 733.

Kansas. — Compare *State v. Simmons* (1888) 39 Kan. 262, 18 Pac. 177; *State v. Garrett* (1896) 57 Kan. 132, 45 Pac. 93; *State v. Wellman* (1918) 102 Kan. 503, L.R.A.1918D, 949, 170 Pac. 1052, Ann. Cas. 1918D, 1006. And see *State v. May* (1896) 57 Kan. 428, 46 Pac. 709.

Nebraska. — Compare *Re Robinson* (1890) 29 Neb. 135, 8 L.R.A. 398, 26 Am. St. Rep. 378, 45 N. W. 267.

New York. — *People v. Rowe* (1858) 4 Park. Crim. Rep. 253. See also *People v. Eberspacher* (1894) 79 Hun, 410, 29 N. Y. Supp. 796; *Re Lagrave* (1873) 45 How. Pr. 301, 14 Abb. Pr. N. S. 333, note.

Oklahoma. — *Mathews v. State* (1921) — Okla. Crim. Rep. —, 198 Pac. 112.

Pennsylvania.—*Dow's Case* (1851) 18 Pa. 37. Compare *Norton's Case* (1885) 15 W. N. C. 395.

South Carolina. — *State v. Smith* (1829) 17 S. C. L. (1 Bail.) 283, 19 Am. Dec. 679.

Tennessee. — See *Ward v. State* (1899) 102 Tenn. 724, 52 S. W. 996.

Texas. — *Brookin v. State* (1888) 26 Tex. App. 121, 9 S. W. 735.

Vermont. — *State v. Brewster* (1835) 7 Vt. 118.

Wisconsin. — *Baker v. State* (1894) 88 Wis. 140, 59 N. W. 570.

Wyoming. — *Kingen v. Kelly* (1891) 3 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36.

England.—Ex parte *Scott* (1829) 9 Barn. & C. 446, 109 Eng. Reprint, 166, 2 Mann. & R. 361. See also *Reg. v. Lopez* (1858) *Dears. & B. C. C.* 525.

Canada. — *Rex v. Walton* (1905) 6 Ont. Week. Rep. 905; *Re Walton* (1905) 11 Ont. L. Rep. 94, 10 Can. Crim. Cas. 269.

"The criminal law, administered, as it is, for the protection of the whole people, does not take cognizance of the means by which alleged offenders are apprehended, so long as no act is done which in itself is an infraction of the law." Ex parte *Brown* (1886) 28 Fed. 653.

And it has been said: "Undoubtedly at common law the rule is, the court trying a party for a crime committed within its jurisdiction will not investigate the manner of his capture, in case he had fled to a foreign country and had been brought back to its jurisdiction, although his capture had been plainly without authority of law. It is sufficient the accused is in court, to require him to answer the indictment against him. It is thought, and with good reason, any other rule would work great embarrassment in the administration of the criminal law." *Ker v. People* (1884) 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Crim. Rep. 211, affirmed in (1886) 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

In the case of a woman who was arrested in Brussels on a warrant issued in England, and was taken, apparently against her will, to England and lodged in jail, whereupon she sued out a writ of habeas corpus to obtain her release, the court said: "The question, therefore, is this,—whether, if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them." Ex parte *Scott* (1829) 9 Barn. & C. 446, 109 Eng. Reprint, 166.

The reason for the rule announced by practically all the cases in which the question has arisen was stated in *Mahon v. Justice* (1888) 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204, as follows: "They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from

private parties, or because of indignities committed against another state. It would indeed be a strange conclusion, if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated, because other parties had done violence to him, and also committed an offense against the laws of another state."

The trial of a person brought into a state by forcible abduction is not a violation of that provision of the Federal Constitution prohibiting the deprivation of life, liberty, or property without due process of law. *Ker v. Illinois* (1886) 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, wherein the court said, in answer to such a contention: "The 'due process of law' here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be, in some sense, said to be 'without due process of law.' But it would hardly be claimed that after the case had been investigated, and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' So here, when found within the jurisdiction of the state of Illinois and liable to answer for a crime against the laws of that state, unless there was some positive provision of the

Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision."

Similarly, a person forcibly brought into the United States from a foreign country cannot attack the jurisdiction of the court to try him on the ground that such a forcible abduction is a violation of the right of asylum guaranteed to him by treaty between the United States and the foreign country. *Ker v. Illinois* (U. S.) supra, wherein it was said: "The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom. In the case before us, the plea shows that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act or profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States."

In *Ex parte Lamar* (1921) — A.L.R.

—, 274 Fed. 160, it was held that petitioner was not entitled to release on habeas corpus from imprisonment under conviction in the Federal court for the southern district of New York, although he had been unlawfully brought into that district from the penitentiary in Atlanta, Georgia, where he was serving a sentence under a conviction for another offense, upon instructions by the Attorney General and without resort to the removal proceeding upon notice contemplated by statute in such case, and had been produced for trial pursuant to a writ of habeas corpus ad prosequendum served upon the officer who had him in charge when he arrived in New York.

The contrary doctrine to that stated in the general rule, however, has been announced in a few jurisdictions. Thus, in *State v. Simmons* (1888) 39 Kan. 262, 18 Pac. 177, wherein it appeared that officers of the state of Kansas went into Missouri, and there arrested a person accused of violating the laws of Kansas, and forcibly brought him back to Kansas, the court, holding that in such a case the trial court was without jurisdiction to try the accused, said: "It would not be proper for the courts of this state to favor, or even to tolerate, breaches of the peace committed by their own officers in a sister state, by sustaining a service of judicial process procured only by such a breach of the peace. Indeed, it would not be proper for any court in any state to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary, in the very nature of things, to hold

society together." The doctrine laid down in *State v. Simmons* (Kan.) supra, was later approved in *State v. Garrett* (1896) 57 Kan. 132, 45 Pac. 93, wherein the effect of a voluntary waiver of extradition papers was involved. And in the still later case of *State v. Wellman* (1918) 102 Kan. 503, L.R.A.1918D, 949, 170 Pac. 1052, Ann. Cas. 1918D, 1006, wherein the effect of irregularities in extradition proceedings was at issue, the court took occasion to say that the conclusions reached were not in conflict with the rule announced in the *Simmons* Case.

The rule laid down in *State v. Simmons* (Kan.) supra, however, has been held not to extend to the case of a person charged with a crime in one county who was arrested without a warrant in another county of the same state, and illegally brought within the county where the crime was committed. *State v. May* (1896) 57 Kan. 428, 46 Pac. 709, wherein it was said: "The district court of Harvey county had jurisdiction to try the defendant notwithstanding the irregularity or the illegality of his original arrest in Sumner county. No other sovereignty was invaded. A warrant might have been properly served upon the defendant in any county of the state whose sovereignty is coextensive with its external boundaries, and the jurisdiction of whose courts for the apprehension of alleged offenders upon proper process is not affected by county lines. His original arrest was irregular, but this does not affect the jurisdiction of the court into which he was afterward brought by regular process of law."

In the case of *Re Robinson* (1890) 29 Neb. 135, 8 L.R.A. 398, 26 Am. St. Rep. 378, 45 N. W. 267, the court announced a rule similar to that laid down in the *Simmons* Case (Kan.) supra. In that case it appeared that a person accused of committing a crime in Nebraska was arrested in Kansas by the order of a Kansas justice of the peace and delivered to a Nebraska constable, who forcibly, and against the will of the accused, and without any warrant, requisition,

or other legal process, conveyed the accused out of the state of Kansas into Nebraska. Holding that the Nebraska court was without jurisdiction, the court said: "In principle there is no difference between the case at bar and where a person is held for an offense other than the one he was extradited for. In either case it is an abuse of judicial process, which the law does not allow. Ample provisions are made for the arrest and return of a person accused of crime, who has fled to a sister state, by extradition warrants issued by the executives of the states. There is no excuse for a citizen or officer arresting, without authority of law, a fugitive, and taking him forcibly and against his will into the jurisdiction of the state for the purpose of prosecution. We cannot sanction the method adopted to bring the petitioner into the jurisdiction of this state. He did not come into the state voluntarily, but because he could not avoid it. The district court, therefore, did not acquire jurisdiction of the person of the petitioner, and his detention is unlawful."

It has been held that, on the request of the state wherein the unlawful capture was made that the person so taken be returned, it was proper for the court to waive its jurisdiction and return the prisoner. Norton's Case (1885) 15 W. N. C. (Pa.) 395, wherein it appeared that a citizen of New York, accused of committing a crime in Pennsylvania, and who had escaped to Canada, was lured back to New York by a false telegram, and there arrested and taken, against his will and without lawful authority, into Pennsylvania. On the request of the governor of New York that he be released, the court held that as the seizure of the accused in New York was an indignity to the sovereignty of that state, it would, in its discretion, order his release.

And in Dow's Case (1851) 18 Pa. 37, wherein it appeared that a person charged with committing a crime in Pennsylvania was arrested without lawful authority in the state of Michigan and brought back to

Pennsylvania, the court held that the jurisdiction of the court to try him for the crime charged was in no way impaired by the manner of his apprehension, and stated that, in the absence of a request from the governor of Michigan, he would not be released.

III. Application of rule.

a. Unlawful arrest.

The courts uniformly apply the rule that the unlawful manner of bringing a person accused of crime into the jurisdiction of a court does not impair the jurisdiction of the court to try him, to cases of the arrest by officers in another state and the bringing of an accused into the state wherein he is charged with a criminal offense, without the formality of extradition proceedings.

Thus, in Dow's Case (1851) 18 Pa. 37, wherein the relator, after indictment, fled to Michigan, and was there arrested without legal authority and taken to Pennsylvania, it was held that his illegal arrest in another state was no ground for discharging him in habeas corpus proceedings. To the same effect, see State v. Day (1882) 58 Iowa, 678, 12 N. W. 783; Mathews v. State (1921) — Okla. Crim. Rep. —, 198 Pac. 112; Brookin v. State (1888) 26 Tex. App. 121, 9 S. W. 735; Baker v. State (1894) 88 Wis. 140, 59 N. W. 570; Kingen v. Kelley (1891) 8 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36.

The same rule is applied where the unlawful arrest is made in a foreign country. Thus, in Rex v. Walton (1905) 6 Ont. Week. Rep. 905, wherein it appeared that the accused was arrested in Buffalo in pursuance of a telegram from the police authorities of Toronto, and delivered to the Toronto police without any extradition proceedings, it was held that the illegality of his arrest in no way impaired the jurisdiction of the court.

Similarly, in the case of State v. Brewster (1835) 7 Vt. 118, the same doctrine was announced. It appeared that a person charged with crime had escaped to Canada, and was brought back against his will and without the consent of the authorities of that

country, and he sought to plead his illegal capture and forcible return in bar of the indictment. The court, refusing his application, observed that the escape of the prisoner into Canada did not purge the offense, or oust the jurisdiction of the court, and, he being within its jurisdiction, it was not for it to inquire by what means or in what manner he was brought within reach of justice. It was further said: "If there were anything improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of this court."

And in *People v. Rowe* (1858) 4 Park. Crim. Rep. (N. Y.) 253, a warrant was issued before indictment, and the defendant, who was then in Canada, was forcibly taken to the line, and delivered to the New York officer, who held the warrant. It was held that the illegality of the arrest was no ground for a motion to quash the indictment or to discharge the prisoner, the court saying: "We see no analogy between this case and the cases of arrest in civil actions procured by the trick or fraud of the plaintiff. Where the defendant is so induced by the plaintiff to come within the jurisdiction, the court may discharge him without bail. Here is no wrong chargeable to the people. On the other hand, the indictment is, on such a motion as this, conclusive evidence of the prisoner's guilt, and the court would be guilty of a gross injury to the people if it should discharge him untried."

In *Ex parte Scott* (1829) 9 Barn. & C. 446, 109 Eng. Reprint, 166, 2 Mann. & R. 361, the rule was applied to the case of a woman arrested in Belgium and brought back to England without extradition papers.

Similarly, it has been held that although the action of the governor of a state, on the refusal of the Federal government to request a foreign gov-

ernment to deliver up an accused person because of the absence of an extradition treaty, in making the request himself and thereby causing the unlawful arrest of the accused, amounted in a sense to a kidnapping, the jurisdiction of the state court over the person of the accused was not impaired by the unlawful act of the governor. *People v. Pratt* (1889) 78 Cal. 345, 20 Pac. 731, wherein it was said: "The governor of the state cannot oust the courts of the commonwealth of their right to try an individual charged with an offense over which they have jurisdiction, because of the fact that he has been instrumental in having the defendant there, by violation of his personal rights. It will not do to say that a fugitive from justice can escape the punishment for his crime because the governor of a state may have violated some law. The people of a state are not bound by any illegal act of their governor, nor should they be."

In an Illinois case it appeared that extradition papers, under an extradition treaty, had been secured from the United States government, directed to the government of Peru, but that before the extradition papers were presented the government agents despatched to Peru to bring back the accused, seized and brought him to Illinois. Claiming that he had been kidnapped in Peru, and transferred to this country, he set up a plea to the jurisdiction on the ground that he had been deprived without due process of law of a right of asylum secured to him by the treaty. The court refused to inquire into the mode of his capture. *Ker v. People* (1884) 110 Ill. 627, 51 Am. Rep. 706, 4 Am. Crim. Rep. 211. That decision was affirmed by the Supreme Court of the United States on the ground that the question was within the province of the state court in (1886) 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

In *Mahon v. Justice* (1888) 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204, the Supreme Court applied the rule to the case of a man indicted in Kentucky who escaped to West Virginia, and who, while extradition proceedings were pending, was recaptured by cer-

tain persons from Kentucky acting without legal authority, and brought back to Kentucky. The court refused to discharge him from custody on account of the illegality of the means of his apprehension, saying that the jurisdiction of the court in which the indictment was found was in no way impaired by the manner in which the accused was brought before it.

Similarly, it appeared in *State v. Ross* (1866) 21 Iowa, 467, that the accused, who were arrested in Missouri, were brought by force and against their will, by persons acting without authority either of a requisition from the governor or otherwise, to Iowa, where an indictment against them had been found. In Iowa they were rearrested, and turned over to the police authorities for detention and trial. It was contended that their arrest was in violation of law; that they were brought within the jurisdiction of the state by fraud and violence; that the comity of states, a just appreciation of the rights of citizens, and a due regard to the integrity of the law, demanded that the court should, under such circumstances, refuse its aid; and that there could be no rightful exercise of jurisdiction over the persons thus arrested. The court, holding that the defendants were not entitled to be discharged, said: "The liability of the parties arresting them without legal warrant, for false imprisonment or otherwise, and their violation of the penal statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge. The offense being committed in Iowa, it was punishable here, and an indictment could have been found without reference to the arrest. There is no fair analogy between civil and criminal cases in this respect. In the one (civil) the party invoking the aid of the court is guilty of fraud or violence in bringing the defendant or his property within the jurisdiction of the court. In the other (criminal) the people, the state, is guilty of no wrong. The officers of the law take the requisite process, find the persons charged within the juris-

diction, and this, too, without force, wrong, fraud, or violence on the part of any agent of the state, or officer thereof. And it can make no difference whether the illegal arrest was made in another state or another government. The violation of the law of the other sovereignty, so far as entitled to weight, would be the same in principle in the one case as the other. That our own laws have been violated is sufficiently shown by the indictment. For this the state had a right to detain the prisoners, and it is of no importance how or where their capture was effected."

Likewise, in *State v. Smith* (1829) 17 S. C. L. (1 Bail.) 283, 19 Am. Dec. 679, Smith, who had been convicted of a criminal offense, was pardoned on condition that he should leave the state forever. He accepted the pardon, and went to North Carolina. Subsequently he returned, whereupon the governor of South Carolina issued a proclamation offering a reward for his arrest, he having violated the condition of his pardon. Smith, however, returned to North Carolina, where he was forcibly seized by persons from South Carolina, without warrant or authority from any officer or tribunal of either state, except the proclamation of the governor of South Carolina, and was brought into the latter state and lodged in jail. He sued out a writ of habeas corpus on the ground that his arrest in North Carolina was illegal, and that his detention was likewise illegal. The motion for a discharge was refused and the prisoner was remanded.

In the case of *Re Ezeta* (1894) 62 Fed. 964, wherein it appeared that the accused, citizens of a foreign country, who had taken refuge on an American war vessel, had been brought into a port of the United States although they had applied to be allowed to leave the vessel at a foreign port and before coming to the United States port, it was held that this fact did not affect the jurisdiction of the United States court over the accused after they were found within the territory of the United States.

b. Fraud or trickery.

In *Ex parte Brown* (1886) 28 Fed. 653, it appeared that the accused, who was in Canada, was induced to go to a town in the United States by the false statement that it was in Canada, and while there he was taken into custody. The court, refusing to discharge him on his plea that he was brought into the jurisdiction of the United States court through fraud and trickery, stated that the manner of the apprehension of one accused of crime could not affect the jurisdiction of the court into whose custody he was delivered.

IV. Mistake as to identity.

In the reported case (*DOMINGUEZ v. STATE*, ante, 503), wherein it appears that a citizen of Mexico had been arrested under a mistake of fact as to his identity, by American soldiers when in pursuit of bandits, and brought into

the state of Texas, it is held that on his release from the charge on which he had been arrested, the courts of Texas had no power to try him on another charge. The court distinguishes the case from *Ker v. Illinois* (1886) 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225, set out *supra*, II., on the ground that his arrest was not unlawful, and, while not a case of extradition, applies the rule adopted in cases of foreign extradition whereby the courts are forbidden to try an extradited person on a charge other than that for which he was extradited. Apparently there are no other cases involving a similar set of facts. There are numerous cases involving the right to try a person extradited from a foreign country on a charge other than that for which he was extradited, but such cases are not deemed to be within the scope of this annotation.

M. B.

WALTER STALLARD, by Next Friend, Appt.,

v.

G. B. SUTHERLAND et al.

Virginia Supreme Court of Appeals — September 22, 1921.

(— Va. —, 108 S. E. 568.)

Infant — equitable aid to avoid contract — estoppel.

Equity will not aid an infant to avoid a deed of trust given to induce a creditor of his brother to forego collection of his debt by legal process, where the infant falsely represented himself to have attained his majority, and his appearance and conduct confirmed the representation.

[See note on this question beginning on page 520.]

APPEAL by plaintiff from a decree of the Circuit Court for Wise County, dismissing a bill filed to annul and vacate a deed of trust and a conveyance of certain property. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. M. Vicars and J. M. Quillin, Jr., for appellant.

Messrs. Bond & Bruce for appellees.

Prentiss, J., delivered the opinion of the court:

Walter Stallard, claiming to be an infant, suing by his next friend, instituted his suit, alleging, in substance, that on the 24th day of

August, 1914, while still an infant, he was induced to convey a tract of land in Wise county to M. M. Long, trustee, to secure a debt to one J. F. Ford; that no part of the debt was for necessities, and the most of said debt he did not owe, but that it was for goods bought by his brother, one E. T. Stallard, and that none of such

goods or proceeds were then owned by or in the possession of the infant; that the trustee on the 26th day of June, by authority of the deed of trust, sold the property for \$265, and conveyed it to G. B. Sutherland and J. F. Holbrook, two of appellees. The bill prayed for an annulment and vacation both of the deed of trust and of the conveyance made by the trustee to his vendees, and for general relief. Before the case was heard the infant became twenty-one years of age, and upon his petition was substituted as complainant.

The defendants answered the bill, denying that Walter Stallard was an infant at the time of executing the deed of trust, and alleging, in addition, that he had for a long time theretofore been engaged in business for himself in his own name, without the aid of either parent or guardian; that he was fully matured and developed mentally, and entirely competent and able to transact business for himself; that he was more than twenty-one years of age at the time of the execution of the deed of trust; that he made oath to that effect before the notary who took his acknowledgment thereto; and that, relying upon these representations of the said Stallard, the creditor was induced to dismiss his action for the recovery of the debt, and to accept the joint note of the alleged infant and the debtor, secured by the deed of trust given as security therefor, and omitted any further effort or proceedings to collect or secure the said debt.

Depositions were taken, and upon the hearing the trial court entered a decree dismissing the bill, from which this appeal was taken.

The pertinent facts shown by the evidence are that the appellant was an infant at the time of the execution of the deed of trust, having been born February 5, 1895. He was therefore about nineteen and one-half years of age at the date of the deed of trust in August, 1914. His father and mother had moved from that community to Georgia, but he had

returned, was working for himself as a laborer, collecting his wages, depositing his money in bank, writing his own checks, paying his own board bill, and that he appeared to be twenty-one years of age. The complainant in his testimony does not deny the allegation that he represented himself to be twenty-one years before and at the time he executed the deed, but contents himself with saying that he does not remember whether or not he did so. The evidence to the contrary is convincing, so that the determining question is whether or not, under these circumstances, he can secure the aid of a court of equity in his effort to repudiate the deed of trust. Much has been written upon this subject, and the authorities are not in accord upon the precise question which this record presents. In cases like this, it is proper to remember the oft-quoted language of Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1802, 97 Eng. Reprint, 1107: "A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is that it never shall be turned into an offensive weapon of fraud or injustice."

Confining the discussion to the question at issue here,—that is, whether an infant thus guilty of fraud and deceit is estopped in equity to reassert his title,—the English cases all appear to hold that an infant is thereby estopped. The cases are collected in a note to *Lowery v. Cate*, 108 Tenn. 54, 57 L.R.A. 685, 91 Am. St. Rep. 744, 64 S. W. 1068. The American cases are not all consistent, but the weight of authority is in accord with the English rule.

Among the American cases are the following:

Hayes v. Parker, 41 N. J. Eq. 630, 7 Atl. 511, where an infant, by representing himself of age, secured a settlement with the guardian, and executed a discharge. He was not permitted to compel his guardian to account further. This is said there: "At law . . . he [an infant] is incapable of fraudulent acts which

will estop him from interposing the shield of infancy. . . . In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction—the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by them—in determining whether he should be permitted to invoke successfully the plea of infancy.”

So, in *New York*, where in *Blakeslee v. Sincepau*, 71 Hun, 412, 24 N. Y. Supp. 947, the implication in *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112, is followed. The infant having stated to the purchaser of the land, of which he was actually the owner, that he had no title to it, it was held that he was estopped to sue in ejectment, because he was “an infant of sufficient age to appreciate his rights and duties.”

In *Schmitheimer v. Eiseman*, 7 Bush, 298, it is held that an infant who conveyed land, falsely representing himself to be of age, cannot have his deed set aside on the ground of infancy.

In *Ferguson v. Bobo*, 54 Miss. 121, an infant with knowledge of her rights conveyed her land to her father to enable him to borrow money, and her father later conveyed to a mortgagee. She was held estopped to set up her legal title.

In *Goodman v. Winter*, 64 Ala. 440, 437, 38 Am. Rep. 13, an infant remainderman was held estopped from repudiation of a sale of land by the life tenant; the infant having received his share of the compensation.

In Ontario, in *Bennetto v. Holden*, 21 Grant, Ch. U. C. 222, it was held that, where an infant conveyed land representing herself to be of age, and after majority conveyed to others who had knowledge of the earlier grant, she was bound by her misrepresentations.

It appears that in Louisiana an infant is precluded as effectually as

an adult, for in *Guidry v. Davis*, 6 La. Ann. 90, it is said: “It is an error to suppose that the law can sanction the perpetration of frauds by minors; the truth and reality of bona fide transactions are as binding upon them as upon majors.”

In *Rundle v. Spencer*, 67 Mich. 189, 34 N. W. 548, the court avoided putting the decision upon the ground for equitable estoppel, but awarded an injunction to stay proceedings in an action of ejectment brought by one who had sold the land in question while an infant, putting the decision on the equities of that particular case.

In *Harmon v. Smith* (C. C.) 38 Fed. 482, it is said that the doctrine of estoppel does not apply to minors “unless such conduct is intentional and fraudulent.”

In the case of *Commander v. Brazile*, 88 Miss. 668, 9 L.R.A. (N.S.) 1117, 41 So. 497, it is held that, where a minor, by false representations that he is of age, aided by his mature appearance, induces another to enter into a contract with him under the belief that he is of full age, of which he accepts the benefit, he cannot set up his minority in defense of an action upon the contract.

A modern case in which there is quite a discussion of the whole question is *International Land Co. v. Marshall*, 22 Okla. 693, 19 L.R.A. (N.S.) 1056, 98 Pac. 951, where it is held that equity will refuse to lend its aid in any manner to one seeking its active interposition, who has been guilty of an unlawful or inequitable conduct in the matter with relation to which he seeks relief, and applies the doctrine to an infant who fraudulently represented himself to be over twenty-one years of age, when in fact he was only nineteen years of age, and refused to cancel a deed, in the absence of an offer to refund the amount of money so fraudulently obtained.

There are cases to the contrary, and this statement is deduced from the American cases in 14 R. C. L. 241, 242: “But where the contract has been executed, and the infant

seeks to avoid the title conferred thereby, in order to maintain either an action or a defense, the decisions are more conflicting. According to the apparent weight of authority, his right of avoidance is not lost to him by estoppel based on his false assertions as to his age, but there are well-considered cases to the contrary. If the infant is obliged to bring an action in equity to obtain a cancelation of the deed in question, or like equitable relief, the distinctive rule of the equity courts that he who seeks equity must do equity has often been held to prevent his recovery; but even on this point the cases are not entirely uniform. Of course, to create the estoppel it must be proved that the infant in fact misrepresented his age, but the other party was deceived by the misrepresentations, and that he would not otherwise have made the contract."

The distinction seems to be that, in order to charge the infant with equitable estoppel, he must be guilty of something more than a mere failure to disclose his infancy at the time he enters into the contract. If, however, he fraudulently represents that he is of full age, or actively conceals his minority, and the other party is thereby induced to execute the contract, then it is held that the infant will be estopped in equity, by his own fraud, to avoid the contract on the ground of infancy, to the prejudice of the other contracting party. It may be stated as a well-supported general proposition that, where one who, though an infant, has arrived at years of discretion, and by direct fraud or deception has entrapped another who was ignorant of the facts into waiving valuable property rights, such an infant will be estopped thereafter from relying upon his infancy to avoid such a contract. *Williamson v. Jones*, 43 W. Va. 563, 38 L.R.A. 703, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19; note to *Craig v. Van Bebber*, 18 Am. St. Rep. 635; 22 Cyc. 512, 548.

The Virginia case of *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209, is relied upon by the appellant. While there are expressions in that opinion which can be quoted in opposition to the doctrine which we have indicated as here applicable, in that case no element of fraud or falsehood was involved. There the purchaser of the interest of the infant knew that he had no legal right to convey, and accepted the title upon condition that he was to make the purchaser a good deed with general warranty, thereafter, upon the day when he should attain the age of twenty-one years, and the infant's repudiation of his contract was upheld. The instant case presents an entirely different question. Here the infant falsely represented himself to have attained his majority, his appearance confirmed it, and he was in fact holding himself out to the community, by his conduct in attending to all his business transactions just as an adult would; and in the transaction in question the false statements of his brother and himself were made to induce the creditor to believe that he was of age, and forego the collection of his debt by legal process.

It was in *Watts v. Creswell*, 9 Vin. Abr. 415, that Cowper, Ch., said: "If an infant is old and cunning enough to contrive and carry on a fraud, . . . in a court of equity he ought to make satisfaction for it." 4 Ann. Cas. 536, note.

In the states of Iowa, Kansas, Utah, and Washington, the doctrine to which we give our approval is enforced by statutes, each of which provides that an infant cannot disaffirm his contract "in cases, where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him (the minor) capable of contracting."

Mr. Pomeroy appears to give his full adherence to this rule, saying: "Since an infant is not directly bound by his ordinary contracts,

Infant—equitable
aid to avoid
contract—
estoppel.

unless ratified after he becomes of age, so obligations in the nature of contract will not be indirectly enforced against him by means of an estoppel created by his conduct while still a minor. On the other hand, an equitable estoppel arising from his conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act."

And he says this also: "The incapacity of infants to enter into binding contracts is the same in equity as in law; but such contracts are generally voidable only, and may therefore be ratified after the infant attains his majority. Fraud, however, will prevent the disability of infancy from being made available in equity. If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract ob-

tained by fraud." 2 Pom. Eq. Jur. 4th ed. §§ 815, 945.

In *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 61, 9 N. E. 420, it is held that under the Code of Civil Procedure of Indiana the distinction made in the English cases between suits in equity and actions at law is immaterial, and in an action for deceit against an infant applied the equitable rule, saying that the courts there would not inquire as to the form of the proceeding.

Without prolonging the discussion, it is sufficient to say that we prefer to follow, in this conflict in the American cases, that line which tends to discourage and prevent fraud, and which is in accord with equitable doctrines. This infant, who was managing his own business just like an adult, whose appearance indicated that he had attained his majority, who falsely misrepresented his age, who was intelligent enough to appreciate the fraudulent scheme, and in conjunction with his brother to attempt its execution, should not be aided by a court of equity to consummate such fraud.

Affirmed.

ANNOTATION.

Misrepresentation as to age as estoppel to plead infancy.

This annotation is supplemental to the annotation to *Le Rosa v. Nichols*, 6 A.L.R. 416.

It may be noted that the first two cases cited below are among the few cases sustaining the estoppel in actions at law, in the absence of special statutes.

When sued at law on the contract.

(Supplementing annotation in 6 A.L.R. 418.)

In *Klinck v. Reeder* (1921) — Neb. —, 185 N. W. 1000, an action on promissory notes given by an infant for the purchase price of a tractor, it was held as follows: "While generally the doctrine of estoppel in pais is not applicable to infants, yet, where an infant of so mature an age and appearance as makes his statement of

being of age plausible, while actually transacting business for himself, makes fraudulent and false representations that he is of age to another, for the purpose of transacting business with him, and such other person believes such statements to be true, and relies and acts thereon, and parts with his property because thereof, the doctrine of estoppel in pais will apply, and such infant will not be permitted to set up his minority as a defense to an action to enforce the performance of the contract so entered into."

When suing at law.

(Supplementing annotation in 6 A.L.R. 420.)

In *Falk v. MacMasters* (1921) 197 App. Div. 357, 188 N. Y. Supp. 795, an

action by an infant to recover moneys deposited by him with the defendants to margin certain stock transactions conducted by them as brokers for the plaintiff, it was held on the pleadings that it would, if established, be a good defense that the plaintiff falsely represented himself to be of age, and that, acting on his instructions, they had expended and paid out the money.

When suing in equity.

(Supplementing annotation in 6 A.L.R. 423.)

In *Adkins v. Adkins* (1919) 183 Ky. 662, 210 S. W. 462, where it was held that if an infant, deceiving his brother as to his age, induced him to pay for and take a deed for the infant's share of certain land, the court would refuse the infant's suit to cancel the deed, though this holding was not necessary, as the court below had found that the infant was of age when he executed the deed, and such finding was not disturbed. It was there said: "This court has uniformly adhered to the rule that the doctrine of estoppel operates against infants the same as against adults; that they are no more privileged to practise fraud upon innocent persons, and reap the reward of their misrepresentations, than is an adult; and where one deals with them under the bona fide belief that they are twenty-one years of age, and the infant so represents himself to be, he will be bound by his representations."

In the reported case (*STALLARD v. SUTHERLAND*, ante, 516) it will be seen that an infant nineteen and one-half years of age, of the appearance of twenty-one years of age, and (says the court) "working for himself as a laborer, collecting his own wages, depositing his money in bank, writing his own checks, paying his own board bill," gave a deed of trust to secure a debt, most of which he did not owe, but it was for goods bought by his brother; that he made oath that he was more than twenty-one years of age before the notary who took his acknowledgment of the deed, and that, relying on this, the creditor dismissed an action for the recovery

of the debt, and accepted the joint note of the alleged infant and the debtor, secured by the deed of trust; that the trustees had sold the land under the deed of trust; and that the infant brought the action praying for the annulment and vacation both of the deed of trust and of the deed of the trustee thereunder. And the court refuses to grant him any relief.

In *New Domain Oil & Gas Co. v. McKinney* (1920) 188 Ky. 183, 221 S. W. 245, in holding that there was no estoppel, the court said: "This court has, perhaps, gone as far as any other in applying the doctrine of estoppel to infants, and . . . it was held that any acts of the infant in the way of misrepresentations as to his age, whereby he was permitted to practise fraud upon an innocent party, would estop him from afterward asserting his true age to the detriment of the party so fraudulently deceived. But even this rule has been applied by this court only to cases where the conditions, appearances, and surroundings of the infant were such as to deceive one dealing with him, as to his age. It would not apply to a representation, although fraudulently made, by an infant of such tender years as that no one could be deceived thereby. . . . It would be illogical to hold that an infant by his silence (which is nonaction) could indirectly validate his deed, when he could not directly do so by his active conduct in executing it."

In *Carmen v. Fox Film Corp.* (1920) 15 A.L.R. 1209, 269 Fed. 928, the appellate court reversed the judgment of the trial court (258 Fed. 703) which awarded an injunction and heavy damages to the plaintiff, a motion picture actress, who, having while twenty years of age disposed of her services for several years largely by means of options, some months later, on being asked by another motion picture producer whether she was open to an engagement, replied that she was free to accept employment, and thereupon, while still an infant, she entered into a contract with it to appear only for it, beginning shortly after her majority, at

greatly increased pay. The new employer, having been indemnified by the old employers (or one of them), refused to carry out its contract with the actress, who brought this suit against the old employers. The appellate court considered the plaintiff unworthy of the assistance of a court of equity, saying, *inter alia*: "The court below, in view of the allegation in the complaint and the failure in the answer to deny it, has held that the contracts between the plaintiff and the defendants were New York contracts, and governed by the New York law, and therefore voidable, as under New York law the plaintiff was not of age when she signed them. It is contended that this was error, and that the capacity of parties to contract is to be determined by the law of the domicile, or, according to some authorities, by the law of the place of performance. In the view we take of this case, it is not material whether the contract was binding and breached, or voidable and avoided. In either case the conduct of the plaintiff has been such as entitled her to no relief in this court. According to her own allegations in her complaint, she was a minor when she entered into the contract with Keeney, and she misled him into making the contract by representing that she was free to make it, when in fact she was morally not free to make the contract, and there was doubt whether she was legally free to make it. If the contracts were voidable because of her infancy, then, while she was under no legal obligation to recognize them, she was under a moral obligation to abide by them, and good faith required her to continue to render the services she had agreed to give. In either case her action in repudiating her pledged word was misconduct of which no person of honor and conscience would have been guilty. That no action could be brought against her at law because of what she did does not alter the moral character of her act. And when she comes into a court of conscience, and asks its affirmative aid to assist her in carrying into effect the inequitable arrangement into

which she unfaithfully entered, the appeal falls on deaf ears. One who comes into equity must come with clean hands, and her hands are not clean. The testimony discloses that reliance cannot be placed upon her agreements which the law does not oblige her to keep, and that for a money gain to herself she unscrupulously disregarded her express contracts." This decision and opinion would seem to judge the business conduct of a girl of twenty with greater severity than that of several corporations combined against her, and it will be observed that what the court in particular cannot forgive is that she was legally right when she said that she was open to employment, when it was claimed that legally she was not.

Statutes.

(Supplementing annotation in 6 A.L.R. 425.)

Under the California statute providing that "a minor cannot, . . . under the age of eighteen, make a contract relating to real property, or any interest therein," a deed of trust of real property, executed by a minor under eighteen years of age, is void, and its ratification by the minor, still under eighteen years, but representing herself otherwise, is likewise void, and the court will so declare at the suit of the minor. *Lee v. Hibernia Sav. & L. Soc.* (1918) 177 Cal. 656, 171 Pac. 677.

Where a minor purchasing an automobile requests permission to take it out at once, and to pay for it the following day, saying that his money is in the bank, this statement is not a representation that he is of age, under the Iowa statute preventing disaffirmance of contracts "in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting." *Friar v. Rae-Chandler Co.* (1921) — Iowa, —, 185 N. W. 32. In the same case it was also held that one engaged as a chauffeur, or as a stock salesman who, during the time

he was selling stock, was also attending a commercial college, but spending his week-ends at the home of his parents in another place, was not engaged in business as an adult within the statute. The court referred with approval to *Seeley v. Seeley-Howe-LeVan Co.* (1905) 128 Iowa, 294, 103 N. W. 961, and also said: "Testimony

was offered showing that plaintiff had the appearance of an adult. This fact may have, to some extent, deceived defendants, but it was in no sense a misrepresentation. It was material and to be considered only in this case on the question of his having engaged in business as an adult." B. B. B.

FRANK PEARCE, Plff. in Err.,
v.
INDUSTRIAL COMMISSION et al.

Illinois Supreme Court — October 22, 1921.

(299 Ill. 161, 132 N. E. 440.)

Workmen's compensation — injury arising out of employment — fall on sidewalk when getting supplies for lunch.

An injury from a fall upon the sidewalk of a public highway to an employee in a building, who had gone for supplies for the noonday lunch, in accordance with an agreement among certain of the employees to purchase such supplies, and prepare and eat them upon the premises of the employer, in preference to carrying cold lunches, does not arise out of his employment, within the meaning of the Workmen's Compensation Act.

[See note on this question beginning on page 525.]

ERROR to the Circuit Court for Cook County (Torrison, J.) to review a judgment affirming an award by the Industrial Commission in favor of claimant in a proceeding by him under the Workmen's Compensation Act to recover compensation for an injury alleged to have arisen out of his employment with defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John A. Bloomington for plaintiff in error.

Mr. Morris Kompel, for defendants in error:

Where the facts and circumstances justify the conclusion of the board that the injuries arose out of and in the course of the employment, the supreme court will not reverse.

Chicago Dry Kiln Co. v. Industrial Bd. 276 Ill. 556, 114 N. E. 1009. Ann. Cas. 1918B, 645; *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; *Paul v. Industrial Commission*, 288 Ill. 532, 123 N. E. 541, 18 N. C. C. A. 292.

An injury is accidental, within the meaning of the act, which occurs in the course of the employment, unex-

pectedly, and without the affirmative act or design of the employee.

Matthiessen & H. Zinc Co. v. Industrial Bd. 284 Ill. 378, 120 N. E. 249; *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530; *Bryant v. Fiesel*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Honnold, Workmen's Comp.* 281; *Bradbury, Workmen's Comp.* 325.

Carter, J., delivered the opinion of the court:

Peter Peterson filed a claim for compensation, alleging that he received an injury arising out of his employment with plaintiff in error June 12, 1918. His claim was allowed by the arbitrator, and on re-

view the arbitrator's finding was approved by the Industrial Commission. The circuit court of Cook county affirmed the finding of the commission, and this writ of error has been sued out to review the proceedings.

Peterson was a janitor and all-round handy man in the Ewart Building, at 118 North Jefferson street, Chicago, and had been so employed for about a year previous to the occurrence in question. It is agreed by both parties that they were under the Workmen's Compensation Act (Laws 1913, p. 335) on the day of the injury, but plaintiff in error denies that the said injury arose out of defendant in error's employment. The record shows without contradiction that a special arrangement was made by the defendant in error, the chief engineer of the building and his assistant, whereby, instead of bringing cold lunches, they each contributed to the expense of a warm lunch, and one of the three would go out and purchase groceries, meat, and whatever else they wished for lunch, and it would be cooked in the building. The testimony of the assistant engineer, Mannik, was to the effect that before he was employed at the Ewart Building he had worked in another manufacturing building, where a similar arrangement had been made by some of the employees, and that after he came to work in the Ewart Building he suggested this plan to the chief engineer, and they talked it over together, and also discussed it with the defendant in error, whose employment began about a month after Mannik was hired, and the three decided to follow the plan. Mannik himself did the cooking, and Peterson usually was the one to go after the groceries and meat, after getting suggestions from the chief engineer or Mannik as to what food should be obtained for that certain day. Sometimes the chief engineer or Mannik went out after the food, but usually Peterson was sent. On the day of the injury, Peterson,

under this arrangement, went to the meat market and other places to obtain supplies for the noon meal, and on his way back fell down, but is unable to tell what caused the fall. His left leg or hip was seriously injured, and he was taken, at the suggestion of the chief engineer, to the Cook County Hospital, and later, when his recovery was found to be somewhat slow, he was taken to the Oak Forest Hospital (another county institution), where he remained for three months.

Defendant in error testified that, on the day he was injured, the chief engineer, Wall, told him about 11 o'clock to go and get meat and other supplies for dinner, stating that he (Wall) would attend to the elevator while defendant in error was gone. It would appear that the regular elevator man usually took his lunch at 11:30 A. M., and that while he was gone defendant in error ran the elevator. The chief engineer attended to the hiring of his assistant and of defendant in error, and had charge of the building and the employees during the most of the time. Plaintiff in error, Pearce, agent of the building, was in general charge of its management, but allowed the chief engineer to attend to the details, including the hiring and discharge of most employees. Pearce testified that he did not know of the special arrangement of these men for eating their lunch on the premises, or about one going out to buy the food to cook; that the power in the building was shut off from the use of the tenants from 12 to 12:30, and that was usually the employees' lunch time. The testimony tends to show that Pearce had seen the three men eating their lunch in the building, but there is no evidence that he had affirmatively acquiesced in their practice in any way.

There can be no question from the record that the injury to defendant in error was a serious one, but it is not clearly shown that the fall was due to what is commonly termed an accident, or whether it was due to

(399 Ill. 161, 188 N. W. 440.)

some physical condition or disease. The chief question in controversy here is whether the defendant in error's fall on the street, in returning with material for lunch, under the circumstances shown in this record, arose out of his employment. The evidence shows that, prior to the time this special arrangement was made by these three employees, in which they were joined at one time by another employee for a brief period, defendant in error and Mannik brought their lunches to the building, and ate them there during the lunch period, and that Wall usually went out to some nearby restaurant for his lunch. There appears to have been no definite rule as to how or where the employees in the Ewart Building should eat their lunch. Ordinarily, where the lunch period is not subject to the employer's control, or restricted in any way, and the employee is free to go where he will at that time, if he is injured on the public street, off the premises of the employer, the authorities hold that the injury does not arise out of the employment. *McKrell v. Howard & Jones*, 2 B. W. C. C. 460; *Harper*, *Workmen's Comp.* 2d ed. § 55; *Bradbury*, *Workmen's Comp. Law*, 3d ed. 526; 1 *Honnold*, *Workmen's Comp.* 361; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Draper v. University of Michigan*, 195 Mich. 449, 161 N. W. 956; *Bylow v. St. Regis Paper Co.* 179 App. Div. 555, 166 N. Y. Supp. 874. So far as the record shows, the place where defendant in error fell had no relation to, nor was any part of the sur-

roundings of, his place of work, but was a block or more away, on a public street.

Counsel for defendant in error argues that the special arrangement as to lunch was made by Wall, the chief engineer, in furtherance of the business of the employer, with a view to economizing in hiring additional help during the lunch hour. We do not think the evidence justifies this conclusion. We think the record shows that the arrangement for lunch was made by the chief engineer and his coemployees, mainly for the purpose of furnishing warm lunches for themselves, which would be more enjoyable, and perhaps more healthful, than if cold. The fact that they sent out for the material and chose to eat the meal on the premises is not material, in view of the fact that the injury took place on a public street some distance from the place of employment. We think it is clear from this record that the arrangement for lunch was a special, voluntary one among the employees, and without the direction or sanction of the employer, and that the injury did not arise in the scope or area of defendant in error's employment, and that therefore the accident did not arise out of the employment. This being so, it is unnecessary to consider and discuss other questions raised in the briefs.

The judgment of the Circuit Court will be reversed, and the award of the Industrial Commission set aside.

*Workmen's compensation—
injury arising
out of employ-
ment—fall on
sidewalk when
getting supplies
for lunch.*

ANNOTATION.

Workmen's compensation: injury to employee while away from plant, primarily to serve a purpose of his own or of another employee, but which may incidentally benefit employer.

As to compensation for injuries during lunch hour, on employer's premises, see annotation in 6 A.L.R. 1151.

As to compensation for injury re-

ceived while doing prohibited act, see annotation to *Fournier v. Androscoggin Mills*, — A.L.R. —.

The determination of the question here considered depends largely upon

the facts and circumstances in the several cases.

It will be noted from the title that the scope of the annotation lies within narrow compass; and to bring a case therein it must not only appear that the employee, in leaving the plant, was serving primarily a purpose of his own or that of another employee, but also that there was, or at least there was claimed to be, some incidental benefit, or possibility of benefit, to the employer; hence cases that turn upon the question as to when an employee has returned to the employer's service, so as to come within the protection of the act, after having temporarily left the same for a purpose in which the employer had no concern, direct or incidental, are not within its scope.

It will be observed that in the reported case (*PEARCE v. INDUSTRIAL COMMISSION*, ante, 523) it was held that an injury from a fall upon the sidewalk in a public highway, to one employed in a building, who had gone for supplies for the noonday lunch, in accordance with an agreement among certain of the employees to purchase such supplies, and prepare and eat them upon the employer's premises, in preference to carrying cold lunches, did not arise out of his employment, within the meaning of the Compensation Act, the court holding that the evidence did not justify the conclusion, which was argued, that the special arrangement was made by the chief engineer, who hired the other employees, in furtherance of the business of the employer, with a view to economizing in hiring additional help during the lunch hour.

And in *Spizzirri v. Krouse* (1919) 73 Pa. Super. Ct. 476, it was held that the workman was not injured by an accident in the course of his employment, where it appeared that he had been employed with others for several days to remove certain property, and that the employer gave the men a quantity of junk, and permitted them to use a truck to remove it, and that, while they were going from one dealer to another, to sell to the best advantage, the truck collided with an-

other vehicle, and the workman was injured. The court said: "Now, it is clear the employer had a right to make a gift of this personal property. With the gift made and the property turned over to the possession of the donee, his interest in it, as it seems to us, had entirely disappeared. It was of no consequence to him where the defendants took the junk, to what dealer they sold it, what price they received for it. These matters were entirely within the control of the plaintiff and his fellows, and were of interest only to them. But, if we stretch the proposition that the employer was interested in having the junk removed from the garage, to the length of saying such interest continued until the truck reached the place of business of the first dealer, upon what possible consideration can it be said to have existed any longer? That dealer was willing to take the junk and pay a price for it. Had the plaintiff and his fellows accepted that price, every possible interest of the employer in their mission would have been extinguished. Indeed, his interest, if any he had, would have been subverted had the offer of the first dealer been accepted; because the plaintiff would have returned to his work that much sooner, in accordance with the request made by defendant's manager when he gave permission to use the truck. Wholly for their own benefit, however, as we view it, and without any further possible interest of the employer in the expedition, the plaintiff and his fellows determined to try their fortune in another part of the city; and, in traveling there, by a route selected by themselves, prosecuting a journey wholly for their own profit, the accident occurred. In our opinion this determination worked a suspension of the relation, and broke the continuity of the course of employment. We are unable to say that the plaintiff, thus injured, has furnished any legal basis for the conclusion that the accident occurred during the course of his employment."

And in *Lee v. The St. George*

(1914) 7 B. W. C. C. (Eng.) 85, it was held that the accident did not arise out of and in the course of the employment, where a steward on a ship, whose duty it was to go ashore and order stores for the ship, and who was permitted to go to his home, left the ship early in the morning, and went to his home, and remained several hours, and, after he had entered the dock gates on his way back, and was going toward the stores to get the supplies, was knocked down by an engine and injured. The court stated that the place where he was injured was between his home and the stores, and not between the ship and the stores, and that, at the time, he was on his own, and not the ship's business.

And a motorman who had closed his day's work, and had signed his name to the register, denoting that fact, and, while going to have his watch tested, after he had reached the public highway, was run down by an automobile, over which the employer had no control, was held not to have sustained an injury which arose out of or in the course of his employment. *De Voe v. New York State R. Co.* (1915) 169 App. Div. 472, 155 N. Y. Supp. 12, affirmed in (1916) 218 N. Y. 318, L.R.A.1917A, 250, 113 N. E. 256.

And in *Whitfield v. Lambert* (1915) 8 B. W. C. C. (Eng.) 91, it was held that the accident did not arise out of the employment where a farm laborer, who had just commenced work, was allowed, according to custom, the use of a horse and cart to go to the station for his box, and, while on the way, he was injured when the horse was frightened by a motor. The court said: "The employer had only promised to let the workman have a horse and cart. This was the usual practice in the neighborhood. The workman said that, in all his previous places, he had the use of the farmer's horse and cart to convey his box. His father gave evidence that he had lived in that part of the country all his life, and that farm servants were always allowed a horse and cart to go for

their boxes. It cannot, therefore, be said that the workman, in going with the horse and cart for his box, was fulfilling any contract by the employer to carry his box from Warcop station to the farm. He was merely using the employer's horse and cart with leave and license, as it was agreed he should be at liberty to do. He was going on his own business, not on the farmer's business."

And in *Wilson v. H. C. Frick Coke Co.* (1920) 268 Pa. 256, 110 Atl. 723, it was held that the death of a workman was not due to an injury by accident while in the course of his employment, where it appeared that he was a day laborer who had been ordered by his foreman to appear before a physician for examination on a certain night, but that he did not go until the following night, and was drowned while returning, the court holding that he was not injured while performing any duty which he was employed to perform, nor while actually engaged in the furtherance of the employer's business.

And a messenger boy who, in performing his duties, traverses the streets of a city, departs from the scope of his employment when he climbs upon a passenger vehicle not owned or controlled by his employer, for the purpose of expediting his work, so that an accident which befalls him when upon such vehicle cannot be said to arise out of and in the course of the employment the court holding that, since he was provided with carfare when the messages were to go beyond a certain distance, he was to walk on other occasions. *State ex rel. Miller v. District Ct.* (1917) 138 Minn. 326, L.R.A.1918F, 881, 164 N. W. 1012.

And one engaged by the proprietor of a cycle repair shop to look after the shop and do small repairs to cars and bicycles on the premises, and who was expressly told not to leave the shop, or to take bicycles out of the shop, cannot properly be found to have sustained an injury arising out of his employment, where he left the shop for the purpose of returning a motorcycle which had been brought in for

repair and, while he was riding it, was run into and killed, there being no emergency justifying him in taking the course which he took. *Leggett v. Gibbons* (1916) 85 L. J. K. B. N. S. (Eng.) 980, 114 L. T. N. S. 830, [1916] W. C. & Ins. Rep. 154, 9 B. W. C. C. 354.

And where a moving picture company's plant occupied the four corners of intersecting streets in a city, and the two thoroughfares were constantly being used by officers and employees of the company in passing between portions of the plant, and an employee whose services were not immediately needed, but who was required by the rules to remain at the plant, was standing on the street, talking with other employees on matters purely personal, it was held that he was not entitled to compensation for injuries sustained by being struck by an automobile of one of the directors, since the accident did not arise out of the employment. *Balboa Amusement Producing Co. v. Industrial Acci. Commission* (1918) 85 Cal. App. 793, 171 Pac. 108.

But in *Rainford v. Chicago City R. Co.* (1919) 289 Ill. 427, 124 N. E. 643, there was held to be evidence that an injury to a conductor of a street car arose out of his employment, where there was testimony that he had stopped his car, and was on his way to his house near by, to have some lunch prepared for him, and was struck by another car as he was crossing the track.

And in *Punches v. American Box Board Co.* (1921) — Mich. —, 185 N. W. 758, it was held that the injury arose out of and in the course of the employment, where it appeared that the employer hired a team for use in its business, which was originally kept on its premises, but that the injured employee, who usually drove the team, subsequently, with the foreman's knowledge, kept it in his barn and drove it back and forth to his work, and, while driving to work in the morning, an accident occurred which resulted in his death.

So, a seaman engaged in coaling his vessel, who, during a time when

coaling could not be done, because the vessel had grounded, attempted to go on shore for some money due him for the sale of old ropes,—which was allowed the seaman, but out of which there was to be paid any renewal of small breakages in the ship's crockery which the skipper might direct,—and fell and injured himself, was held to have suffered an injury by accident arising out of the employment, although, at the time of the accident, no breakages had occurred requiring the application of any part of the funds for renewal, and the skipper had given no directions that any part should be so applied. *Duck v. North Sea Steam Trawling Co.* (1916) 9 B. W. C. A. (Eng.) 83.

And a workman who was instructed to get a barge at a wharf, but, upon going there, found that he would not be able to get it for some time, because of the condition of the tide, did not go outside of the ambit of his employment in attempting to get into a small boat near by, in which he could sit down and watch the tide until the time was favorable for him to perform his work. *May v. Ison* (1914) 110 L. T. N. S. (Eng.) 525, 7 B. W. C. C. 148.

And injuries caused by being drenched with water and saturated with smoke, received by an employee in charge of his employer's volunteer fire brigade, while assisting in extinguishing a fire in a garage, situated about 40 feet from his employer's premises, may be found to have arisen out of the employment, where the workman entered the burning garage with the employer's chemical engine before the arrival of the town apparatus, although he subsequently worked in connection with the fire apparatus of the town. *McPhee's Case* (1915) 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257.

And the death of a compositor on a newspaper may be found to have arisen out of and in the course of his employment, although it occurred while he was upon the roof of an adjoining building, where he had gone for air on a hot night. *Von Ette's*

Case (1916) 223 Mass. 56, L.R.A. 1916A, 641, 111 N. E. 696, 12 N. C. C. A. 551.

And in *Messer v. Manufacturers' Light & Heat Co.* (1919) 263 Pa. 5, 106 Atl. 85, where an engineer, while on his vacation with pay, and subject to call, received a telephone message from the superintendent of the company for which he worked, to inspect

a certain pumping station, to increase the engineer's efficiency, it was held that he sustained an injury by accident in the course of his employment, upon its appearing that he was injured while driving his automobile in carrying out the superintendent's request, although, at the time of the injury, he might have turned the car toward home.
J. T. W.

BLASSIUS GRASSER, Appt.,

v.

J. C. JONES et al., Respts.

Oregon Supreme Court (Dept. No. 1)—November 22, 1921.

(— Or. —, 201 Pac. 1069.)

Mortgage — redemption — convict — termination of sentence.

A statute suspending the civil rights of one imprisoned for crime for a period less than that of his natural life does not give him a right, after termination of his imprisonment, to redeem from a mortgage foreclosure which occurred during his imprisonment, the period of redemption from which has otherwise expired.

[See note on this question beginning on page 531.]

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County (Bingham, J.), sustaining a general demurrer to the complaint in an action brought to compel the defendant sheriff to permit plaintiff to redeem from a mortgage foreclosure, and to require an accounting for the rents and profits of the land, and for the personal property of plaintiff, alleged to have been wrongfully appropriated by defendants. *Affirmed.*

Statement by Burnett, Ch. J.:

Prior to January 16, 1915, the plaintiff gave a note, and secured the same by mortgage on his real estate. On that date he was convicted of a felony, and sentenced to imprisonment in the penitentiary of this state for a term of from one to fifteen years. Default having been made in the payment of the note, suit to foreclose the mortgage was commenced March 11, 1916. This proceeded to decree, sale, confirmation, and sheriff's deed; the date of this latter document being August 3, 1917. The plaintiff was pardoned July 15, 1919. On November 22 following, he offered to redeem in pursuance of formal notice given within thirty days prior thereto. The

sheriff, to whom the application was made, refused to allow him to redeem, and he has brought this suit against the officer, with the purchaser at the sale and others, who, he says, claim some interest in the property, the object being to compel the allowance of redemption, for an accounting of the rents and profits of the property, and for damages for the conversion of certain personal property alleged to have been left by the plaintiff on the premises when he was incarcerated in the penitentiary. The circuit court sustained a general demurrer to the complaint, and the plaintiff appeals.

Messrs. Ronald C. Glover and A. O. Condit for appellant.

Mr. W. C. Winslow for respondents.

Burnett, Ch. J., delivered the opinion of the court:

The mortgagor or judgment debtor whose rights and title were sold has a right to redeem real property within one year after the confirmation of the sale. Or. Laws, § 248. The sale was confirmed July 17, 1916, but the offer to redeem was not made until more than three years later, namely, November 22, 1919. If nothing else were shown, it is plain that the offer was too late. Says the plaintiff, however, quoting § 17, Or. Laws: "If any person entitled to bring an action mentioned in this chapter or to recover real property, or for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either . . . imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of the action, but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than one year after such disability ceases."

The section is taken from chapter 2 of title 1, Or. Laws, and relates to the time for commencing actions or suits.

It is also said in the language of § 2380, Or. Laws, that "a judgment of imprisonment in the penitentiary for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of such imprisonment."

The contention on behalf of the plaintiff is that his civil rights, among them the right of redemption, were suspended while he was a convict, and that § 17, Or. Laws, allows him to redeem within one year after his disability as a convict ceased. In other words, he contends that his restoration to citizenship by pardon included the revival of his

right to redeem, which hitherto had been suspended.

Section 17, as stated, relates to the time within which a suit or action may be commenced. The plaintiff had no cause of suit or action, in any event, until the sheriff refused to allow him to redeem. An offer to redeem and a refusal to allow redemption are conditions necessarily precedent to the right to sue. Hence, his cause of suit accrued, if at all, after his disability was removed. What the result would have been if the plaintiff had made his offer to redeem before the expiration of the year, and while he was still in prison, is not before us, because no such offer was made. The question turns upon the effect to be given § 2380, *supra*, suspending the civil rights of the convicted plaintiff.

The right to redeem is manifestly a civil right. 2 Words & Phrases, 1199. The effect of the suspension of the civil rights of a convict under a statute identically like ours had the consideration of the supreme court of California in *Re Nerac*, 35 Cal. 392, 95 Am. Dec. 111. The essence of the case is stated thus in the syllabus: "One sentenced to the state prison for a felony, for a term less than his natural life, is not dead in law. His civil rights in some matters are suspended, but the rights of his creditors are not suspended."

In *Gray v. Stewart*, 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852, the sale of a convict's land, and the consequent deed were held valid. In *Byers v. Sun Sav. Bank*, 41 Okla. 728, 52 L.R.A. (N.S.) 320, 139 Pac. 948, Ann. Cas. 1916D, 222, the court sustained the right of a convict to contract to encumber the land to pay his attorney to procure for him a parole, and this under a statute precisely like ours. The court in *Re Deming*, 10 Johns. 232, said: "The limitation to the operation of a pardon on this antecedent right is that it cannot divest any person of any right or interest which the law had permitted to be acquired and

vested in consequence of the judgment."

This language is used in the syllabus of *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482: "A court has jurisdiction to enforce an execution against the property of a defendant in an action, who has been sentenced to the state prison for life, on a charge of murder, though the judgment, in the civil action, was not entered against him until after his civil death."

The subject is extensively treated in *Avery v. Everett*, 110 N. Y. 317, 1 L.R.A. 264, 6 Am. St. Rep. 368, 18 N. E. 148. The substance of the doctrine taught in that case is that civil death does not of itself divest the offender of his lands as a general rule; he can be sued, but cannot sue; he can contract, but cannot compel the courts to aid him in the enforcement of his contract. This was the declaration of the court concerning the situation of a convict at common law. In *Gray v. Gray*, 104 Mo. App. 520, 79 S. W. 505, it is said that the civil death which attaches to a person as an incident of his conviction of an infamous crime destroys his right to sue, but not the right of courts to entertain suits against him. The court quotes with approval this language from *Chitty's Criminal Law*, 725: "This situation of *civilitur mortuus* is never allowed to protect him (an attainted or convicted person) from the claims of private individuals or the necessities of public justice; so that though he can bring no action against another, he may be sued, and an execution may be taken out against him."

If, as some of these precedents indicate, anyone convicted of a crime can contract, he certainly could give notice and make his offer

to redeem, thus fixing the genesis of his right to sue if refused, with the privilege of waiting under the terms of the statute until his disability was removed, before prosecuting the suit. On the other hand, if his civil rights are suspended, as the statute says, they form no obstacle to the proceedings on behalf of his creditors. To hold otherwise would be to punish them, or, at least, to impair the validity of their contracts. Under the statute, the mortgage creditor has a right to foreclose upon default being made. He may pursue that remedy to its full fruition, ending in the sheriff's deed to the property sold at foreclosure. If it is to be understood that one who otherwise would have a right of redemption for a year after the sale could, by committing a crime, extend that period for five years, or while he is incarcerated as a punishment for his offense, it would impair the value of the mortgagee's remedy, and allow the debtor to take advantage of his own wrong. The suspension of his civil rights is one of the consequences of the crime of which he is convicted, and should have engaged his attention before he committed the offense.

In brief, it is not the rights of the mortgagee which are suspended, but those of the mortgagor convicted of the crime, and it cannot be that his conviction will work out for him a more favorable situation than if he had not been proved guilty of the offense, especially where the result would be to impair the obligation of his contract with the mortgagee. The judgment of the Circuit Court is affirmed.

McBride, Harris, and Brown, JJ., concur.

Mortgage—
redemption—
convict—
termination of
sentence.

ANNOTATION.

Effect of imprisonment to extend time for redemption from judicial, execution, or tax sale.

No case, other than the reported case (*GRASSER v. JONES*, ante, 529), appears to have considered the pre-

cise question of the effect of the imprisonment of the person entitled to redeem from a judicial, execution, or

tax sale, to extend the time allowed by law for redemption. It is held in that case that the imprisonment of the mortgagor did not operate to extend the time for redemption of mortgaged premises which had been sold under foreclosure proceedings, and to which a sheriff's deed had been delivered, although it was provided by statutes that the time to bring action by one imprisoned on a criminal charge should be extended for a certain period, and that the civil rights of a person imprisoned should be suspended. The decision appears to rest on the inequity of permitting one, who ordinarily would have a right of redemption for a certain period, to extend that period by committing a crime, and also on the ground that, the suspension of the civil rights of a person imprisoned being a consequence of the crime of which he is convicted, it is inequitable that his conviction should work out for him a more favorable situation

than if he had not been proven guilty of the offense.

Attention may be called, however, to *Gray v. Stewart* (1904) 70 Kan. 429, 109 Am. St. Rep. 461, 78 Pac. 852. In that case it appeared that, prior to the imprisonment of a mortgagor, judgment of foreclosure was rendered against him. Thereafter, during imprisonment, the mortgaged premises were sold, the sale confirmed, and a sheriff's deed delivered. The mortgagor contended that, by reason of his imprisonment, the sale and sheriff's deed were insufficient to transfer title. The court refused to uphold this contention, saying: "We hold that the confinement of Gray in the penitentiary under the sentence imposed did not cause the judgment of foreclosure against him to become dormant, . . . and, hence, that the proceedings under such judgment, which ripened into a sheriff's deed, were valid and vested an indefeasible title to the land in the purchaser."

L. F. C.

SANITARY CAN COMPANY

v.

NATIONAL PICKLE & CANNING COMPANY, Appt.

Iowa Supreme Court — September 28, 1921.

(— Iowa, —, 184 N. W. 354.)

Payment — by check on insolvent bank.

The tender to a bank to which a draft with bill of lading attached has been sent for collection, of a check on itself, does not amount to payment, although the maker of the check had sufficient funds on deposit to meet the check, and the check is marked "Paid," if the draft requires payment in cash or its equivalent, and the bank is insolvent, so that the check is never paid.

[See note on this question beginning on page 537.]

APPEAL by defendant from a judgment of the District Court for Lee County (Craig, J.) in favor of plaintiff in an action brought to recover a money judgment and interest upon an account for a carload of cans. *Affirmed.*

Statement by Preston, J.:

Action brought at law to recover a money judgment for \$844.92, and interest on account, for a car of

cans. Defendant pleaded payment. The case was transferred to equity. The court found there was due plaintiff from defendant \$1,137.92,

(— Iowa, —, 184 N. W. 854.)

but that there should be credited thereon, as conceded and offered by plaintiff, the net sum of \$502.73, which last amount was the dividend from proceedings in bankruptcy of D. H. Sage, or his estate, doing business as Sage Banking Company. This left a balance of \$634.48, for which judgment was rendered. The defendant appeals.

Mr. W. B. Collins, for appellant:

While it is a well-established rule that an agent having money demands for collection is authorized to receive nothing but money in payment unless specially authorized by its principal so to do, yet where the agent is a bank of deposit it may receive its own certificate of deposit as money, and its principal will be bound by such payment, and the debtor discharged thereby, even though the bank soon afterwards becomes insolvent and never remits to its principal.

British & A. Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319; Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193; 7 C. J. Banks & Bkg. § 3020; Smith v. Essex County Bank, 22 Barb. 627; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Commercial Bank v. Union Bank, 11 N. Y. 208; Pratt v. Foote, 9 N. Y. 463; Baldwin's Bank v. Smith, 215 N. Y. 78, L.R.A.1918F, 1089, 109 N. E. 188, Ann. Cas. 1917A, 500; Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670; Belk v. Capital F. Ins. Co. 102 Neb. 702, 169 N. W. 262; Rohrbach v. Hammill, 162 Iowa, 131, 143 N. W. 872.

The system by which nearly all banks in this country transact monetary affairs, by the use of checks, drafts, and certificates of deposit, must be presumed to be known by men of business, and the courts take judicial notice of such customs, and they will not permit one who must be presumed to be familiar with them to profit by pleading ignorance of them.

British & A. Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319; Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193.

The one who made the wrong possible must suffer the loss.

State ex rel. Carroll v. Corning Sav. Bank, 129 Iowa, 838, 115 N. W. 937; Benton County Sav. Bank v. First Nat. Bank, 161 Iowa, 712, 140 N. W. 811.

Messrs. L. J. Montgomery and Hollingsworth & Blood, for appellee:

The usual rule is that a check operates as payment only when the check is itself paid.

Bellevue Bank v. Security Nat. Bank, 168 Iowa, 707, 150 N. W. 1076; Griffen v. Erskine, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193; Dille v. White, 132 Iowa, 327, 10 L.R.A.(N.S.) 510, 109 N. W. 909; McFarland v. Howell, 162 Iowa, 110, 143 N. W. 860; 2 Bolles, Bkg. 600.

Before acceptance of a check will be considered payment, it must have been so expressly agreed.

Gower v. Halloway, 18 Iowa, 154; Dille v. White, 132 Iowa, 327, 10 L.R.A.(N.S.) 510, 109 N. W. 909.

The retention of worthless paper and an attempt to collect thereon do not establish payment.

Huse v. McDaniel, 33 Iowa, 406.

Instituting suit on worthless paper is not an acceptance as payment, but operates for the benefit of the original debtor, who can still be sued on the original debt.

Ibid.

A collecting bank has no authority to accept checks or credits on itself in payment of collection.

Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351; 2 Michie, Banks & Bkg. p. 1397; Bellevue Bank v. Security Nat. Bank, 168 Iowa, 707, 150 N. W. 1076; McCarver v. Nealey, 1 G. Greene, 360; Aultman & Co. v. Lee, 43 Iowa, 404; National Loan & Invest. Co. v. Bleasdale, 140 Iowa, 695, 119 N. W. 77.

Defendant cannot impose its worthless check on plaintiff. Dille v. White, 132 Iowa, 327, 10 L.R.A.(N.S.) 510, 109 N. W. 909.

Nonpayment of a check given in payment of a debt entitles the holder to sue upon the original debt.

2 Bolles, Bkg. 600; Huse v. McDaniel, 33 Iowa, 406; Gray Bros. v. Otto, 178 Iowa, 855, 160 N. W. 293.

Preston, J., delivered the opinion of the court:

The plaintiff, a manufacturer of cans in the East, shipped to the defendant a carload of cans at the agreed price of \$844.92, and drew a sight draft on defendant, dated October 1, 1914, for the amount thereof, with bill of lading attached, through the National Newark Banking Company, of Newark, New

Jersey. The draft was payable to said bank, signed by plaintiff, and addressed to National Pickle & Canning Company, St. Louis, Missouri. Upon the face of the draft, in red ink, was printed the notation: "This draft must be paid in cash or its equivalent, the bank named as payee acting only as agent to collect and remit to the drawer."

It also recited: "Bill of sale attached, deliverable only on payment hereof."

It is indorsed: "Pay to the order of any bank for collection for account of National Newark Banking Company, Newark, New Jersey."

The transaction was treated as if the draft had passed through the Newark bank, although by agreement between plaintiff and that bank, plaintiff sent out such drafts itself for collection, and accordingly the draft in question was forwarded for collection to the Sage Banking Company, at Alexandria, Missouri, at which point defendant had a factory. The defendant treats that transaction as having been done by the Newark bank. The Sage Banking Company, receiving the draft, called up defendant company's manager, who came down on the evening of October 13, 1914, between 7 and 8 o'clock, to pay the draft, and take up the bill of lading attached, and gave defendant's check on said Sage Banking Company for the full amount. Defendant, as drawee of the draft, had to its credit on the books of the Sage Banking Company about \$1,100, yet at the time the check was given the bank was insolvent, and had no funds on hand sufficient to pay the draft. The Sage Banking Company did not advise defendant's manager that his check was worthless, or that the bank was in a failing condition. Upon drawing defendant's check, as before stated, and with such worthless check, it took up the draft, received the bill of lading from the bank, and defendant afterwards procured and used the cans covered by the bill of lading. The check was marked across the face:

"Paid. Sage Banking Co." But it appears that the bank clerk who received the check did nothing further with it, and did not charge it to the account of the defendant on the books of the bank. There was at no time after the check was received sufficient money in the bank to pay it, and the next day, between 1 and 2 o'clock, the bank closed its doors, and thereafter passed into bankruptcy.

Later, when the facts were made known to the Newark bank, it, for the purpose of protecting both plaintiff and defendant and all parties in interest, filed a claim in bankruptcy for the amount of the check; said claim setting out the facts and the existence of a dispute as to whether the draft was paid by the check and as to whether the bankrupt had exceeded his authority as a collecting agent, and expressly stating that the claim was filed without prejudice to any action against the defendant, either by the Newark bank or plaintiff. The claim in bankruptcy was allowed, and dividends paid to the Newark bank, and held by them for the plaintiff and the defendant herein, and for their protection, and after defendant had been requested to prove up for the entire amount of the account, and their refusal so to do. The net amount of the dividends, after deducting some \$80 or \$90 for expenses of filing and collecting, was credited on the claim sued on herein, as before stated.

During the pendency of the bankruptcy proceedings, defendant claiming that the draft covering the purchase of the cans, as well as the account for the cans, was fully paid by the check transaction, this suit was instituted, claiming that defendant owed plaintiff for the cans and upon the account and the draft drawn therefor. As said, defendant answered, claiming that the draft had been paid by the giving of the check. The trial court found for plaintiff, and in addition directed plaintiff to assign, or cause to be assigned, to the defendant the balance

(— Iowa, —, 184 N. W. 354.)

of said claim in bankruptcy, or cause to be paid to the defendant all dividends that might thereafter be paid on the claim, and such assignment to be made on the demand of the defendant, and so on. The clerk of the Sage Banking Company, who transacted the business in question for the Sage bank, knew the financial condition of his bank, and that it was insolvent, but, as said, did not advise defendant's superintendent of that fact.

Appellant's contention, as we gather from the errors assigned and brief point, is that plaintiff and the Newark bank selected the Sage Banking Company, at Alexandria as agent to collect the draft and bill of lading attached, rather than an agent at St. Louis, Missouri, and selected the Sage Banking Company as its agent to present and receive payment of the draft, thereby justifying defendant in acting as it did in payment of the draft by the check. But the draft was to be paid in cash, or its equivalent, whether it was sent to one bank or another. That is the question in the case,—whether, under the circumstances, the check transaction was a payment.

1. In appellant's argument and reply, and the two so-called additional arguments, all four of them refer to the two Iowa cases, *British & A. Mortg. Co. v. Tibballs*, 63 Iowa, 468, 473, 19 N. W. 319, and *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193. While other cases are cited, appellant seems to rely more especially upon these two. The appellee also relies on the *Griffin* Case and others. Appellee seeks to distinguish the *British & A. Mortg. Co.* Case from the instant case, in this, that in that case there were no instructions expressly requiring a cash payment, but, on the contrary, payment by draft was suggested, and that, under the facts, it was shown that they did not expect that the maker would collect the cash and present it at the counter of the bank for payment. They point out that in the instant case the Sage

bank, by the plain indorsement on the face of the draft, was expressly required to receive nothing but cash. The case was distinguished in *Griffith v. Merchants Life Asso.* 141 Iowa, 414, 417, 133 Am. St. Rep. 177, 119 N. W. 694. It is no doubt true that the giving of the check of defendant by it to the Sage bank was conditional payment. But it was only a conditional payment.

Payment—by
check on in-
solvent bank.

We said in *Bellevue Bank v. Security Nat. Bank*, 168 Iowa, 707, 150 N. W. 1076, that the general rule is that, when the holder of a check presents it at the counter of the bank upon which it is drawn, and receives payment therefor, the transaction is closed. It was also said in that case that the bank as the collecting agent was within its duty in accepting from the maker of the note a check, if it had reason to believe the same to be good, but that the acceptance of such check operated presumptively only as a conditional payment of the note, and that, upon the dishonor of the check, the condition failed, and that the holder of the note was entitled to maintain his original cause of action. We said further in that case that, whatever difference there may be in the authorities on these propositions, they are sustained by a great weight of authority, and we are committed to them, citing the *Griffin* Case, and *Dille v. White*, 132 Iowa, 327, 10 L.R.A. (N.S.) 510, 109 N. W. 909. The opinion quotes from the *Griffin* Case to the effect that checks, drafts, and so on, are extensively used in commercial transactions, and that, in authorizing an agent to make collections, it may be assumed, in the absence of instructions to the contrary, that the authority is to be executed in the manner usual and customary in the commercial world; that, while the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason

to believe will be honored on presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt, and that, if the instrument is honored by the drawee, payment relates back. The opinion also discusses the question of conditional credit obtained upon the books of the bank as a conditional credit, and that it is subject to the honor of the checks.

But in the instant case there were specific instructions that the draft drawn by the plaintiff upon the defendant should be paid in cash only, or its equivalent. Though it appears that the defendant had an amount on deposit with the Sage bank larger than the draft, still the bank was at that time insolvent, and this fact was known to the Sage bank and the party who took the defendant's check, so that the bank took a worthless check and sought thereby, as the agent of plaintiff, or the bank through whom plaintiff made the draft, to pay the draft, although authorized to accept only cash, or its equivalent. The Sage bank might as well have taken a carload of broken grindstones. Under the authorities before cited, the acceptance of the check would, at most, be a conditional payment. It appears, as before stated, that the check was not charged to the account of the defendant by the Sage bank or its employees. There was, then, no conditional credit on the books of the bank. We do not understand either party to claim anything in that regard, although appellant cites authority to the proposition that the giving of the check by the defendant was an appropriation of the funds in its hands to the payment of the draft. But there were no funds to be appropriated. There was a paper balance in favor of defendant on the bank's books. But the bank was insolvent. We understand appellee to concede that

the bank was, in a sense, plaintiff's agent; that is, for the purpose of collecting the money on the draft. The draft on its face so provides. But they contend, and cite authority, that by accepting a worthless check the bank exceeded its authority, and that, in regard to such excess of authority, the Sage bank was the agent of the defendant, and further, that in so doing it was a matter between the defendant and the Sage bank, which does not affect the rights of the plaintiff as drawer of the draft against the defendant.

Appellee cites *Dille v. White*, 132 Iowa, 327, 347, 348, 10 L.R.A. (N.S.) 510, 109 N. W. 909, to the proposition that the loss incident to the bank's insolvency had already been suffered by defendant as a depositor, and that it cannot shift this loss to the plaintiff by checking it over in payment of the draft, and thus recoup its loss by receiving the goods and keeping them. Other cases are cited by appellee to the effect that the insolvency of an agent revokes the agency, and that the acceptance of a draft for collection by an insolvent bank is a fraud. We shall not take time or space to discuss these later propositions. On the main proposition already discussed, we think there was no final or absolute payment of the draft in question by the check given by the defendant to the Sage bank. In addition to the cases already cited, and as having a bearing, see 2 *Michie Banks & Bkg.* pp. 1395, 1397, 1482; *McFarland v. Howell*, 162 Iowa, 110, 116, 143 N. W. 860; 2 *Bolles, Bkg.* 600; *Gray Bros. v. Otto*, 178 Iowa, 855, 160 N. W. 293; *Morris v. Eufaula Nat. Bank*, 106 Ala. 383, 18 So. 11. Without further discussion, we are of the opinion that the trial court rightly decided the case, and the judgment is affirmed.

Evans, Ch. J., and Weaver and De Graff, JJ., concur.

ANNOTATION.

Check on bank as payment of debts held by bank for collection.

It is a general rule that a bank which is acting as the collecting agent of the owner of a claim has no authority, unless specially conferred, to accept in payment anything but cash. 3 R. C. L. p. 616, § 245. It is a rule prevailing in all but a few jurisdictions, that a check given by a debtor to his creditor for the amount of the indebtedness does not amount to a payment, in the absence of an agreement, express or implied, that it shall amount to payment. 21 R. C. L. 60, § 59. Both of these rules militate against the receipt of a check operating as payment, generally. The latter rule has been applied in case of a check drawn upon the bank holding the claim. In *Bellevue Bank v. Security Nat. Bank* (1915) 168 Iowa, 707, 150 N. W. 1076, the acceptance by a bank holding a claim for collection, of a check drawn upon itself by the debtor, was held to operate as conditional payment only, and, upon the dishonor of the check, the condition was held to fail, and the holder of the note entitled to maintain his original cause of action. In this case the check was not paid, because the account of the drawer had, through a fraudulent scheme, been made to appear larger than it really was, and upon discovery the check was dishonored. In *United States Nat. Bank v. Shupak* (1918) 54 Mont. 542, 172 Pac. 324, the rule that a check is conditional payment only is applied in case of a check drawn on the bank which held the obligation. There were some other facts in this case, however, which militate against it as authority upon the general rule; the note had been sent to the bank for collection; an officer of the bank retained the genuine note and forged a renewal, sending the renewal to the owner; about nine months thereafter the genuine note was presented by the bank to the makers for payment, who gave the check in question.

The rule that the bank has no au-

thority to accept anything but cash has been invoked, and it has been held there is no payment of a draft sent to a bank for collection, where, upon presenting the draft to the drawee, the latter gave the person so presenting it for the bank a check on the bank for the amount, the employee stamping the word "Paid" on the back of the draft, and turning it over to the drawee, but when the employee arrived at the bank, there were no funds to meet the check, and the employee was instructed to return to the drawee's place of business to get the draft, but this was refused. *Western Brass Mfg. Co. v. Maverick* (1893) 4 Tex. Civ. App. 535, 23 S. W. 728. The rule that a bank is not authorized to receive anything but cash is referred to in *Pollak Bros. v. Niall-Herlin Co.* (1911) 187 Ga. 23, 35 L.R.A.(N.S.) 13, 72 S. E. 415, and it is there said that the receipt of the check under the circumstances was equivalent to the actual receipt of the money by the bank. See *infra* for facts in this case.

An exception has been made to the rule that a check does not operate as payment where a bank which holds a claim for collection accepts a check drawn on itself. It is held that such a check does amount to payment if the drawer has sufficient funds to pay it. *Scott v. Gilkey* (1894) 153 Ill. 168, 39 N. E. 265. In this case a check given by the maker of a note held by the bank for the owner, for interest on the note, was held to amount to payment.

It is held in *Baldwin's Bank v. Smith* (1915) 215 N. Y. 76, L.R.A. 1918F, 1089, 109 N. E. 138, Ann. Cas. 1917A, 500, that the holder, and not the maker, of a note payable at a bank, must bear the loss caused by the failure of the bank without remitting or making any record of payment, where the maker had funds on deposit, and the note was sent to the bank for collection and remittance on the due date, while the statute makes such a

note equivalent to a check, at least, where a bank accepts a verbal order to pay the note and charge it to the maker's account. The court said: "If the maker had actually gone to the bank and passed the necessary currency over its counter to pay the note, with a direction thus to apply it, that would plainly have constituted payment. *Smith v. Essex County Bank* (1856) 22 Barb. (N. Y.) 627. If they had sent a check drawn on the bank to pay the note the acceptance of it would have been per se an appropriation of the funds of the drawer, or, to be accurate, of the funds subject to the drawer's order to the payment of the note. *Pratt v. Foote* (1854) 9 N. Y. 463; *Commercial Bank v. Union Bank* (1854) 11 N. Y. 203; *Oddie v. National City Bank* (1871) 45 N. Y. 735, 6 Am. Rep. 160. The verbal order, with the statement of the president of the bank that it would be acted upon, was the equivalent, in legal effect, of a written order and its acceptance." The bank in this case failed seven days after the maturity of the note without having remitted, although during all the intervening time, the makers of the note had more than sufficient funds to their credit with which to meet the note, and the bank had sufficient funds to pay it.

There was held to be a payment of a note owned by a bank, where, a few days before the note was due, the maker called at the bank with a check on the bank drawn by the indorser of the note, and proposed to the bank that the check should be taken as payment of the note. This was declined, but it was agreed that the check should be left, and if the drawer's account was good on the day when the note would fall due, the check would pay the note. On the day the note fell due, the account was not good, but shortly thereafter the account was made good; whereupon the check was charged to the account and the note was credited to discount notes as paid, and also posted in the bill book and marked upon the tickler as paid, and the charge of the check to the drawer was posted from the cash book into the ledger. *Pratt v. Foote*

(1854) 9 N. Y. 463, approved on rehearing in (1854) 10 N. Y. 599. According to the court, upon rehearing, the payment was as complete as if the maker of the note had presented the indorser's check, and had received the money for it, and had then with the money paid the note. Upon the authority of *Pratt v. Foote* it is held in *Commercial Bank v. Union Bank* (1854) 11 N. Y. 203, that the giving of a check by the drawee of a draft in payment of a draft held by the bank, for collection, together with the delivery of the draft as paid to the drawee, amounts to payment, although at the time the drawer of the check had not sufficient funds to meet it. But if not paid by that transaction, according to the court, after the account of the drawer of the check was made good, there was a payment.

Where, in accordance with a course of dealing, it must be assumed that a bank was directed by the maker to pay a note which was sent to it for collection out of the deposit then standing therein to the maker's credit, and, on the day of the maturity of the note, the bank draws its draft for the purpose of transmitting the proceeds to the owner, stamps upon the face of the note "Paid," and perforates the note in three places, and puts the note thus stamped and mutilated in the file with checks so that a proper record of the transaction may be entered at the end of the day upon the permanent books, there is a payment of the note which is good as against an assignee for the benefit of creditors of the maker who, at this point, notifies the bank of the assignment and requests the bank to hold the account. *Nineteenth Ward Bank v. First Nat. Bank* (1903) 184 Mass. 49, 67 N. E. 670.

In *Bartley v. State* (1897) 53 Neb. 310, 73 N. W. 744, approved on rehearing in (1898) 55 Neb. 294, 75 N. W. 832, a prosecution for embezzlement in which it appeared that the state treasurer had, upon presentation of a warrant through a bank, drawn his check upon the bank for the amount of the warrant, and received the warrant as paid, the court says

that these facts "constituted a segregation or separation of the amount of dollars expressed in the check from the general mass of money in the bank as the portion belonging to the state, and passed the title to the latter." Continuing, the court says: "In contemplation of the parties, and in the eye of the law, the segregation was as full and complete as though Mr. Millard, the president of the bank, upon the delivery of the check to him, had stepped into the vault and counted out [the amount involved], placed it upon the counter, charged the state with that amount on the bank books, credited the Chemical National Bank [the holder of the warrant] with a like sum, delivered the warrant to the defendant, and then returned the money to the vault from whence it came; or as if the check had been made payable to the defendant's own order, by himself presented to the paying teller at the bank for payment, who selected from the mass of money in the bank the sum represented by the check, placed the same in the pile on the counter, and then, by direction of the defendant, applied the same in payment of the warrant."

There is payment of a draft drawn upon the customer of a bank, where the customer directed the officers of the bank to pay the draft and charge it to his account, which the bank agreed to do, and did charge the amount to the account of the customer, and drew a draft in favor of the owner of the draft collected, for the amount of the collection. *Welge v. Batty* (1882) 11 Ill. App. 461. The fact that the bank failed two days afterwards, and that the draft drawn by it in payment of the collection was dishonored, cannot reinstate the liability of the debtor to the creditor. According to this court the law did not require the giving back the first counting of the money out of the bank, to the debtors, and then paying back to the bank for the draft.

The agreement of a bank which holds a note for collection, with the maker, to pay the note out of a special deposit of the maker, and the cancellation and surrender of the note to the

maker pursuant to such an agreement, are held to amount to payment in *Belk v. Capital F. Ins. Co.* (1918) 102 Neb. 702, 169 N. W. 262.

In *Sayles v. Cox* (1895) 95 Tenn. 579, 32 L.R.A. 715, 49 Am. St. Rep. 940, 32 S. W. 626, where a note sent to a bank for collection was paid by the maker by delivering the check of a third person upon the bank, the court says: "The fact that George paid his note to the bank in a check upon itself can make no difference, as it was equivalent to a payment in money, even if the bank had failed the same day."

There was held to have been a payment of a note in *Bierce v. State Nat. Bank* (1912) 33 Okla. 776, 127 Pac. 856, where an indorser of the note sent to the bank owning it the check of a third person upon the bank for the amount of the note, which the bank accepted and charged to the drawer's account, marking the note "Paid." No question of loss through insolvency arose in this case, the question being one of ownership of the note. Although there is some language used in the opinion indicating that the check did not amount to payment until the check was itself paid, the general tenor of the opinion seems to be that the acceptance of the check by the drawee bank, where the drawer had funds to meet it, constituted payment.

A case bearing some resemblance in facts to the facts involved in the question under annotation is *Daniel v. St. Louis Nat. Bank* (1899) 67 Ark. 223, 54 S. W. 214. In that case the maker of a note which had been sent to the bank for collection deposited money in the bank, which gave him a receipt for it, acknowledging a receipt of the sum deposited as part payment on the note. The instructions in this case treat the fact more as if the bank had the amount thus deposited in its custody, and it is held that if the owner of the note and the bank in question were correspondents, and, after the bank received the note for collection, it had money belonging to the maker which the maker directed to be paid on this note, and at the

same time the bank charged up to the maker the amount of the money thus on deposit, and credited the owner of the note with the amount in the usual course of business, that the transaction would amount to payment, and this was held although the bank making the collection failed on the next day, and returned the notes to its correspondent bank without credit of the sum thus paid.

Where the maker of notes which had been left by the owner with the bank executed new notes payable directly to the bank, but where he was not credited by the bank with any money, there was held to be no payment of the notes, although the owner of a note, in one instance, was credited on the ledger of the bank with the proceeds of the note. *Scott v. Gilkey* (1894) 153 Ill. 168, 89 N. E. 265.

There was held to be a payment of a draft in *Howard v. Walker* (1898) 92 Tenn. 452, 21 S. W. 897, where it was sent by the owner through his bank to a bank in the city of the drawee's residence, and upon presentation to the drawee he directed that it be taken to his bank for payment, whereupon it was included with other paper in making the usual daily settlement according to the custom of the banks, and was, by the drawee's bank, charged to the account of the drawee, canceled and delivered up to the drawee, upon making up his pass book, leaving still a balance to the credit of the drawee in the bank. At the date of the settlement both banks were insolvent, but their officers did not know it until afterwards. There was no remittance of the amount thus collected.

Among the cases which have expressly considered the effect of the insolvency of the bank, there is a difference of opinion as to whether or not the check operates as payment. That it does not, see the reported case (*SANITARY CAN CO. v. NATIONAL PICKLE & CANNING CO.* ante, 532).

A check upon an insolvent bank in payment of a claim held by it for collection was held not to be payment in *United States Nat. Bank v. Shupak* (1918) 54 Mont. 542, 172 Pac. 324.

The court here said that the note could not be paid by giving the worthless check, since the maker did not part with anything of value, or alter his situation to his prejudice. See *supra* for facts.

But other cases hold that the transaction amounts to payment even in case the bank is insolvent. *Pollak Bros. v. Niall-Herin Co.* (1911) 137 Ga. 23, 35 L.R.A.(N.S.) 13, 72 S. E. 415; *State ex rel. North Carolina Corp. Commission v. Merchants & Farmers Bank* (1905) 137 N. C. 697, 50 S. E. 308, 2 Ann. Cas. 537 (obiter). And see *Howard v. Walker* (1898) 92 Tenn. 452, 21 S. W. 897, *supra*.

In *Pollak Bros. v. Niall-Herin Co.* (Ga.) *supra*, although the bank at the time of the transaction was insolvent, it was not known to be so, either by the debtor or by the officers of the bank. In holding that the giving of the check amounted to payment, the court says: "We dare say that no depositor who paid a note or draft payable at his own bank ever went through the senseless ceremony of first taking out his money at one window and immediately paying it in at another window. He pays the note or demand which his bank holds against him with his check; and if he has the money to his credit, and the bank is a going concern, with money on hand sufficient to cash the check, the payment is equivalent, in law and in fact, to a payment in money. What sound reason can be advanced to require, as essential to the validity of the payment, the useless formality of the depositor taking his money from the bank officer and immediately restoring it to him? The draft was in the possession of the bank, which had a legal right to receive the money in payment, which was also in its custody, and when the bank accepted its depositor's check in payment of the draft, canceling and delivering it to him, and entered the transaction on its books, thenceforward the draft was paid, and the bank held the money as the agent of the drawer. The bank's failure after the remittance of the collection by check, and the consequent inability of the drawer to

realize on the check, did not and could not affect the past transaction."

The delivery of a certificate of deposit payable upon demand to a bank in discharge of a note held by it for collection, at a time when the bank was paying all claims and transacting a banking business, amounts to a payment of the note. *British & A. Mortg. Co. v. Tibballs* (1884) 63 Iowa, 468, 19 N. W. 319. Some doubt is thrown upon the decision in this case by the decision in the reported case. It seems difficult, at least, to reconcile them. In the *Tibballs* Case, the court says: "There can be no doubt that if Massey had presented his certificates he would have been paid. If he had done this and immediately returned the money to the cashier, it is conceded that this would have been payment. . . . The law does not require any such vain and unnecessary formality in the transaction of business." It was shown in evidence that it was customary for this particular bank, and indeed for all other banks, to receive their certificates of deposit in payment of claims in the hands of the bank for collection, but it was not shown that the owner of this particular claim had notice of such custom. The court says, however, that it is not necessary, either to prove the custom or bring notice of it home to the plaintiff, but courts take judicial notice of the general customs and usages of merchants and of whatever ought to be generally known within the limits of their jurisdiction; and the court concludes: "We think that the system by which nearly all the banks in this country transact monetary affairs by the use of checks, drafts, and certificates of deposit, and without the actual handling of bank notes or coin, is so well known and understood that no business man,

much less a company whose sole occupation is loaning money, should be allowed to profit by pleading ignorance of it." When the interest coupon which was involved in this case was transmitted to the bank, it was accompanied with a letter from the owner to the bank, in which it was stated that, although the same was payable in gold coin, yet the bank might receive currency in payment. And the letter accompanying the note involved directed that the note, mortgage, and release should be delivered in exchange for a New York draft, free of exchange, for the amount represented by the note and the interest coupon. This direction of the plaintiff is held to show very plainly that it was not expected that the debtor should collect together bank notes or coin and present himself at the counter of the bank and count it down in payment. It was claimed that the bank was insolvent on the day of the transaction. As to the effect of this the court says: "If it were shown that Massey [the debtor] knew this at the time of the transaction, there might be ground for the claim that he ought not to have intrusted the bank with making the application of the certificates of deposit. But the evidence does not show that Massey knew that the bank was then insolvent. On the other hand, the court was fully warranted in finding from the evidence (which we need not set out) that Massey supposed and had reason to believe that the bank was solvent and responsible. He knew that the plaintiff had intrusted its collections in Monroe county to the bank, and he had paid the previous interest coupons to the bank, and most of them in certificates of deposit."

W. A. E.

KINNEY-ROME COMPANY
v.
FEDERAL TRADE COMMISSION.

United States Circuit Court of Appeals, Seventh Circuit — September 8, 1921.

(275 Fed. 665.)

Unfair trade — giving premiums to salesmen of retailers who purchase products.

The giving through arrangement with the retailers, of premiums, by a manufacturer, to salesmen of retailers, through whom he markets his products, as an inducement to push his product in preference to that of competitors, is not a violation of the Federal Trade Commission Act, making unlawful unfair methods of competition in commerce.

[See note on this question beginning on page 549.]

PETITION to review an order of the respondent Trade Commission that petitioner cease and desist from giving premiums to salesmen of retailers through whom it markets its products, in alleged violation of the Federal Trade Commission Act, making unlawful unfair methods of competition. *Order annulled.*

The facts are stated in the opinion of the court.

Argued before Evans and Page, Circuit Judges, and Carpenter, District Judge.

Mr. Colvin C. H. Fyfe for petitioner.

Mr. Marshall B. Clarke for respondent.

Page, Circuit Judge, delivered the opinion of the court:

This is an original petition filed by petitioner to review an order made by the Federal Trade Commission, respondent, in a proceeding wherein respondent had filed its complaint, charging that petitioner was engaged in manufacturing and selling bed springs in interstate commerce in direct competition with other corporations similarly engaged, and that "respondent [petitioner] for more than one year last past, with the intent, purpose, and effect of stifling and suppressing competition in the manufacture and sale of bed springs and kindred products, in interstate commerce, has given and offered to give premiums, consisting of necktie sets, . . . to the salesmen of merchants handling the products of the respondent [petitioner] and those

of its competitors, as an inducement to influence them to push the sales of respondent's [petitioner's] products, to the exclusion of the products of its competitors."

The matter was submitted to the respondent upon an agreed state of facts, in substance as follows: "That the respondent, the Kinney-Rome Company, in the course of its business of manufacturing and selling 'de luxe' bed springs, has . . . given and offered to give premiums, such as necktie sets, etc., . . . to the salesmen of merchants handling the products of the respondent and those of its competitors, when such salesmen have been instrumental in making a sale of respondent's 'de luxe' bed springs; these premiums being given with the knowledge and consent and through arrangements with the merchants who are the employers of said salesmen. . . . Salesmen of respondent's said customers do not explain the above-described system of premiums to persons to whom they sell the said 'de luxe' bed springs, so far as is known to respondent."

(275 Fed. 665.)

The findings of fact followed the stipulation of facts, and stated this conclusion: "That the methods of competition set forth in the foregoing findings, as to the facts under the circumstances set forth, are unfair methods of competition in interstate commerce in violation of the provisions of § 5" of the Federal Trade Commission Act of September 26, 1914. 38 Stat. at L. 717, chap. 311, Comp. Stat. § 8836e, 4 Fed. Stat. Anno. 2d ed. p. 577.

Thereupon respondent entered the order here complained of, which is in part: "It is ordered that the respondent . . . cease and desist from directly or indirectly giving . . . premiums, such as necktie sets, . . . to salesmen or employees of merchants handling the products of the respondent and those of one or more of its competitors, where such salesmen or employees have been instrumental in making a sale of the respondent's products."

Section 5 provides that:

"Unfair methods of competition in commerce are hereby declared unlawful" and "the commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect."

1. In *Federal Trade Commission v. Gratz*, 253 U. S. 421, 64 L. ed. 993, 40 Sup. Ct. Rep. 572, it is said: "The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts not

the commission, ultimately to determine as matter of law what they include."

While the exact words "unfair methods of competition" have not been frequently, if at all, used in the decisions, yet "unfair competition" and "unfair trade" have been repeatedly the subject of consideration and discussion by Federal and state courts, and several times in this circuit. In *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 436, 24 U. S. App. 395, 64 Fed. 845, this court said: "The right of appellees to relief is . . . rested upon principles applied by courts of equity in cases analogous to cases of trademarks, where the relief is afforded upon the ground of fraud."

In *G. W. Cole Co. v. American Cement & Oil Co.* 65 C. C. A. 105, 130 Fed. 703, it was stated by this court: "The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of a complainant to enjoy the good will of a trade built up by his efforts, and sought to be taken from him by unfair methods."

In *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, at page 604, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 168, it was said: "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff."

In *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609, the court stated: "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to

palm off its goods as those of complainant, the action fails."

In *International News Service v. Associated Press*, 248 U. S. 215, at page 241, 63 L. ed. 211, 2 A.L.R. 293, 39 Sup. Ct. Rep. 73, it was said: It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of complainant, characteristic of the most familiar if not the most typical, cases of unfair competition [citing *Howe Case*, supra]. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business, because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own."

See also *Keystone Type Foundry v. Portland Pub. Co.* 108 C. C. A. 508, 186 Fed. 690; *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.* 25 C. C. A. 314, 46 U. S. App. 709, 80 Fed. 105; *Rathbone S. & Co. v. Champion Steel Range Co.* 37 L.R.A. (N.S.) 258, 110 C. C. A. 596, 189 Fed. 30; *Bates Mfg. Co. v. Bates Numbering Mach. Co.* (C. C.) 172 Fed. 892; *West Pub. Co. v. Edward Thompson Co.* (C. C.) 169 Fed. 833; *Manitowoc Malting Co. v. Milwaukee Malting Co.* 119 Wis. 543, 97 N. W. 389; *Sartor v. Schaden*, 125 Iowa, 696, 101 N. W. 511; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426, 4 L.R.A. (N.S.) 447, 106 N. W. 595; *Rocky Mountain Bell Teleph. Co. v. Utah Independent Teleph. Co.* 31 Utah, 377, 8 L.R.A. (N.S.) 1153, 88 Pac. 26; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.) 121 Fed. 357;

American Brewing Co. v. Bienville Brewery (C. C.) 153 Fed. 615.

There are many other cases in the Federal courts which cite the *Howe* and *Goodyear Cases*.

2. It is not conceived that Congress, which laid down no definition whatever, intended to either limit or extend the matters which constituted unfair methods of competition prior to the passage of the Clayton Act (*Curtis Pub. Co. v. Federal Trade Commission*, — C. C. A. —, 270 Fed. 881, 908), but that its object was the creation of a board of commissioners, who, as stated in *Sears, R. & Co. v. Federal Trade Commission*, 6 A.L.R. 358, 169 C. C. A. 323, 327, 258 Fed. 311, "are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."

We conclude, from the discussion of the term "unfair competition" by the courts, and we are of opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an "unfair method of competition."

Unfair trade—
giving premiums
to salesmen of
retailers who
purchase
products.

3. Without, perhaps, admitting petitioner's conclusions, even if its premises are true, respondent vigorously assails those premises, saying: "Petitioner's whole brief is based on this false assumption,—that the manufacturer is justified in doing whatever the dealer may do."

We are of opinion that the assumption is not false, but is fully justified. The stipulated facts show: "These premiums being given with the knowledge and consent and through arrangements with the merchants who are employers of said salesmen."

It cannot be that a merchant may personally do a thing touching his business that is legal, but that it becomes illegal when done by another through his procurement. When petitioner did the things complained of through arrangement with the merchants, the merchants became parties to the act. As it effected sales of their property, presumably they profited by the arrangement. If it was lawful as to one, it was lawful as to the other.

4. In determining whether there was used "an unfair method of competition," it must always be kept in mind that the thing complained of was done in the merchant's business through an arrangement with him. What, then, may the merchant do? In *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, at page 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 551, the Supreme Court said: "The trader or manufacturer . . . carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

That case has been repeatedly approved, and a portion of that language was used in *United States v. Colgate & Co.* 250 U. S. at page 307, 63 L. ed. 996, 7 A.L.R. 443, 39 Sup. Ct. Rep. 468. In respondent's brief is asserted a self-evident truth, viz.: "The manufacturer has no such relation to the goods after he has sold them as entitles him to control their resale by the dealer."

This means that not only petitioner, but every manufacturer, is excluded from all right to control the merchant in his resale of his goods. No one, then, having any right to interfere in his business, or to control in any way the resale of his goods, the merchant may do and permit to be done anything in con-

nection with his business that he may see fit, and those he permits to participate in his business may do anything in that business permitted by him, and no one has any right to complain, unless that which is done amounts to a fraud upon his rights. If such right did not belong to the merchant, then he would not have the ordinary rights of contract that belong to every man, and he would be compelled to carry the burdens, risks, and hazards of a business, subject, without his consent, to the control of every manufacturer who might have sold him a bill of goods.

5. The rights which it is urged have been affected are the rights of other manufacturers and also the rights of the public. Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered. It is conceded that no manufacturer had any right to interfere in the merchant's business. It is equally true that, when any manufacturer sold to the merchant, he met, overcame, and ended any competition in which he had any interest. His interest in those goods was terminated, and when they again entered the channels of trade they entered as the goods of a new owner, along with the other goods owned by him. The new owner's problems were with other retail dealers, handling oftentimes goods identical in make and kind with his own, and competing for the favor of the buying public. It needs no discussion to show that that was wholly his competition, to be met in his own way, by his own methods, and in it the manufacturer had no part. Any plan or scheme to advance one kind of goods and to keep back another is a matter wholly and absolutely under the control of the merchant in meeting his problems in his competition, and does not constitute a fraud, nor is it unfair to anyone who does not own the goods.

Likewise the public, if it has an interest in competition, has such in-

terest only in the competition between different merchants. It has no right to demand for itself that a merchant shall set up a competition in his own house and between his own goods. The channels of trade that must be kept open for the manufacturer are those that run between him and other manufacturers, and necessarily end when he has sold. The channels of trade that must be kept open for the buying public do not run through the retailer's store, but do run between the different stores seeking the favor of the buying public.

6. We are of opinion that there can be nothing in the contention that some special interest in a clerk which is undisclosed to the buying public represents an unfair method of competition, because of an incentive and opportunity of the clerk to deceive the public. Undoubtedly the clerk, with the master's consent, may discriminate between the master's goods. All of the buying public, with at least ordinary knowledge and intelligence, knows that a salesman is representing the merchant's interest, and that every merchant may and very frequently does have reason for pushing the sale of one kind of goods more than another; but, if that were not true, it would be little less than an ab-

surdity to say that a salesman, who often is the merchant himself, in order to escape the charge of unfairness, must disclose to every would-be buyer his interest in the transaction in hand. That is just what the contention, if allowed, would lead to.

Nor is it conceived that there is any danger from falsehood or misrepresentation. A salesman, with the master's consent, may discriminate all he pleases between the goods he has to sell. Neither a salesman having a special interest in one article, where he has many to sell, nor a salesman with a single article to sell, has any right to indulge in falsehood and misrepresentation; but there is here no evidence of falsehood or misrepresentation.

The order to cease and desist is annulled and set aside.

NOTE.

The validity and construction of the statute creating the Federal Trade Commission is the subject of annotations in 6 A.L.R. 366, and 11 A.L.R. 797, which are supplemented by the annotation following *NEW JERSEY ASBESTOS CO. v. FEDERAL TRADE COMMISSION*, post, 549.

NEW JERSEY ASBESTOS COMPANY

v.

FEDERAL TRADE COMMISSION.

United States Circuit Court of Appeals, Second Circuit—February 26, 1920.

(264 Fed. 509.)

Trade commission — jurisdiction — presents to employees.

1. The giving of social entertainment to employees to induce them to influence their employers to make purchases does not so affect the public as to come within the jurisdiction of the Federal Trade Commission.

[See note on this question beginning on page 549.]

Evidence — judicial notice — incidents of business.

2. The court takes judicial notice that the entertainment of customers'

employees by persons having goods for sale has been an incident of business from time immemorial.

[See 15 R. C. L. 1122.]

Master and servant—discharge for taking bribes.

3. The payment of money or giving of valuable presents to an employee to induce him to influence his employer

to make a contract of purchase is a fraud justifying the discharge of the employee within the contract term of service.

[See 18 R. C. L. 518.]

PETITION to review an order of the Federal Trade Commission finding the respondent company guilty of using unfair methods of competition. *Reversed.*

The facts are stated in the opinion of the court.

Argued before Ward, Rogers, and Manton, Circuit Judges.

Mr. Robert W. Crawford for petitioner.

Messrs. Edward L. Smith, Claude R. Porter, and Charles S. Moore for respondent.

Ward, Circuit Judge, delivered the opinion of the court:

January 6, 1919, the Federal Trade Commission issued a complaint against the New Jersey Asbestos Company, under § 5 of the Act of September 26, 1914 (Comp. Stat. § 8836e, 4 Fed. Stat. Anno. 2d ed. p. 577), entitled, "An Act to Create a Federal Trade Commission, to Define its Powers and Duties, and for Other Purposes," alleging that the company had, during the year 1918, been giving to employees of its customers and prospective customers, liquors, cigars, meals, theater tickets, valuable presents, and sums of money and entertainments, to induce them to influence their employers to purchase the company's products, and that a proceeding by the commission in respect thereof would be to the interest of the public.

The company filed an answer, admitting that it is engaged in interstate as well as intrastate business, and that it had paid reasonable amounts in furnishing entertainment to employees of customers, and as incidental to such entertainment had supplied liquors, cigars, meals, and theater tickets, but denying that this was done for the purpose of inducing them to influence their employers to buy its goods, and especially denying that it ever gave them valuable presents or sums of money.

The charge of giving valuable presents and sums of money has been abandoned by the commission. May 27, 1919, the commission filed its report and two findings of fact, and its conclusion of law, as follows:

"First. That the respondent, the New Jersey Asbestos Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New Jersey, having its principal office and place of business at the city of New York, in the state of New York, and is now, and for more than one year last past has been, engaged in manufacturing and selling engine packings composed of asbestos, metal and asbestos, flax, wood fiber, and kindred products, throughout the states and territories of the United States, and that, at all times hereinafter mentioned, the respondent has carried on and conducted such business in direct competition with other persons, firms, copartnerships, and corporations manufacturing and selling like products.

"Second. That said respondent, the New Jersey Asbestos Company, in the course of its business of manufacturing and selling engine packings composed of asbestos, metal and asbestos, flax, wood fiber, and kindred products, throughout the states and territories of the United States, for more than one year last past, has been lavishly giving gratuities, such as liquor, cigars, meals, theater tickets, and entertainment, to employees of customers as an inducement to influence their employers to purchase or to contract to purchase from the said respondent,

the New Jersey Asbestos Company, engine packings composed of asbestos, metal and asbestos, flax, wood fiber, and kindred products, without other consideration therefor.

"Conclusion.

"That the methods set forth in the foregoing findings of fact, under all the circumstances therein set forth, are unfair methods of competition, in violation of the provisions of § 5 of the act of Congress approved September 26, 1914, entitled, 'An Act to Create a Federal Trade Commission, to Define Its Powers and Duties, and for Other Purposes.'"

The findings of fact being mere conclusions, it is necessary to examine the evidence to see whether they are supported by any testimony or not. It shows that the officers of the company in the year 1918 did entertain at the company's expense both customers and employees of customers, and that the salesmen down to May 1st were employed on a salary or on a salary and commission basis, and were allowed to charge in their monthly accounts reasonable lump sums for entertainment. After May 1st they were on a commission basis only, and any entertainment given by them was given at their own expense.

We have held in *Federal Trade Commission v. Gratz*, 11 A.L.R. 793, 169 C. C. A. 330, 258 Fed. 314, that only unfair practices which affect the public, as distinguished from individuals, are within the jurisdiction of the commission. We take

**Evidence—
judicial notice—
incidents of
business.**

judicial notice of the fact that the method of entertainment found to be unfair has been an incident of business from time immemorial. It is recognized by article 133 of the regulations covering the assessment of income tax promulgated January 2, 1918 as follows:

"Spending money. — So-called spending or treating money, if actually advanced by corporations to

their traveling salesmen to be used by them as a part of the expenses incurred in selling the product of such corporations, is an allowable deduction in a return of income by such corporations. The deduction of such expenditures is conditioned upon a satisfactory showing that all the allowance claimed as a deduction was actually expended for and was an ordinary and usual expense incurred in selling the product or merchandise of the corporation."

The payment of money or the giving of valuable presents to an employee to induce him to influence his employer to make a contract of purchase is a fraud justifying the discharge of the employee within his

**Master and
servant—
discharge for
taking bribes.**

contract term of service, and perhaps the recovery by the purchaser of the amount or value of such inducement from the seller, upon the theory that it must have been included in the price. But even in such a case we think it would be a matter between individuals, and not one so affecting the public

**Trade
commission—
jurisdiction—
presents to
employees.**

as to be within the jurisdiction of the commission, under our decision in the *Gratz Case*, supra. However, it stretches theory to the breaking point to suppose that the entertainment expenses found unfair in this case constitute fraud practised by the respondent and by the employees on the purchasers of the respondent's goods. It is difficult to conceive that the purchaser would have a right to recover the amount of such entertainment as a part of the price paid for the goods bought, or that he would have a right to discharge the employee within the term of his service on this ground. So broad a construction of the statute would bring within the disposition of the commission a vast number of subjects and controversies which in their nature belong to the legislative and judicial departments of the government. For instance, advertising is a method of selling goods which

without increasing their merits, increases their cost; and so does securing servants of competitors by paying them higher wages, though

we suppose no one would say the act gives the commission a right to regulate these matters.

The order is reversed.

ANNOTATION.

Validity and construction of statute creating Federal Trade Commission.

Only the more recent cases discussing the validity and construction of the statute creating the Federal Trade Commission (Act of September 26, 1914, chap. 311, 38 Stat. at L. 717, Comp. Stat. § 8836a, 4 Fed. Stat. Anno. 2d ed. p. 575) are reviewed in this note. The earlier cases on the subject are collected in the annotations in 11 A.L.R., at page 797, and in 6 A.L.R., at page 366.

The validity of the act has been reaffirmed in the two cases in which that question has been raised since the previous annotation was written. See *National Harness Mfrs' Asso. v. Federal Trade Commission* (1920) — C. C. A. —, 268 Fed. 705; *T. C. Hurst & Son v. Federal Trade Commission* (1920) 268 Fed. 874. In the former case it was contended that the Federal Trade Commission Act conferred legislative, executive, and judicial powers and functions on one administrative body contrary to articles 1, 2, and 3 of the Constitution. The court held, however, that Congress had the power to authorize an administrative commission to determine the question of fact as to what methods of competition were employed by a given trader, and to decide provisionally the mixed question of law and fact whether such methods were unfair. This authority conferred on the commission was held to be a valid executive and administrative one, and since by the terms of the act creating it no order of the commission could be enforced without obtaining an order from the circuit court of appeals, it was held that no judicial powers were delegated to the commission. The court refused to pass on the validity of the section of the Federal Trade Commission Act relating to the right of the commission or its agents to access to the

documentary evidence of any corporation investigated, since the commission in the case before the court had not attempted to exercise that right.

In *T. C. Hurst & Son v. Federal Trade Commission* (Fed.) supra, the court stated that it was clearly within the power of Congress to legislate generally with respect to the burdens that might or might not be imposed on foreign or interstate commerce. Under this power it was held that Congress could declare what would be fair and what unfair methods and dealings in relation to such commerce, and authorize a commission to make findings of fact as to such dealings, and render an order in relation thereto subject to the requirement that the order should be enforced only through the judgment of the circuit court of appeals in the exercise of its supervisory power of review.

In *Federal Trade Commission v. Beech-Nut Packing Co.* (U. S. Adv. Ops. 1921-22, 178) — U. S. —, 66 L. ed. —, — A.L.R. —, 42 Sup. Ct. Rep. 150, it is said that Congress, in enacting the Federal Trade Commission Act, deemed it better to leave the "unfair methods of competition" declared unlawful thereby, without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes.

It is within the power of the Federal Trade Commission to make an order forbidding any practice having a dangerous tendency unduly to hinder competition or to create monopoly. *Federal Trade Commission v. Beech-Nut Packing Co.* (U. S. Adv. Ops. 1921-22 178) — U. S. —, 66 L. ed. —, A.L.R. —, 42 Sup. Ct. Rep. 150.

The commission may make an order enjoining manufacturers and distributors from combining to refuse to sell

to a concern on the terms and prices charged competitors. *Western Sugar Ref. Co. v. Federal Trade Commission* (1921) 275 Fed. 725.

In *KINNEY-ROME CO. v. FEDERAL TRADE COMMISSION* (reported herewith) ante, 542, the circuit court of appeals of the seventh circuit expresses the opinion that there must be some fraud in trade that injures a competitor or lessens competition, before it can be said that there has been used an "unfair method of competition" within the meaning of the act.

In *Federal Trade Commission v. Beech-Nut Packing Co.* (U. S. Adv. Ops. 1921-22, 178) — U. S. —, 66 L. ed. —, — A.L.R. —, 42 Sup. Ct. Rep. 150, it was held, reversing the decision of the circuit court of appeals in (1920) 264 Fed. 885, noted in the annotation in 11 A.L.R. 798, that the unfair methods of competition which the Federal Trade Commission is empowered to condemn and suppress embrace a resale-price plan adopted by a manufacturing corporation, in so far as in its practical operation, though without agreement, express or implied, it necessarily constrains the jobber, wholesaler, or retailer, if he would have the company's products, to maintain the prices "suggested" by it, his failure to do so subjecting him to liability to be reported to the company either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it, and causing him to be enrolled upon a list known as "undesirable-price cutters," to whom goods are not to be sold, and who are only to be reinstated as those whose record is "clear," and to whom sales may be made, upon their giving satisfactory assurance that they will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices. The court said: "From this course of conduct a court may infer—indeed, cannot escape the conclusion—that competition among retail distributors is practically suppressed, for all who would deal in the

company's products are constrained to sell at the suggested prices. Jobbers and wholesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated, or who are on the company's list of undesirables, until they are restored to favor by satisfactory assurances of future compliance with the company's schedules of resale prices. Nor is the inference overcome by the conclusion, stated in the commission's findings, that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, which are quite as effectual as agreements, express or implied, intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods. Under the facts established we have no doubt of the authority and power of the commission to order a discontinuance of practices in trading such as are embodied in the system of the Beech-Nut Company."

In *Standard Oil Co. v. Federal Trade Commission* (1921) 17 A.L.R. 389, — C. C. A. —, 273 Fed. 478, it appeared that an order was issued by the Federal Trade Commission requiring certain wholesale vendors of oil products to desist from making or enforcing contracts whereby retail vendors agreed to lease a pump, tank, or other equipment for handling petroleum products at a rental which would not yield a reasonable profit on its cost, and to use such pump, tank, or other equipment only for storing or handling the products of the lessor. The order was reversed on the ground that the practice forbidden was not an unfair method of competition. As to the contention that the practice tended to produce a monopoly, the

court said: "It may be admitted that one function of the Trade Commission is to discern and suppress such practices in their beginning; but a thing exists from its beginning, and it is not a conclusion of law, from any facts here found, that a system which, at least, is keenly competitive, extremely advantageous to the public, and, in the opinion of a majority of the competent witnesses, economical, is at present unfair to anyone or unfair because tending to monopoly. A tendency is an inference from proven facts, and an inference from the facts as found by the commission is a question of law for the court. As matter of law there is at present no violation of the Trade Commissions Statute; therefore the first of respondent's contentions cannot be sustained."

In *Curtis Pub. Co. v. Federal Trade Commission* (1921) — C. C. A. —, 270 Fed. 881, the court held that, in view of the long period of effort required to build its novel sales organization, composed of schoolboys, and distributing agents drawn chiefly from the schoolboy salesmen, the Curtis Publishing Company did not engage in an unfair method of competition in requiring its distributing agents to agree not to act as agents for or supply at wholesale rates any periodicals other than those published by the Curtis Company. The court further held that the finding by the Federal Trade Commission that the insistence of the Curtis Publishing Company on the exclusive services of its distributing agents was an unfair method of competition was not a finding of fact which was intended to be conclusive within the meaning of the clause in the act providing "that the finding of facts, if supported by testimony, shall be conclusive." It was also decided that the circuit court of appeals, though bound by the commission's finding of facts, if supported by testimony, was authorized to consider other facts appearing in the transcript of the testimony and proceedings before the commission. On this point the court said: "Now, it is very apparent that, where the

supervisory review by the circuit court of appeals, which Congress invoked, provided that that court 'shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript, a decree,' it is the province, and indeed the duty, of the reviewing court to consider not merely the findings of the commission, but the whole record, the whole proofs, and the whole proceeding, and to say, first, whether, in view of all the proofs, the limited facts found by the commission really passed on the pertinent and decisive facts, and so warranted an injunction; and, second, if such limited facts do not reach the merits, and do not alone legally justify and warrant a decree of unfair competition and injunctive relief, then, since Congress has enacted that the circuit court of appeals 'shall make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission,' it is quite clear that it is not only the province, but the duty, of the circuit court of appeals, and indeed the expressed purpose of Congress, that such reviewing court should itself examine the pleadings, the entire testimony and proceedings, and upon such inclusive examination determine whether the facts found by the commission and the proofs on which the commission made no findings, and which the court, in the absence of such finding, itself finds and determines, legally established a case of unfair business competition by the Curtis Company. Taking, therefore, the record, proofs, and pleadings as a whole, we hold as a legal and judicial conclusion that the proofs are not such as can support a judgment or decree of unfair competition on the part of the Curtis Company toward the Pictorial Company and the Crowell Company."

In *Winsted Hosiery Co. v. Federal Trade Commission* (1921) — C. C. A. —, 272 Fed. 957, the commission found that the petitioner in its interstate trade sold certain brands of underwear which were made partly

of cotton, with the labels "Men's Natural Merino Shirts," "Men's Gray Wool Shirts," and similar labels containing the word "wool" or "worsted." It was also found that for twenty years it had been a general custom and practice in the underwear business to brand wearing apparel made partly of cotton, with the labels used by the petitioner. The commission, on the basis of its findings of facts, issued an order requiring the petitioner to desist from using on goods not made wholly of wool, labels containing the words "merino," "wool," or "worsted," unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garment was composed, or by a word or words otherwise clearly indicating that the garment was not made wholly of wool. In reversing the order the court said: "The commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public, and if such method of competition is prohibited by the act, to issue an order requiring the person or corporation using it to cease and desist from doing so. . . . In this case there was obviously no unfair method of competition as against other manufacturers of underwear. The labels were thoroughly established and understood in the trade. There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly. Manifestly no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition or for an injunction or damages under the Anti-trust Act. Assuming that some customers are misled because they do not understand the trade signification of the labels, or because some retailers deliberately deceive them as to its meaning, the result is in no way connected with unfair competition, but is like any other misdescription or misbranding of prod-

ucts. Conscientious manufacturers may prefer not to use a label which is capable of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but it is, in our opinion, not within the province of the Federal Trade Commission to do so."

In *NEW JERSEY ASBESTOS Co. v. FEDERAL TRADE COMMISSION* (reported herewith) ante, 546, it is held that the practice on the part of a trader of providing customers and employees of customers with entertainment, liquor, cigars, meals, or theater tickets, is not an unfair method of competition affecting the general public. The court follows the decision in *Federal Trade Commission v. Gratz* (1919) 11 A.L.R. 793, 169 C. C. A. 380, 258 Fed. 314, in holding that the jurisdiction of the Federal Trade Commission is restricted to the protection of the public from unfair methods of competition, and does not empower the commission to interfere with methods of competition merely because they are unfair as between individuals.

And in *KINNEY-ROME Co. v. FEDERAL TRADE COMMISSION* (reported herewith) ante, 542, the court annulled an order requiring a manufacturer to desist from its practice, through arrangement with retailers, of giving premiums to the salesmen of the retailers through whom it marketed its product, as an inducement to push its product in preference to that of its competitors, since that practice was not an "unfair method of competition" within the act.

In *National Harness Mfrs' Assn. v. Federal Trade Commission* (1920) — C. C. A. —, 268 Fed. 705, it was held to be an unfair method of competition and a matter of public interest for an association to induce, coerce, or compel manufacturers of harness and saddlery goods to refuse to recognize as legitimate jobbers entitled to buy from manufacturers at jobbers' prices and terms individuals and firms carrying on a combined and closely affiliated wholesale and retail business. An order of the Federal Trade Commission requiring an asso-

ciation of harness makers, its officers and members, to desist from continuing such activities, was therefore affirmed.

With respect to whether the Federal Trade Commission is authorized to investigate the transactions of an unincorporated voluntary association which is not itself engaged in trade, but the members and officers of which are so engaged, the court said in *National Harness Mfrs' Asso. v. Federal Trade Commission* (Fed.) *supra*: "By § 5 of the Federal Trade Commission Act the commission is given jurisdiction, when it has reason to believe that 'any . . . person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.' Section 4 of the act (§ 8836d) defines a corporation as 'any company or association, incorporated or unincorporated,' which either (a) is organized to carry on business for profit and has shares of capital or capital stock, or (b) is 'without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.' The Harness Manufacturers' Association is a voluntary unincorporated association, and thus without capital stock. It is not itself engaged in business. Petitioner contends that it, therefore, is not within the act. But this contention overlooks the fact that the association is not the only one proceeded against; but that its officers and the members of its executive committee, as well as its members generally, are included in the proceedings as parties and made subject to the commission's order. The language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged

in commercial business. The order may be enforced by reaching the officers and members, personally and individually. A voluntary association, having many members, may be brought into court by service on its officers and such of its members as are known and can be conveniently reached, sufficient being served to represent all the diverse interests. *Evenson v. Spaulding* (1907) 9 L.R.A. (N.S.) 904, 82 C. C. A. 263, 150 Fed. 517. Among the cases under the Anti-trust Act which have enforced the liability of individual members for acts in violation of the statute, although done through a voluntary unincorporated association, are *Loewe v. Lawlor* (1908) 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; *Dowd v. United Mine Workers* (1916) 148 C. C. A. 495, 235 Fed. 5, and (apparently) *Eastern States Retail Lumber Dealers' Asso. v. United States* (1914) 234 U. S. 600, 58 L. ed. 1490, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951. These cases, we think, present a satisfactory analogy to the instant case."

In *T. C. Hurst & Son v. Federal Trade Commission* (1920) 268 Fed. 874, a district Federal court refused to grant any injunctive relief against a seizure and inspection of private papers and records by the Federal Trade Commission, on the ground that the action for such relief should be brought in the circuit court of appeals, which was by statute given exclusive jurisdiction of the enforcement of the order sought to be enjoined.

In *Quincy Oil Co. v. Sylvester* (1921) — Mass. —, 14 A.L.R. 111, 130 N. E. 217, it was held that the Federal Trade Commission Act had no application to a contract between a wholesale dealer and a retail dealer in gasoline, where the transactions under the contract were wholly domestic, though the gasoline to be sold was brought to the place of business of the wholesale dealer by interstate commerce. The contract in question provided for the loan of a pump to the retail dealer on the

condition that he would not use it in handling the products of any other dealer than the one who made the loan to him, and that on violation of the retail dealer's agreement the other party to the contract might remove the pump, or, at its option, require the retail dealer to pay for it at a stipulated price.

An order of the commission must follow the charge in the complaint; otherwise it is improvident and will be annulled by the court. *Western Sugar Ref. Co. v. Federal Trade Commission* (1921) 275 Fed. 725.

An order of the commission, based upon a charge of conspiracy and upon

the findings and conclusions sustaining such charge, must be supported by evidence which is sufficient to warrant a finding and conclusion separately against each respondent seeking a review of the order. *Western Sugar Ref. Co. v. Federal Trade Commission* (1921) 275 Fed. 725.

A circuit court of appeals in reviewing an order of the commission is limited by the statute to the question whether there is testimony in the record supporting the findings and conclusions of the commission, and to questions of law. *Western Sugar Ref. Co. v. Federal Trade Commission* (1921) 275 Fed. 725. W. S. R.

CATHERINE M. HALLORAN

v.

NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.

Vermont Supreme Court — October 4, 1921.

(— Vt. —, 115 Atl. 143.)

Damages — allowance for impaired purchasing power of dollar.

1. In allowing compensation for pecuniary losses through personal injury, the jury may take into consideration the impaired purchasing power of the dollar although there is no evidence in the case regarding the matter.

[See note on this question beginning on page 564.]

— mental suffering — knowledge that operation cannot be performed.

2. One suffering from a malady requiring a surgical operation to save life, who is so badly injured by another's negligence that the operation is impossible, may recover damages from the one causing the injury for mental suffering arising from knowledge that the operation cannot be performed.

[See 8 R. C. L. 521, 523.]

Appeal — record controlling on question of exception.

3. The record controls, on appeal, as to whether or not an exception was allowed plaintiff or defendant upon a certain ruling.

New trial — failure to raise question of law — lack of diligence.

4. A new trial should not be granted for failure of counsel to raise, in an action to recover for negligent injuries against a telephone company in possession of the government, the defense of nonliability of defendant because the negligence was that of the government, where at the time of the trial several decisions existed pointing directly to the fact of such nonliability, and defendant had raised the defense successfully in other cases.

[See 20 R. C. L. 287.]

(Watson, Ch. J., and Slack, J., dissent.)

EXCEPTIONS by defendant to rulings of the Washington County Court (Chase, J.) made during the trial of an action brought to recover dam-

ages for personal injuries alleged to have been caused by negligent and wrongful acts of defendant, which resulted in a verdict for plaintiff, and petition for new trial. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Shields & Conant, for defendant:

The law does not permit recovery for all mental distress, even though the remote cause be the injury.

Bovee v. Danville, 53 Vt. 183; *Rogers v. Bigelow*, 90 Vt. 41, 96 Atl. 417.

Plaintiff erred in asking the jury to draw conclusions unfavorable to the defendant because of its failure to call certain witnesses equally within the power of the plaintiff to call.

Jericho v. Huntington, 79 Vt. 329, 65 Atl. 87; *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108; *State v. Fitzgerald*, 68 Vt. 125, 84 Atl. 429.

Arguments of counsel should be confined to the evidence in the case.

Ward v. Ward, 91 Vt. 157, 99 Atl. 635; *Carleton v. E. & T. Fairbanks & Co.* 83 Vt. 537, 93 Atl. 462; *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14; *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108.

The court should grant a new trial.

Massucco v. Tomassi, 78 Vt. 188, 62 Atl. 57; *Re Ketchum*, 92 Vt. 280, 102 Atl. 1032; *O'Boyle v. Parker-Young Co.* — Vt. —, 112 Atl. 385.

Messrs. Theriault & Hunt, for plaintiff:

One might have physical blemishes and defects which, independently of what others might say or do, would cause no mental distress, and of which the injured one might first become aware from the attitude of others towards him, and yet the mental distress, thus arising, would be a proper element of damage.

Coombs v. King, 107 Me. 376, 78 Atl. 468, Ann. Cas. 1912C, 1121, 3 N. C. C. A. 167; *Stevens v. Dudley*, 56 Vt. 158; *Isham v. Dow*, 70 Vt. 588, 45 L.R.A. 87, 67 Am. St. Rep. 691, 41 Atl. 585, 5 Am. Neg. Rep. 106; *Ide v. Boston & M. R. Co.* 88 Vt. 66, 74 Atl. 401; *Chesapeake & O. R. Co. v. Robinett*, 45 L.R.A.(N.S.) 440, note; *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Watson v. Augusta Brewing Co.* 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152, 19 Am. Neg. Rep. 107; *Warner v. Chamberlain*, 7 Houst. (Del.) 18, 30 Atl. 638; *Walker v. Boston & M. R. Co.* 71 N. H. 271, 51 Atl. 918; *Butts v. National Exch. Bank*,

99 Mo. App. 168, 72 S. W. 1083; *Southern Kansas R. Co. v. McSwain*, 55 Tex. Civ. App. 317, 118 S. W. 874; *Missouri, K. & T. R. Co. v. Miller*, 25 Tex. Civ. App. 460, 61 S. W. 978; *Cincinnati Traction Co. v. McKee*, 27 Ohio C. C. 630; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Louisville, N. A. & C. R. Co. v. Snyder*, 10 Am. St. Rep. 64, note; *Sutherland, Damages*, 4th ed. § 1248; *Nichols v. Central Vermont R. Co.* — Vt. —, 12 A.L.R. 338, 109 Atl. 905; *Rogers v. Bigelow*, 90 Vt. 41, 96 Atl. 417.

Matters relating to the failure of the defendant to produce certain witnesses to show certain things, and the testimony to be given regarding them, were necessarily peculiarly within the knowledge of the defendant; at least, it does not appear that such was not the fact, or that the plaintiff, equally with the defendant, had knowledge of such testimony.

Re McCabe, 73 Vt. 175, 50 Atl. 804; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438; *Newton v. American Car Sprinkler Co.* 87 Vt. 546, 90 Atl. 583.

Economic and commercial conditions, to which the jury's attention was directed, as a matter of course, enter into every monetary consideration, and it was proper that they should be commented upon by both counsel and court.

Powers v. Calédonia County Grammar School, 93 Vt. 220, 106 Atl. 836; *Essex Storage Electric Co. v. Victory Lumber Co.* 93 Vt. 437, 108 Atl. 426; *Foss v. Smith*, 79 Vt. 434, 65 Atl. 553; *New Haven Trust Co. v. Doherty*, 74 Conn. 468, 51 Atl. 130; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

There is nothing before the court upon which its broad power to grant new trials may be exercised. It does not appear, and the court cannot take judicial notice, that the particular property and persons immediately responsible for the plaintiff's injuries were, at the particular time they were inflicted, under government control.

Spring v. American Teleph. & Teleg. Co. 86 W. Va. 192, 10 A.L.R. 951, 103 S. E. 206; *Reynolds v. Hassam*, 56 Vt. 449; *McConnell v. Strong*, 11 Vt. 280; *Rogers v. Whitney*, 91 Vt. 79, 99 Atl.

419; Barber v. Vinton, 82 Vt. 327, 73 Atl. 881; Way v. Fellows, 91 Vt. 326, 100 Atl. 682; Wyman v. Atlantic Coast Line R. Co. 115 S. C. 138, 104 S. E. 542; Donovan v. Miller, 9 L.R.A.(N.S.) 524, note; Payton v. McQuown, 97 Ky. 757, 31 L.R.A. 39, 53 Am. St. Rep. 437, 31 S. W. 874.

Plaintiff had the right to maintain her action.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Western U. Tele. Co. v. Burlington Traction Co. 90 Vt. 506, P.U.R.1917C, 320, 99 Atl. 4, Ann. Cas. 1918B, 841; United States v. Geer, 268 Fed. 385; Commercial Club v. Chicago, St. P. M. & O R. Co. 142 Minn. 169, P.U.R.1919D, 417, 171 N. W. 312; Chicago, B. & Q. R. Co. v. Public Utilities Commission, 68 Colo. 475, 190 Pac. 539; Hines v. McCook, 25 Ga. App. 395, 103 S. E. 690; Hines v. Easterly, — Tex. Civ. App. —, 224 S. W. 943; McGregor v. Great Northern R. Co. 42 N. D. 269, 4 A.L.R. 1669, 172 N. W. 841; C. F. Witherspoon & Sons v. Postal Tele. & Cable Co. 257 Fed. 758; Fish v. Rutland R. Co. 189 App. Div. 352, 178 N. Y. Supp. 439; Bryant v. Pullman Co. 188 App. Div. 311, 177 N. Y. Supp. 488; L. N. Dantzer Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 4 A.L.R. 1669, 80 So. 770; Postal Tele.-Cable Co. v. Call, 167 C. C. A. 178, 255 Fed. 850.

Powers, J., delivered the opinion of the court:

The plaintiff secured a verdict in an action predicated upon the defendant's negligence, and the latter seeks a reversal of the judgment rendered thereon. Only three of the exceptions saved at the trial are briefed by the defendant, and these only are considered.

1. The plaintiff's evidence tended to show that at and before the time of the accident she was suffering from a malignant disease of a private nature, which required a prompt surgical operation if a fatal result was to be averted; that the accident had resulted in a serious and incurable organic disease of the heart, which precluded the operation referred to; that through her physician she learned these facts; and that she suffered much mental anxiety and distress on account of the same. The defendant excepted

to the admission of the evidence tending to show such mental anguish, and to its being allowed as an element of the plaintiff's damages.

As we have seen, the physical condition which required an operation existed at the time of the accident, and was not caused by it; but the physical condition which made it impossible to perform the operation was a direct result of the accident. The mental distress which the plaintiff was allowed to show was not on account of the doctor's disclosure of her fatal malady, but from the knowledge that the condition of her heart would not admit of an operation, which would otherwise be an available cure. This anxiety she would have been free from, but for the accident. It was, then, a natural and proximate result of the physical injury sustained through the defendant's neg-

**Damages—
mental suffering
—knowledge
that operation
cannot be
performed.**

ligence, and a proper element of recoverable damages. Rogers v. Bigelow, 90 Vt. 41, 96 Atl. 417; Nichols v. Central Vermont R. Co. 94 Vt. 14, 12 A.L.R. 333, 109 Atl. 905.

It is under this rule that fear of hydrophobia (Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751), apprehension of insanity (Walker v. Boston & M. R. Co. 71 N. H. 271, 51 Atl. 918), dread of blood poisoning (Butts v. National Exch. Bank, 99 Mo. App. 168, 72 S. W. 1083); fear of giving birth to a deformed child (Prescott v. Robinson, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. Rep. 987, 69 Atl. 522), dread of death from swallowing glass (Watson v. Augusta Brewing Co. 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. Rep. 157, 52 S. E. 152), are admitted as proper elements of damage. It is to be observed that mere regret, disappointment, or vexation are not mental suffering within the meaning of the rule (Bovee v. Danville, 53 Vt. 183), but fear, worry, and apprehension are typical sorts of it (Egan v. Middlesex & B. Street R. Co. (D. C.) 212 Fed. 562). And it is very properly held

(— *Vt.* —, 115 *Atl.* 148.)

that the anxiety must be natural and not speculative (*Rogers v. Bigelow*, supra), real and not fanciful (*Watson v. Augusta Brewing Co.* supra).

2. In the course of his argument, counsel for the plaintiff called attention to the fact that none of the defendant's officers or servants had appeared as witnesses, the obvious purpose being to have the jury infer that, if produced, these persons would have given evidence unfavorable to the defendant. To this line of argument the defendant objected, and asked for an exception. The court ruled, in effect, that the argument was improper, saying, "I don't believe you better pursue that line of argument, and you may have an exception." The transcript, to which controlling reference is made, shows that an exception was allowed to the plaintiff. The defendant insists that this is a mistake, and that

Appeal—record controlling on question of exemption.

in fact the exception was allowed to the defendant; and it calls attention to

certain circumstances indicating this. But we are bound by the plain terms of the record, and will not allow it to be falsified in this court. Right or wrong, it is the sole and only basis for appellate action.

3. Counsel for the plaintiff was allowed to urge in argument that, in assessing the damages, the jury should consider the present impaired purchasing power of the dollar, and the court instructed them that they might consider it. The defendant excepted. There is no claim that there was any evidence in the case regarding this matter.

The result sought by the law in assessing damages in such cases is compensation—so far as a money payment can—the ascertainment of such a sum as will compensate the plaintiff for the injury. Necessarily, damages are to be expressed in terms of money. And while money is the standard of value by which the worth of all other property is to be measured, and while, in theory, its value remains constant and unfluctuating, and while it must be

admitted that really it is prices which rise and fall amid changing economic conditions, yet, after all, in a very real and a practical sense, money itself is a shifting standard, varying in value according to the changes in its purchasing power. As a medium of exchange, its value appreciates or depreciates according to the rise and fall in commodity prices. So it is

that, at least so far as those elements of damages properly classed as pecuniary

Damages—allowance for impaired purchasing power of dollar.

losses—like loss of time, loss of earning power, expenses, and the like—are concerned, it is proper for the jury to take into consideration the fact, known to everybody, that the purchasing power of money is, at present, seriously impaired. And it is so held by the courts. *Washington & R. R. Co. v. La Fourcade*, 48 App. D. C. 364; *Louisville & N. R. Co. v. Scott*, 188 Ky. 99, 220 S. W. 1066. The question has more often arisen in cases involving the question of excessive verdicts. But the principle is the same, and the decisions are in accord. *Noyes v. Des Moines Club*, 3 A.L.R. 605, and note (186 Iowa, 378, 170 N. W. 461); *Bowes v. Public Service R. Co.* 94 N. J. L. 378, 110 Atl. 699; *Melish v. New York Consol. R. Co.* 108 Misc. 291, 178 N. Y. Supp. 228; *Hance v. United R. Co.* — Mo. App. —, 223 S. W. 123; *Duffy v. Kansas City R. Co.* — Mo. App. —, 217 S. W. 883; *Hurst v. Chicago, B. & Q. R. Co.* 10 A.L.R. 174, and note (280 Mo. 566, 219 S. W. 566); *McCreedy v. Fournier*, 113 Wash. 351, 194 Pac. 398; *Standard Oil Co. v. Titus*, 187 Ky. 560, 219 S. W. 1077; *Illinois C. R. Co. v. Johnston*, 205 Ala. 1, 87 So. 866. Whether any different rule should be applied to the elements of damages other than pecuniary losses, like physical suffering and mental distress, is a question neither raised nor considered.

Judgment affirmed.

The defendant also brings a petition for a new trial, which was

heard with the exceptions. It is a novel application, in that it is predicated not upon newly discovered evidence, but newly discovered law. The claim is that the system, equipment, and property of the petitioner, including that involved in the accident in question, were, at that time, in the complete control, operation, and management of the United States government, under the resolution of Congress of July 16, 1918, the proclamation of the President of July 22, 1918, and the bulletin of the Postmaster General of August 1, 1918; that the employees responsible for the accident were those of the government, and not of the petitioner; and that, therefore, the suit brought by the petitioner was, in effect, against the government, and could not be maintained; that this point was not raised at the trial, and that the law of the subject was then so unsettled and uncertain that the petitioner was excused for omitting to make this defense.

We have before us, then, a record showing a trial, full and fair, a review disclosing no error, and a petition asking that a retrial be granted to enable the defeated party to take advantage of a defense then available, but not presented through counsel's misapprehension of the law. That such an application should be looked upon with disfavor, and should not ordinarily be granted, is quite apparent. That it will not be granted except in very exceptional cases is equally so. Any negligence or other fault on the part of the petitioner or his counsel will defeat it. *Webb v. State*, 90 Vt. 65, 96 Atl. 599. Any less stringent rule would open the door to a practice which might overwhelm this court with applications of this character and submerge it in a fathomless sea of disputation.

The *Webb Case* above cited is not a precedent for the petitioner; for there the action of the court itself, in some measure, misled the petitioner, and he lost his opportunity for a review. And, too, each case must stand on its own merits. *Re*

Ketchum, 92 Vt. 280, 102 Atl. 1032. In considering the merits of the petition before us we will assume that the facts set forth in it would afford a complete defense to the action against the petitioner, and that the power of this court in the matter of new trials is broad enough to warrant the relief prayed for. Even then, we think the application should be denied for lack of diligence. Several decisions, in both state and Federal courts, pointing directly toward the result contended for by the petitioner here, had been handed down before the trial below. But disregarding these, it appears that the petitioner was, at that time, in possession of information obtained at first hand, which, if communicated to its counsel, would have made it the clear professional duty of the latter to raise these questions at the trial, and the omission to do so such negligence as to disentitle the former to relief.

New trial—
failure to raise
question of law
—lack of diligence.

This very petitioner had made these very points—or, at least, those that are fundamental here—in defense of a Massachusetts proceeding to enforce an order regarding intrastate rates, and had obtained therein a decision of the supreme judicial court of that state in its favor, several months before this suit was brought, and a year before it was tried. *Public Service Commission v. New England Teleph. & Teleg. Co.* 232 Mass. 465, 4 A.L.R. 1662, P.U.R.1919D, 49, 122 N. E. 567. The unanimous decision of that court, which left little to be said in answer to the petitioner's claim as to the law, was expressed by Chief Justice Rugg in what Chief Justice White, on June 2, 1919, when it was affirmed by the United States Supreme Court, declared to be a "lucid opinion." *Macleod v. New England Teleph. & Teleg. Co.* 250 U. S. 195, 63 L. ed. 934, 39 Sup. Ct. Rep. 511. By that opinion it was made plain that the government had not assumed a mere public supervision over the operations of private

owners of telephone lines, but an absolute and complete possession and control of their systems, their equipment and appurtenances, their materials and supplies; that, this being so, the United States, though not named on the record, was the real party defendant; and that, inasmuch as a sovereign cannot be impleaded in a judicial tribunal except by its consent, the suit could not be maintained. The Massachusetts case involved the matter of rates only; but, as argued, the principles applied are those on which this petition is predicated.

The failure of the petitioner or its legal department to call these decisions to the attention of its local counsel was without adequate justification or excuse. It must have known about them; and, if it chose to allow the trial below to proceed without communicating this information to the counsel in charge of the case, it must abide the result. See *W. T. Rawleigh Co. v. Pierce*, 92 Vt. 44, 102 Atl. 96.

Petition dismissed, with costs.

Watson, Ch. J., dissenting:

I am unable to agree with the majority of my associates that there was no error in the ruling below, permitting counsel for plaintiff, when arguing to the jury on the question of damages, to say to them to "consider the value of a dollar today, as compared with what it was," and in upholding the charge of the court to the same effect.

In law we are compelled to compensate for violated rights in money, and for this purpose, to make pecuniary estimates of the value of their violations, the possession of money becomes a kind of legal *sum-mum bonum*. Terry, *Principles of Anglo-American Law*, § 126, p. 99. And since the only compensation which the law can compel is a compensation in money, it must be measured by something which will measure the pecuniary loss, and the measure to be applied must be real and a tangible one. 17 C. J. 166c; *Thé A. A. Raven* (D. C.) 222 Fed.

958; 8 R. C. L. 431, ¶ 8. Actual pecuniary compensation is the general rule, whether the action be in contract or in tort (except where exemplary damages are warranted). 8 R. C. L. 431, § 8. And damages which may be recovered for injuries resulting from the negligence of another are to be arrived at according to general rules of law, framed with reference to the just rights of both parties: Not merely what it may be right for the injured party to receive as just compensation for his injury, but also what it is just to compel the other party to pay. 8 R. C. L. 434, § 8; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88; *Kline v. Kline*, 158 Ind. 602, 58 L.R.A. 397, 64 N. E. 9.

By the Constitution of the United States, the Congress shall have power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." And by statute enacted by Congress, "the gold coins of the United States shall be legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight." U. S. Rev. Stat. § 3585, Comp. Stat. § 6572, 6 Fed. Stat. Anno. 2d ed. p. 297. "The silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment." Rev. Stat. § 3586. See *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141. In the case, *United States v. Marigold*, 9 How. 560, 13 L. ed. 257, the Federal Supreme Court, through Mr. Justice Daniel, said: "The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value; and on account of the impos-

sibility, which was foreseen, of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power."

Acts were passed by Congress in 1862 (Acts Feb. 25, 1862, § 1; July 11, 1862, § 1) and 1863 (Act March 3, 1863, § 3, Comp. Stat. § 6575, 6 Fed. Stat. Anno. 2d ed. p. 299), which made United States Treasury notes a legal tender in payment of debts, public and private. The constitutionality of these acts being challenged, the question came before the Federal Supreme Court in the Legal Tender Cases (*Knox v. Lee* and *Parker v. Davis*) 12 Wall. 457, 20 L. ed. 287. The majority opinion (delivered by Mr. Justice Strong) shows that those acts were passed when the Civil War was raging, seriously threatening the overthrow of the government and the destruction of the Constitution itself; that the equipment and support of large armies and navies required the employment of money to an extent beyond the capacity of all ordinary sources of supply; that the public treasury was nearly empty, and the credit of the government nearly exhausted; that moneyed institutions had advanced so largely of their means that they had been compelled to suspend specie payments. An immediate necessity was pressing. The amount then due the soldiers in the field was nearly a score of millions of dollars. The requisitions for supplies exceeded \$50,000,000, and the current daily expenditure was over \$1,000,000. "The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the Treasury." Therein Mr. Justice Strong further said:

"The Constitution was intended to frame a government, as distinguished from a league or compact, a government supreme in some particulars over states and people. It was designed to provide the same currency, having a uniform legal value in all the states. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. . . . The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly, the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to change it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall correspond, from time to time, with the market value of the same metal as bullion. . . .

"But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted. . . . No one ever doubted that a debt of \$1,000, contracted before 1834, could be paid by 100 eagles coined after that year, though they contained no more gold than 94 eagles such as were coined when the contract was made, and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834 were not money until

they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. . . .

"We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of state legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money."

Mr. Justice Bradley, writing a concurring opinion (same case) said: "The state governments are prohibited from making money or issuing bills. Uniformity of money was one of the objects of the Constitution. The coinage of money and regulation of its value are conferred upon the general government exclusively. That government has also the power to issue bills. It follows, as a matter of necessity, as a consequence of these various provisions, that it is specially the duty of the general government to provide a national currency. The states cannot do it, except by the charter of local banks, and that remedy, if strictly legitimate and constitutional, is inadequate, fluctuating, uncertain, and insecure, and operates with all the partiality to local interests which it was the very object of the Constitution to avoid. But, regarded as a duty of the general government, it is strictly in accord-

ance with the spirit of the Constitution; as well as in line with the national necessities."

In an earlier case it was held that, Congress having undertaken to provide a currency for the whole country, it could secure the benefit of it to the people by appropriate legislation; that to this end Congress could restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482. And for the undoubted purpose of destroying the use of such notes as money, Congress enacted in 1867 (15 Stat. at L. 6, chap. 8): "Every national banking association, state bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation paid out by them."

In *Merchants' Nat. Bank v. United States*, 101 U. S. 1, 25 L. ed. 979, the action was brought by the United States to recover such a tax. It was held that, as against the United States, a state municipality has no right to put its notes in circulation as money; that such use is against the policy of the United States; and that Congress had the power to destroy such use. Much to the same effect is *Juilliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122. And by an act of 1875 (Act Feb. 8, 1875, § 19, U. S. Comp. Stat. § 6289, 4 Fed. Stat. Anno. 2d ed. p. 225) state banks and state banking associations were required to pay a like tax on the amount of their own notes used for circulation and paid out by them. *Hollister v. Zion's Co-op. Mercantile Inst.* 111 U. S. 62, 28 L. ed. 352, 4 Sup. Ct. Rep. 263. By reason of such taxation state banks of circulation ceased to exist in this state. *State v. Franklin County Sav. Bank & T. Co.* 74 Vt. 246, 52 Atl. 1069.

After the enactments of 1862 and 1863, making Treasury notes legal tender for the payment of debts, the Federal Supreme Court, speaking through Mr. Chief Justice Chase, said: There were "two descriptions

of lawful money in use under the acts of Congress, in either of which damages for nonperformance of contracts, whether made before or since the passage of the Currency Acts, may be properly assessed, in the absence of any different understanding or agreement between the parties. . . . When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver [coin], damages should be assessed and judgment rendered accordingly." *Bronson v. Rodes*, 7 Wall. 229, 19 L. ed. 141; *Butler v. Horwitz*, 7 Wall. 258, 19 L. ed. 149; *Dewing v. Sears*, 11 Wall. 379, 20 L. ed. 189.

But, as already observed, if a contract be for the payment of money, without any stipulation as to the kind of money, it is an engagement to pay with lawful money of the United States, and may always be satisfied by payment with legal tender notes. This distinction is made in one of our own cases, in which is the further holding that, in cases involving these different kinds of money and their use under the laws of the United States, the decisions of the Federal Supreme Court are binding in authority upon this court. *Townsend v. Jennison*, 44 Vt. 315.

In *Thorington v. Smith*, 8 Wall. 1, 19 L. ed. 361, the contract was for the payment of Confederate notes, made during the Civil War, the parties residing within the so-called Confederate States. It was held that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States; that contracts stipulating for payment in such currency could not be regarded for that reason, only as made in aid of the war, and so should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation; that it is quite clear that a contract to pay dollars, made between citizens of any state of the Union, while maintaining its constitutional relations with the national government,

is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence; but that it is equally clear if, in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars, made in that country, evidence would be admissible to prove what kind of dollars was intended, and, should it turn out that foreign dollars were meant, to prove their equivalent value in money of the United States; that the court was clearly of the opinion that such evidence should be received in respect to such contracts, in order that justice be done between the parties, and that the party entitled to be paid in the Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States. The holdings in that case were followed in *Bissell v. Heyward*, 96 U. S. 580, 24 L. ed. 678, and in *Rives v. Duke*, 105 U. S. 132, 26 L. ed. 1031.

Specie payment was suspended by banks and by the United States Treasury, December 30, 1861. The first legal tender act was passed February 25, 1862, followed by others of similar import the same year and the next. Under the conditions existing then, and thenceforth during the war period and for some years thereafter, paper currency was at a discount in gold, ranging from \$97.68 in 1862, to \$35.09 (the lowest), July 11, 1864. Although from the latter date onward its valuation was in a state of fluctuation, the general trend was upward, resulting in an act of Congress, passed in 1875, providing for the payment of Treasury notes in coin after January 1, 1879. With the resumption of specie payment had accordingly, depreciation of paper currency ceased, and ever since that time such currency has been convertible into gold and silver at the will of the holder, its specie value being the same.

In *The Vaughn* (*The Telegraph*

(— *Vol. —*, 115 *Atl. 143.*)

v. Gordon) 14 Wall. 258, 20 L. ed. 807, an appeal in admiralty from the decree of a United States circuit court (decided in 1872), the libel was for the loss of a large quantity of barley by the negligence of the persons navigating the said propeller, or by the negligence of the persons navigating the said steamboat, or by their joint negligence. The barley was shipped from a certain port in Canada. The estimate of the damages was made in the currency of Canada, which was equivalent in value to the gold coin of the United States. It was admitted that the decree was solvable in legal tender notes, which were then largely depreciated, but it was held by the district court in which the suit was brought that this was an incident of the suit in the forum where it was brought, and the result was unavoidable. In the circuit court the same rule of damages was applied, but the decree gave the value of the Canada currency in legal tender notes. The Supreme Court held that, upon the rule of damages applied by both courts as respects the kind of currency in which the value of the barley was estimated, the libellants were entitled to be paid in specie, or its equivalent; that the decree under consideration presented the same question which was decided in *Knox v. Lee*, one of the Legal Tender Cases, where the court below instructed the jury that in assessing the damages they might take into account the fact that the judgment could be paid in legal tender notes, the correctness of which instruction was affirmed upon error. The suit of *Knox v. Lee* (decided in 1871) was brought in the court below by the defendant in error, to recover the value of certain sheep, confiscated as the property of an alien enemy, and sold under the authority of the so-called "Confederate government," March 7, 1863. The defendant in error, in connection with others, perhaps, became the purchaser at said sale.

By the several coinage acts of Congress, gold and silver coins of the United States are made legal

tender in all payments, according to their nominal or declared values. *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460. Mr. Justice Field, in writing the opinion in that case, says the Legal Tender Act of 1862 itself distinguishes between the two kinds of dollars, i. e., coin and Treasury notes; and that contemporaneous and subsequent legislation of Congress has distinguished between the two kinds, "recognizing that the notes and the coin were not exchangeable in the market according to their legal or nominal values." Thereon Mr. Justice Field says: "The practice of the government has corresponded with the legislation we have mentioned. It has uniformly recognized in its fiscal affairs the distinction in value between paper currency and coin. Some of its loans are made payable specifically in coin, whilst others are payable generally in lawful money. It goes frequently into the money market, and at one time buys coin with currency, and at another time sells coin for currency. In its transactions it every day issues its checks, bills, and obligations, some of which are payable in gold, while others are payable simply in dollars. And it keeps its accounts of coin and currency distinct and separate."

In my judgment the discussions and holdings of the United States Supreme Court, in the cases to which I have called attention, conclusively show that the medium of exchange by which everything is to be measured is the gold and silver coin, "the only full legal tender money in use," and having a value regulated by Congress, which value, so regulated, is in law unchangeable, except by Congress under the power delegated to it by the Constitution to provide a currency of uniform legal value throughout the states of the Union. If this be not so, why is it that in every instance where the Federal Supreme Court has been called upon to consider the value of depreciated paper currency, in its use in the payment of obligations, the standard taken has been the value of gold coin as regulated

by Congress? In no instance, I believe, has the purchasing power of such currency been made the controlling factor by it in determining the matter. The same principle being applied in the cases involving Confederate notes, and foreign dollars, evidence was held to be admissible to show, not their purchasing power, but their equivalent value in lawful money of the United States. During the period of suspended specie payment, prices of commodities and of services were fluctuating, some of the time as high, perhaps, as during the World War and since; yet not within that period, or since, has that court said anything indicating that the value of United States coin in its use as money may be shown or considered to be other than as declared by the coinage acts of Congress. Is not the position that the value of gold and silver coin, as regulated by Congress, is conclusive, supported by the statement of Mr. Justice Bradley in the *Legal Tender Cases*, where he says, in effect, that the very object of the Constitution in making it specially the duty of the general government to provide a national currency was to avoid the fluctuations, uncertainties, and insecurities which otherwise would exist and operate with all the partiality to local interests? And yet what can be done by a trial court more strikingly illustrative of a doctrine repugnant to this, than to permit a jury, sitting on a negligence case, to take judicial notice that the purchasing power of United

States legal tender money (when there is no difference in its value, whether specie or paper currency) is less than formerly, and so to consider it in fixing the plaintiff's damages to be awarded by their verdict?

It may be that in such cases, where loss of time or value of services is a proper element of plaintiff's damages, the evidence showing the value of his time or services so lost may involve more or less the economic conditions at the time of his injury; but such damages, like all others, are nevertheless to be reckoned on the basis of the standard nominal value of the uniform national currency. To say that damages may be assessed according as a jury may view the purchasing power of such currency is to say that the ever-changing price of commodities and services, bought and sold, as looked upon by the jury in each particular case, instead of the gold dollar, constitutes the standard unit of value—a position, in my judgment, so fundamentally unsound, and so dangerous to the just rights of parties, as not to be sanctioned.

Under the holdings of the majority, "what a door" is opened to a jury to speculate, conjecture, and guess!

I would hold the rulings under discussion to be reversible error, and remand the case for a new trial on the question of damages only.

Slack, J., concurs in this dissenting opinion.

ANNOTATION.

Increase in cost of living, or impaired purchasing power of money, as affecting damages for personal injuries or death.

I. Scope, 564.

II. Personal injuries:

a. In general, 564.

b. Judicial consideration of change, 565.

c. Consideration of change by jury, 566.

III. Death, 566.

I. Scope.

The present annotation supplements

those in 3 A.L.R. 610, and 10 A.L.R. 179, wherein the earlier cases were treated.

II. Personal injuries.

a. In general.

(Supplementing annotations in 3 A.L.R. p. 610, and 10 A.L.R. p. 179.)

The recent authorities are in sub-

stantial accord with the earlier decisions in supporting the general rule that the increase in cost of living, or the impaired purchasing power of money, may be considered in determining the amount of damages that should be awarded for personal injuries.

Alabama. — *Illinois C. R. Co. v. Johnston* (1920) 205 Ala. 1, 87 So. 866; *Tennessee River Nav. Co. v. Woodward* (1920) — Ala. App. —, 88 So. 364.

Georgia. — *Ocilla S. R. Co. v. McInvale* (1920) — Ga. App. —, 105 S. E. 451.

Kansas. — *Hood v. American Refrigeration Transit Co.* (1920) 106 Kan. 76, 186 Pac. 977.

Kentucky. — *Standard Oil Co. v. Titus* (1920) 187 Ky. 560, 219 S. W. 1077.

Missouri. — *Duffy v. Kansas City R. Co.* (1920) — Mo. App. —, 217 S. W. 883; *Lowder v. Kansas City R. Co.* (1920) — Mo. App. —, 221 S. W. 800; *Yates v. United R. Co.* (1920) — Mo. App. —, 222 S. W. 1034; *Hance v. United R. Co.* (1920) — Mo. App. —, 223 S. W. 123; *Roy v. Kansas City* (1920) 204 Mo. App. 332, 224 S. W. 132; *Roach v. Kansas City R. Co.* (1920) — Mo. App. —, 228 S. W. 520.

Nebraska. — *Dailey v. Sovereign Camp. W. W.* (1921) — Neb. —, 184 N. W. 920.

New York. — *Roeder v. Erie R. Co.* (1917) 164 N. Y. Supp. 167.

Vermont. — *HALLORAN v. NEW ENGLAND TELEPH. & TELEG. CO.* (reported herewith) ante, 554.

Virginia. — *P. Lorillard Co. v. Clay* (1920) 127 Va. 734, 104 S. E. 384.

Washington. — *McCreedy v. Fournier* (1920) 113 Wash. 351, 194 Pac. 398.

Canada. — *Ward v. Mainland Transfer Co.* (1919) 3 West. Week. Rep. 193.

b. Judicial consideration of change.

(Supplementing annotations in 3 A.L.R. p. 610, and 10 A.L.R. p. 179.)

In accordance with the general rule stated *supra*, II. a, a number of appellate courts in recent cases have taken into consideration, in passing upon the excessiveness of verdicts for

personal injuries, the depreciated value of money as a medium of exchange.

Alabama. — *Illinois C. R. Co. v. Johnston* (1920) 205 Ala. 1, 87 So. 866.

Georgia. — *Ocilla Southern R. Co. v. McInvale* (1920) — Ga. App. —, 105 S. E. 451.

Kentucky. — *Standard Oil Co. v. Titus* (1920) 187 Ky. 560, 219 S. W. 1077.

Missouri. — *Duffy v. Kansas City R. Co.* (1920) — Mo. App. —, 217 S. W. 883; *Lowder v. Kansas City R. Co.* (1920) — Mo. App. —, 221 S. W. 800; *Yates v. United R. Co.* (1920) — Mo. App. —, 222 S. W. 1034; *Hance v. United R. Co.* (1920) — Mo. App. —, 223 S. W. 123; *Roy v. Kansas City* (1920) 204 Mo. App. 332, 224 S. W. 132; *Roach v. Kansas City R. Co.* (1920) — Mo. App. —, 228 S. W. 520.

New York. — *Roeder v. Erie R. Co.* (1917) 164 N. Y. Supp. 167.

Virginia. — *P. Lorillard Co. v. Clay* (1920) 127 Va. 734, 104 S. E. 384.

Washington. — *McCreedy v. Fournier* (1920) 113 Wash. 351, 194 Pac. 398.

Canada. — *Ward v. Mainland Transfer Co.* [1919] 3 West. Week. Rep. 193.

In passing upon the question of the excessiveness, if any, of a verdict for personal injuries, the court may take judicial notice of the fact that the purchasing power of money has greatly decreased in recent years. *Yates v. United R. Co.* (1920) — Mo. App. —, 222 S. W. 1034; *Hance v. United R. Co.* (1920) — Mo. App. —, 223 S. W. 123.

This recognition of the increased cost of living, or impaired purchasing power of money, usually is in justification of the sustaining of unusually large verdicts. For instance, in *Standard Oil Co. v. Titus* (Ky.) *supra*, the court said: "Since the cost of living has greatly increased, and the purchasing power of a dollar is far less than it used to be, we conclude that the verdict is not excessive." So, in *P. Lorillard Co. v. Clay* (Va.) *supra*, the court, after reviewing many decisions involving the question of excessive verdicts for injuries similar to that under consideration,

held that, in comparing such verdicts with the then-present one, the great increase in the cost of living was a legitimate item to be taken into account in fixing compensation, and reduced a verdict for \$15,000 for loss of an eye to \$10,000, notwithstanding the average of earlier verdicts for a similar injury was but little over \$5,000. And again, in *Ward v. Mainland Transfer Co.* [1919] 3 West. Week. Rep. (B. C.) 193, in holding not excessive an award of damages for personal injuries, it was said that the amounts awarded in earlier cases are no longer a safe guide, owing to the unprecedented advance in the cost of living, and that juries must deal with the state of the times in which they are called upon to act, taking such a reasonable view of future prospects as is humanly possible. And in *Duffy v. Kansas City R. Co. (Mo.) supra*, where smaller verdicts rendered in 1913 were urged upon the court, it said that it was "authorized to take into consideration that the purchasing power of \$5,000 in 1918 is much less than in 1913." In *McCreedy v. Fournier (Wash.) supra*, the court said that "in determining whether the verdict for personal injuries, largely of a permanent character, is excessive, we must, to some extent, take into consideration factors and standards greatly differing from those prevailing only a few years ago." In *Ocilla Southern R. Co. v. McInvale* (1920) — Ga. App. —, 105 S. E. 451, the court, in passing upon the excessiveness of a verdict for personal injuries, said that it would take judicial cognizance of the universally known fact that at the time of the return of the verdict (October, 1919), and at the time of the overruling of the motion for a new trial (May, 1920), the normal value of the dollar had greatly decreased.

In *Hood v. American Refrigerator Transit Co.* (1920) 106 Kan. 76, 186 Pac. 977, it was held that, in determining the capacity of a workman for the purpose of making an award for personal injuries under the Nebraska Workmen's Compensation Law, the cost of living, and of commodities

generally, must be taken into consideration, since such matters are factors which enter into the question.

c. Consideration of change by jury.

(Supplementing annotations in 3 A.L.R. p. 611, and 10 A.L.R. p. 180.)

The reported case (*HALLORAN v. NEW ENGLAND TELEPH. & TELEG. CO.* ante, 554) affords express authority for the proposition that the jury in a personal-injury action may, in assessing damages consisting of pecuniary losses, such as loss of time, loss of earning power, expenses, and the like, consider the present impaired purchasing power of the dollar. In reaching this conclusion it will be remembered that the majority of the court proceeded upon the theory that, to render compensation for pecuniary losses, money must be regarded as having a shifting standard, varying in value according to the changes in its purchasing power, which argument Watson, Ch. J., in his dissenting opinion, strongly refutes, maintaining that damages must be reckoned on the basis of the standard nominal value of the uniform national currency, and that the purchasing power in commodities of such currency is not a controlling factor.

In *Tennessee River Nav. Co. v. Woodward* (1920) — Ala. App. —, 88 So. 364, it was held in a personal-injury action that a charge to the jury that, "in determining the amount expended by the plaintiff for doctors' bills and medicines, you should not consider any difference, if any, between the purchasing power of a dollar at the time plaintiff expended it and at the present time," did "not" correctly state the law.

And see *Ward v. Mainland Transfer Co.* [1919] 3 West. Week. Rep. (B. C.) 193, as set out *supra*, II. b.

III. Death.

(Supplementing annotations in 3 A.L.R. p. 612, and 10 A.L.R. p. 180.)

In *Bowes v. Public Service R. Co.* (1920) 94 N. J. L. 378, 110 Atl. 699, in passing upon the alleged excessiveness of a verdict in favor of a widow for the death of her husband, the

court took judicial notice of the decreased purchasing power of the dollar, saying: "The only question presented is the alleged excessiveness of the damages. The word 'excessive' has a relative meaning. What may be deemed excessive in one environment and social order may be inadequate compensation in another. At a period when the purchasing power of the dollar has, in the language of the day, been 'cut in half,' the value of the sum awarded here is not to be esti-

mated in the numerical quantum of the recompense, but in its comparative ability to furnish the necessities of life. Of these facts the court must take judicial notice."

In *Louisville & N. R. Co. v. Scott* (1920) 188 Ky. 99, 220 S. W. 1066, it was held that, in estimating the damages to the estate of one wrongfully killed, the jury had the right to take into consideration the fact that the purchasing power of a dollar had materially decreased. G. J. C.

R. S. HOLT, Receiver of North Shore Railroad Company,

v.

PENNSYLVANIA COMPANY, Operating the Pittsburgh, Ft. Wayne, & Chicago Railway, Appt.

Pennsylvania Supreme Court — May 26, 1921.

(271 Pa. 76, 118 Atl. 745.)

Eminent domain — partial taking — effect on right to damages.

1. A railroad company which, in appropriating a portion of the right of way of another company, avoids payment of a portion of the claim of damages on the theory that what is left has value, cannot, upon subsequently appropriating the remainder of the right of way, avoid liability for damages on the theory that they were all paid on the former taking.

[See note on this question beginning on page 569.]

Railroads — forfeiture of rights — effect on title.

of its rights as such does not destroy its title to its right of way.

2. Forfeiture by a railroad company

[See 22 R. C. L. 870, 871.]

APPEAL by defendant from a judgment of the Court of Common Pleas for Beaver County (Baldwin, P. J.) in favor of plaintiff in an action brought to recover damages for the taking of its alleged right of way. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. William A. McConnel, for appellant:

When a railroad company takes land by proceedings in condemnation, it takes, for all practical purposes, a fee-simple title.

Ferguson v. Pittsburgh & S. R. Co. 253 Pa. 581, 98 Atl. 732.

In order that the rights of way may be considered as a whole, they must be physically connected with one another, or they must be so inseparably connected in the use to which they are applied as that the injury or de-

struction of the one must necessarily and permanently injure the other.

• *Potts v. Pennsylvania S. Valley R. Co.* 119 Pa. 278, 4 Am. St. Rep. 646, 13 Atl. 291; *Kossler v. Pittsburg, C. C. & St. L. R. Co.* 208 Pa. 50, 57 Atl. 66; *North Shore R. Co. v. Pennsylvania Co.* 251 Pa. 445, 96 Atl. 990; *North Shore R. Co. v. Pennsylvania Co.* 235 Pa. 395, 84 Atl. 402.

Messrs. D. A. Nelson and Holt, Holt, & Richardson, for appellee:

Property is not to be deemed worthless because the owner allows it to

go to waste, or to be regarded as valueless because he is unable to put it to any use.

North Shore R. Co. v. Pennsylvania Co. 251 Pa. 445, 96 Atl. 990, *supra*.

Schaffer, J., delivered the opinion of the court:

This contest is between two corporations, the defendant being the appellant. As we view the record, the matters of complaint are of appellant's own creation.

Plaintiff by grant and condemnation had acquired a right of way for its railroad, some 5 miles in length; just how much use it had made of such right of way was one of the disputed questions on the trial, as were its width and value. Appellant contends appellee had forfeited its rights as a railroad company, and that this had been judicially determined. North Shore R. Co. v. Pennsylvania Co. 251 Pa. 445, 96 Atl. 990. Granting that this is so, the right of way in question, as between the parties to this litigation,

belonged to plaintiff, and not to defendant. When the latter appropriated

it, damages were due to plaintiff, for the value of what was taken, to be fixed by the rule the law prescribes. This same question was raised by appellant in the case just cited, and in disposing of it, we said: "Counsel for appellant contends that the possibility of any such use [for railroad purposes] should not have been taken into consideration, and further, that, since the plaintiff had lost its right to operate as a railroad, the damages for taking its right of way should be based upon the value of the ground for rural or agricultural purposes, only. But this contention is manifestly unsound."

For some years prior to 1912, the right of way had not been used for railroad purposes. In that year, appellant took a strip only 30 feet in width. In 1913 an additional appropriation was made, which is the subject of this litigation. Had defendant used the foresight in 1912

to include in its condemnation that which is now taken, none of the questions before us would have arisen, since, in the main, its present contention is that it paid plaintiff, in the first proceeding, for the damages to the property it is now being asked to pay.

Just how we could so hold on the record before us appellant has not made manifest. Certain it is that the strip now involved was not included in the appropriation of 1912. Appellant, however, contends that, in the prior proceedings, damages were claimed to the entire right of way. It does appear, on the trial of the 1912 case, some of plaintiff's witnesses testified, in substance, that the appropriation then made ruined and destroyed the right of way; but it also appears witnesses for defendant averred that what was left of the right of way, after the 1912 appropriation, could be utilized for railroad purposes. So that defendant's position then and now cannot be reconciled. Having maintained on the former trial that what was left of the right of way was of value, it cannot complain if the jury adopted that view on this. Defendant also claims the result of the 1912 appropriation was to cut off parts of the right of way from that portion of it which is now being appropriated, and therefore a claim for damages to the whole right of way cannot be sustained in this proceeding; but plaintiff counters this proposition with the allegation that, by means of crossing frogs, the whole right of way could be connected up.

The jury before whom the case was tried had the benefit of a view of the property to determine its physical aspects, and, as the question whether there had been a severance of parts of the right of way from other parts of it by the 1912 appropriation was disputed before them, their view must have aided greatly in the solution of that problem. It was a question of fact for

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their determination, as were those of title to the right of way and its extent. There was evidence of an appropriation of part of the right of way by plaintiff by appropriate corporate action, and, in addition, evidence of grants to it of portions of it; and, as to both sources of title, there was a dispute in some instances, whether it was for a right of way 60 feet wide, or for a less width. These question were properly submitted to the jury. Bearing on the width of the right of way, it is significant that some of the grants fixed the width at 60 feet. This gave color to the claim that the right of way was of that width in its entirety. In those cases where the width was not mentioned, plaintiff produced evidence to show an entry and use of land to that extent, while defendant's witnesses testified a less width was actually entered upon; necessarily this dispute was for the jury.

The case has been tried three times. On the first trial, there was a verdict in favor of the plaintiff for \$5,000, and, on motion of both parties, a new trial was granted. On the second, the jury found for plaintiff for \$38,700, and appellant filed a motion for a new trial, which was allowed, unless plaintiff filed a stip-

ulation agreeing to a reduction of the verdict to \$7,500. This plaintiff refused to do. On the third trial, which we are reviewing, the verdict fixed plaintiff's damages at \$9,000; and, in disposing of a motion for a new trial, the court below found this was not excessive.

The litigation between these parties has been varied and of long duration. It first appeared in this court in *Ohio River Junction R. Co. v. Pennsylvania Co.* 216 Pa. 316, 66 Atl. 92; next in *Ohio River Junction R. Co.'s Petition*, 219 Pa. 345, 68 Atl. 830; again in *North Shore R. Co. v. Pennsylvania Co.* 235 Pa. 395, 84 Atl. 402; and then in *North Shore R. Co. v. Pennsylvania Co.* 251 Pa. 445, 96 Atl. 990. As we understand it, the pending case ends it. In this protracted legal battle, all the vexed questions which could be raised have, we think, been determined. It is to the interest of society that litigation should end.

Each of the assignments of error has been carefully examined, and full consideration has been given to appellant's arguments addressed to them. None of them points out error which would warrant a reversal of the case. They are all overruled, and the judgment is affirmed.

ANNOTATION.

Compensation in second eminent domain proceeding.

The question presented in the reported case (*HOLT v. PENNSYLVANIA CO.* ante, 567) is an interesting one in the law of eminent domain, and seemingly a novel one, as a search has disclosed no other cases passing upon the effect on the compensation in a second eminent domain proceeding relating to property, of a former eminent domain proceeding relating to the same property. The estoppel held to exist in the reported case seems to be well founded; that, however, does not determine the damages to be paid on the second proceeding. Apparently, such damages would be the value of

the property in its then situation, irrespective of the fact that under a prior eminent domain proceeding a part of the property had been taken. The situation would seem to be no different than if the owner of the property had sold the right which was taken in the first eminent domain proceeding, leaving him with some interest, or a limited interest, in the property. The question as to the amount of damages would, therefore, be the value of this interest, regardless of the fact that it was, at one time, part of a larger tract. W. A. E.

ALICE G. MICHELS
v.
CLARENCE E. MICHELS.

Maine Supreme Judicial Court — November 1, 1921.

(— Me. —, 115 Atl. 161.)

Divorce — attempt to commit to asylum as cruel and abusive treatment.

1. Whether or not an unsuccessful attempt by a man to commit his wife to an insane asylum constitutes cruel and abusive treatment depends upon the motive from which he acted.

[See note on this question beginning on page 572.]

— when divorce granted.

2. An unsuccessful attempt by a man to commit his wife to an insane asylum, followed immediately by an attempt to have a conservator ap-

pointed for her property, when she has never lost any of her property through unwise investments, or wasted it, shows cruel and abusive treatment entitling her to a divorce.

EXCEPTIONS by libellee to rulings of the Supreme Judicial Court for Cumberland County, at Law, made during the trial of a libel for divorce which resulted in a decree for libellant. *Overruled.*

The facts are stated in the opinion of the court.

Messrs. W. R. Anthoine and E. S. Anthoine, for libellee:

Libellee's acts did not constitute cruel and abusive treatment within the meaning of the statute.

Holyoke v. Holyoke, 78 Me. 404, 6 Atl. 827; Scholl v. Scholl, 194 Mo. App. 559, 185 S. W. 762; Flemming v. Flemming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Rebstock v. Rebstock, 2 Pittsb. 124; Reichert v. Reichert, 124 Mich. 695, 83 N. W. 1008.

Mr. William Lyons, for libellant:

Libellee was guilty of cruel and abusive conduct towards libellant.

Holyoke v. Holyoke, 78 Me. 410, 6 Atl. 827; Rockport v. Searsmont, 101 Me. 260, 63 Atl. 820.

Cornish, Ch. J., delivered the opinion of the court:

Libel for divorce heard by a jury, who found in favor of the libellant on the allegation of cruel and abusive treatment. The presiding justice thereupon entered a decree of divorce, granting the custody of the two minor children to the mother, and ordering the payment of money for their support. To the entering of the decree the libellee filed exceptions. The question presented is whether, as a matter of law, the evidence which is made a part of the

exceptions, warrants the decree (Sweet v. Sweet, 119 Me. 81, 109 Atl. 379), or, expressed in another form, whether, as a matter of law, taking the facts disclosed in the evidence for the libellant as true, they gave her an absolute right to a divorce (Freeborn v. Freeborn, 168 Mass. 50, 46 N. E. 428).

"Cruel and abusive treatment" are words of comprehensive meaning, and the charge covers a wide range of conduct. Holyoke v. Holyoke, 78 Me. 404, 6 Atl. 827. The outstanding fact upon which the libellant places great emphasis in the case is the attempt of the libellee to have her committed to the state hospital for the insane. On May 19, 1919, the husband made the necessary application to the municipal officers of Old Orchard, where the wife was then residing with her children, charging that she was insane, and praying for her commitment to the Augusta State Hospital. Notice was thereupon ordered upon the wife, a hearing was held on May 21, 1919, and the testimony of two physicians who made an examination of her was taken, both of whom testified that in their opinion

she was not insane. Other evidence was also given on both sides.

At the conclusion of the public hearing the proceedings were dismissed by the municipal officers. This unsuccessful charge of insanity, with its attendant publicity, might or might not constitute cruel and abusive treatment. It depends upon the motive which prompted the institution of the proceedings. If the application, although unsuccessful, was made in good faith, in the honest and sincere belief that the wife was in such an unsettled mental condition that her own good and that of her family required confinement and treatment in such an institution, such an act would be regarded as lacking entirely the essential element of cruel and abusive treatment. *Reichert v. Reichert*, 124 Mich. 694, 83 N. W. 1008. It would spring from kindness rather than cruelty.

If, on the other hand, the husband, without just cause, wilfully attempted to have her committed to an insane asylum, such conduct, seriously affecting her health, would obviously constitute cruel and abusive treatment within the meaning of the statute. In other words, it was not merely the act itself, but the motive

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treatment.

which inspired the act, that was to be rigidly inquired into and determined by the jury. As

bearing upon this issue, the evidence was necessarily voluminous. It would be futile to rehearse it.

One significant fact, however, which must have carried great weight is that in July, 1919, only two months after his failure to secure her commitment, Mr. Michels instituted proceedings in the probate court for Berkshire county, Massachusetts, where he was residing, to have a conservator appointed to take charge of his wife's property, alleging in his petition that by reason of mental weakness she had

become incapacitated to properly care for her property. This petition was signed by a sister of the libellant, as well as by the libellee. It was duly served on Mrs. Michels, but was subsequently dismissed by agreement. Here, again, the question of good faith or wilful persecution on the part of the husband was the crucial point, and, as bearing strongly on that, it satisfactorily appears that Mrs. Michels had never lost a dollar of her property by unwise investments, and that she had wasted none. So that his attempts to deprive her of her liberty and of the management of her property both failed. We are constrained to say that the allegations of the libel, and concerning these two proceedings, are founded upon substantial evidence.

In addition to these specific and notorious acts, the libellant testified to her general treatment by her husband during a series of years. Even the printed page reveals something of the atmosphere that must have pervaded the home life, and the cold, neglectful, unsympathetic, and surly attitude of the husband, resulting in her finally leaving him, taking her two children with her, and declaring that she could never return. She was undoubtedly of a highly nervous temperament, and was for a considerable period on the verge of a nervous breakdown. In that condition she needed the tender care and kindly treatment which his marriage vow demanded, instead of neglect at home, or confinement in an insane asylum away from her home and children.

Without further discussing the evidence, it is sufficient to say that in the opinion of the court the libellant, under the facts presented, was entitled to her decree of divorce as a matter of law, and the entry must be, exceptions overruled.

—when divorce
granted.

ANNOTATION.

Charge of insanity, or attempt to have spouse committed to an insane asylum, as ground for divorce.

It was held in *MICHELS v. MICHELS* (reported herewith) ante, 570, that unfounded attempts by a husband to have his wife committed to an insane asylum, and to have a conservator appointed to take charge of her property on the ground that, because of her mental weakness, she was incapacitated to take care of the same, might constitute cruel and abusive treatment entitling the wife to a divorce. The court said that the unsuccessful charge of insanity, with its attendant publicity, might or might not constitute cruel and abusive treatment, depending upon the motive which prompted the institution of the proceeding; that if the application, although unsuccessful, was made in good faith, in the honest and sincere belief that the wife was in such an unsettled mental condition that her own good, or that of her family, required confinement and treatment in such an institution, such an act would be regarded as lacking entirely the essential elements of cruel and abusive treatment; but that if, on the other hand, the husband, without just cause, wilfully attempted to have her committed to an insane asylum, such conduct, seriously affecting her health, would obviously constitute cruel and abusive treatment within the meaning of the statute. And a decree of divorce was sustained in this case.

And in an action brought by the wife for separation on account of cruel and inhuman treatment, it was held in *Beebe v. Beebe* (1916) 174 App. Div. 408, 160 N. Y. Supp. 967, that a finding that the defendant had not been guilty of such treatment should be reversed, where it appeared that he had not acted in good faith in obtaining her commitment to an insane asylum. And it was held, also, that the commitment in the lunacy proceeding did not preclude a finding of the husband's bad faith. The court said that, if the order for commitment

were disregarded, the proofs showed that the plaintiff was rational, and that the defendant's action was not taken in good faith, but that the trial court apparently proceeded on the ground that the official commitment precluded a finding that the defendant offended in obtaining it. The court said: "If the plaintiff was insane, the husband banished her from his presence and personal care, and placed the children at the hazard of her frenzy, and contracted with her as if she was in full mental capacity. If she was a woman in the mental and physical distractions of childbirth, and he superadded his confession of love for another, and his proposed disposition of the marital relations, and based his lunacy proceedings on the condition he had excited, he was cruel and inhuman. But he shields himself behind the order in the lunacy proceedings. That should not be allowed. He contends that it is a judgment establishing the insanity, and that it cannot be attacked even to impugn the good faith of the defendant. . . . And it is urged that the commencement of the proceedings and commitment to an asylum are not grounds for a limited divorce. . . . But the evidence tends to show that the lunacy order was obtained by defendant's fraudulent practice. The physicians did not jointly examine the plaintiff, and one of them had not seen her during the year 1911. But such joint examination is one of the grounds of jurisdiction, and a person knowingly omitting compliance with it cannot plead the protection of the order. The defendant instituted the proceeding, and used the certificate of lunacy for that purpose. He, the instigator of the proceedings, and presenting the certificate, knew whether the two physicians had, on May 10th, made a joint visit to his house and conducted a joint examination of his wife with the result stat-

ed in the certificate, and he must have known that his application was false and fraudulent. It, therefore, is not unassailable as to him, whatever evidence of insanity it might otherwise be. I think, therefore, that the court was not justified in finding that the defendant had not been guilty of cruel and inhuman treatment."

The MICHELS CASE cites, in support of the doctrine that an attempt by the husband in good faith to have his wife committed to an insane asylum, though unsuccessful, is not such cruelty as entitles her to divorce, *Reichert v. Reichert* (1900) 124 Mich. 694, 83 N. W. 1008, where, in affirming a decree dismissing a bill for divorce sought on the ground of cruelty in the husband's attempt to have the wife committed to an insane asylum, the court said: "We are convinced that the complainant became intensely jealous of her husband without just cause, and the application to have her adjudged insane was made in good faith, and in the belief that the statements attributing improper conduct to the defendant were induced by an unsettled mind. We are not able to find in the defendant's action in this regard, or in any other respect, such evidence of cruelty as will justify a decree of divorce."

Other cases support the rule that, if the attempt by one spouse to have the other committed to an insane asylum is made in good faith, it does not constitute ground for divorce.

Thus, in *Wilson v. Wilson* (1916) — Mo. App. —, 190 S. W. 53, it was held that an attempt by the wife to have the husband committed to an insane asylum did not constitute an indignity within the meaning of the statute, so as to entitle him to divorce, where it appeared that she thought that she was acting for his benefit, that he had been, seven years previously, adjudged to be of unsound mind, and that she had been appointed guardian and during the intervening time had managed the estate, although, shortly after being taken to the asylum, he made application to the probate court and was adjudged

sane and capable of managing his own affairs.

And it was held in *Kuster v. Kuster* (1902) 37 Misc. 136, 74 N. Y. Supp. 853, that a wife was not entitled to a degree of separation, either on the ground of cruelty or on the ground that it was unsafe for her to cohabit with her husband, merely because he had secured her commitment to an insane asylum, where it appeared that for several years she had had delusions that her husband and others were trying to poison her, and accused various persons of nefarious designs upon her, that he had received medical advice that she was afflicted with paranoia and was in danger of committing acts of violence upon herself and others, and that, even at the time of the trial, medical experts differed as to her mental condition. The court said that the husband's acts were all inspired, it was convinced, however ill they were conceived, by an honest desire on his part to benefit the plaintiff, and were done because he believed the exigencies of the case warranted them. In reply to the contention that the good faith of the defendant was not involved, the court said that while a husband would not be permitted to escape the consequences of danger to his wife, brought about, for example, by his insane or drunken condition, on the plea that he was not responsible for the acts which menaced her happiness and safety, the question of good faith or motive in such a case being necessarily excluded from consideration, this was not true under such circumstances as those before it; that it was the duty of the husband to protect the wife, and that if, in the performance of that duty, he was confronted with a situation which required him to resort to measures affecting her personal liberty, it would seem to be of the utmost importance to inquire rigidly into his motives and good faith.

In several cases an unfounded charge of insanity has been regarded as a circumstance which, in connection with the other facts in evidence,

was sufficient to justify the granting of a divorce.

Thus, in *Andrews v. Andrews* (1898) 120 Cal. 184, 52 Pac. 298, it was held that a decree in favor of the wife for a divorce should be sustained, where the evidence showed various acts of cruelty on his part, extending over several years, such as calling her vile names, charging her with being "crazy" and "demented," with trying to poison him, and threatening to send her to an insane asylum, as well as also falsely charging her with adultery. The court held that the facts shown were sufficient to constitute "extreme cruelty," within the meaning of the statute.

And it was held in *Russell v. Russell* (1908) 37 Pa. Super. Ct. 348, that a divorce on the ground of cruelty was properly granted to the wife where the evidence showed that the husband heaped indignities upon her in treating her as a menial in the presence of servants, intimated that she was of unsound mind and that she was under the influence of designing and wicked persons, and, in general, manifested toward her such insistent egotism and arrogant domination as rendered her life a burden and her condition intolerable, and justified her fear that he intended further to humiliate her by threats to resort to legal proceedings to test her sanity.

So it was held in *Mamaux v. Mamaux* (1916) 64 Pa. Super. Ct. 131, that a decree of divorce should have been granted in favor of the husband, where the evidence showed that the wife had twice assaulted him, one of the assaults being of a violent nature, that she had purchased a horsewhip to use upon him on certain contingencies, that she had employed detectives to

watch and to report on his conduct, that she had filed a proceeding in divorce, which she discontinued, and an information charging him with adultery, but abandoned the charge, and that she also had filed a petition charging him with insanity, which proceeding also she discontinued. The court held that the cruel and barbarous treatment defined in the statute was not restricted to acts which necessarily endangered life, and that in this case the series of humiliating offenses was erroneously excused by the trial court on the ground of the wife's jealousy and her belief in her husband's misconduct.

In an action by a wife for separation on the ground of excesses and cruel treatment and defamation, it is said in the syllabus by the court in *Harrison v. Harrison* (1906) 115 La. 817, 40 So. 232: "The spreading of a report that the wife is insane, and the publishing of a notice that the husband will not be responsible for any debts she may contract, are not sufficient in themselves to support an action for separation from bed and board on the ground of defamation; but these facts will contribute materially to the support of an action on the ground of excesses and cruel treatment, especially in a case where the wife is a woman of culture and refinement." And it was held that a decree for separation was justified, the evidence showing, in addition to the facts above indicated, that on more than one occasion the defendant had used violence toward the plaintiff. The court cited a Code provision to the effect that excesses and cruel treatment can justify a separation only when "of such a nature as to render the living together insupportable."

R. E. H.

RE ESTATE OF A. M. J. CARDONER, Deceased.

E. P. BUJAC et al., Appts.,

v.

JOSEPH R. WILSON, Exr., etc., of A. M. J. Cardoner, Deceased.

New Mexico Supreme Court — October 18, 1921.

(— N. M. —, 201 Pac. 1051.)

Executor and administrator — eligibility — residence.

1. Sections 2222, 2223, 2242, 2243, and 2244, Code 1915, interpreted, and held that the residence required of a person to entitle him to qualify as an executor is nothing more than actual residence.

[See note on this question beginning on page 581.]

— effect of testator's desire.

2. Aside from the common-law doctrine which excludes idiots and lunatics, the desire of the testator is a controlling factor in determining the

right to administer an estate, and it is only statutory disqualifications which may operate to defeat such desire.

[See 11 R. C. L. 81.]

Headnotes by PARKER, J.

APPEAL by objectors from a judgment of the District Court for Bernalillo County (Hickey, J.), affirming a judgment of the Probate Court holding the executor qualified to administer the estate of deceased in a proceeding by him for appointment as such executor. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Marron & Wood for appellant.

Mr. A. B. McMillen for appellee.

Parker, J., delivered the opinion of the court:

Upon a motion to dismiss the appeal, we handed down an opinion concerning which, upon motion for rehearing, we have some doubts. In view, however, of the opinion we have of the case, we do not deem it necessary to further discuss this motion, and will withdraw the opinion and dispose of the case upon the merits.

The facts in the case are that a Madame Cardoner died at her residence in Albuquerque, New Mexico, on the 1st of October, 1918, leaving a last will, in and by which she appointed Joseph R. Wilson as executor to serve without bond, and named her daughter, Bertha Pauchet, of Barcelona, Spain, her sole legatee. The will was produced and filed by the executor in the probate court, together with a petition for

the approval of the will and the issuance to him of letters testamentary on October 12, 1918. There was no contest as to the validity of the will, but the appellants, on November 30, 1918, together with said Bertha Pauchet, the said legatee, filed amended and supplemental objections to the appointment of Wilson as executor and prayed as follows: "Wherefore your petitioners pray that the will of the said Mathilde Cardoner be admitted to probate as prayed for in the petition, but that the application of the said Joseph R. Wilson to be appointed executor thereof without bond be denied and refused by the court, and that Etienne P. Bujac, creditor, be appointed as administrator with the will annexed and manage her said estate, upon giving ample security as required by law."

A hearing was had on November 30, 1918, in the probate court, and Joseph R. Wilson was held by said court to be a qualified executor un-

der said will, and letters testamentary were thereupon issued to him. From this judgment of the probate court the objecting parties appealed to the district court of Bernalillo county. Pending appeal from the probate court to the district court Bertha Pauchet, the legatee, dismissed her appeal, and asked that the said Joseph R. Wilson be allowed to continue to administer the estate, and opposed the appointment of the said Bujac as administrator with the will annexed. The district court, on November 26, 1919, found that said Joseph R. Wilson was qualified to act as executor, and that letters testamentary had been duly issued to him by the probate court, and that the said E. P. Bujac was not entitled to appointment as administrator of the said estate.

1. The principal ground of opposition to the appointment of Wilson is his alleged nonresidence. It appears from the evidence that, at the time of the death of the deceased, Wilson was a resident of the city of Philadelphia, state of Pennsylvania. Upon the death of the deceased he went to Albuquerque, New Mexico, and soon thereafter, and prior to the issuance to him of letters testamentary, he had acquired a place of residence and had removed to Albuquerque and was living there with his family. These facts are undisputed. It is urged, however, by appellants, that Wilson's residence was so established in Albuquerque for the purpose of enabling him to serve as executor of the estate, and was not established for the purpose of becoming an actual, bona fide, permanent resident as an executor. Evidence was introduced by appellants to establish the fact that Wilson's residence was established here, not for the purpose or with the intention of making his residence permanent, but for the purpose of enabling him to qualify as executor in this matter, and some evidence along this line was offered which was excluded by the court upon technical grounds. In the view we take of the matter, however, it

may be assumed that the evidence offered and tendered would show that Wilson established his residence in Albuquerque, and maintained the same during the pendency of the administration of the estate, for the purpose merely of qualifying himself to serve as executor, although there is evidence in his behalf to the contrary, which the court might well have been justified in believing.

The question turns upon the proper interpretation of our statutes in this regard, the pertinent provisions whereof are as follows:

Sec. 2222. Persons capable of making a will may be appointed as executors or administrators, and after having accepted said appointment, they shall impartially and punctually discharge the duties thereof.

"Sec. 2223. The following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude."

"Sec. 2242. If an executor or administrator become a nonresident of this state, he may be removed and his letters revoked in the manner prescribed in the preceding section, except that the notice may be given by publication for such time as the court or judge thereof may direct.

"Sec. 2243. If a person be named in a will as executor who is a nonresident of the state or a minor, upon the removal of such disability he is entitled to qualify as such executor, if he apply therefor within thirty days from the removal of such disability if otherwise competent. If in the meantime, an administrator with the will annexed has been appointed, his powers and duties cease with the qualification of such executor; but if another executor is qualified and is acting as such, they thereby become joint executors.

"Sec. 2244. Whenever it appears probable to the court or judge that any of the causes for removal of an

executor or administrator exist or have transpired, as specified in § 2241, it shall be the duty of such court or judge to cite such executor or administrator to appear and show cause why he should not be removed, and if he fail to appear or show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently perform the duties of his trust according to law." Code 1915.

It will be noticed that, speaking broadly, all persons capable of making a will may be appointed executor, as is provided by § 2222. The general provisions of this section are restricted somewhat by the provisions of § 2223, to the effect that nonresidents of the state, together with others specified in the section, shall not be qualified to act. By § 2243, it is provided that, if the executor named in the will is a nonresident of the state, he may, upon the removal of such disability, become qualified to act if he applies for letters within thirty days after the disability has been removed. By § 2242, if the executor, after he has qualified, becomes a nonresident, he may be removed and his letters revoked in accordance with certain procedure laid down in the statutes.

Taking these sections of the statute together, we are of the opinion that it is clear that the residence contemplated as a basis for the qualification of an executor means nothing more than actual residence.

**Executor and
administrator—
eligibility
—residence.**

The statute seems to contemplate and to provide for cases exactly like the case

at bar. It contemplates that wills may be presented to probate courts in this state which name executors who are, for the time being, nonresidents of the state, and further contemplates that, upon the removal of such disability by establishing an actual residence in this jurisdiction, the right to administer be-

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comes perfect. Under such circumstances it cannot be said that the quality or character of the residence necessary to qualify an executor is anything more than an actual residence and presence within the state. So that, in accordance with the provisions of § 2244 above quoted, the probate court or judge may exercise a supervisory control over him to the end that he faithfully and diligently performs the duties of his trust according to law.

Counsel have cited a few cases which have attempted to define the meaning of residence, but none of the same seem to us to be applicable in this jurisdiction. Most of the cases cited define the nonresidence necessary in order to confer jurisdiction upon the Federal courts under the divers citizenship requirements. One case cited is based upon the distinction between legal and actual residence, and holds that legal residence is required to avoid the necessity of giving a cost bond. Appellants cite two cases which bear directly upon the question. In *Re Mulford*, 217 Ill. 242, 1 L.R.A. (N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345, 3 Ann. Cas. 986, the court held, under a statute which provided that "no nonresident shall be appointed or act as executor," that a resident of Ohio, who still maintained his homestead in that state, and who came to Illinois and testified that he intended to remain in Illinois so long as it might be necessary to perform his duties as executor of the estate, was a nonresident of Illinois, and was not entitled to complain of the action of the court in refusing to issue to him letters testamentary. It is to be observed, however, at least so far as appears from the report of this case, that Illinois has no such provisions of law as we have. There is in Illinois no provision that a nonresident who has been named an executor may remove the disqualification, and obtain letters testamentary within thirty days after the removal of said disqualification.

The other case cited is *Re Don-*

ovan, 104 Cal. 623, 38 Pac. 456. In that case a brother of the deceased, who died intestate in California, resided in the state of Massachusetts at the time of the death of his brother. He, and others entitled to share in the estate, signed and forwarded to the appellant a request for his appointment as administrator and appellant, in pursuance of such request, and later filed his petition praying that letters of administration be issued to him. Three days before the hearing the brother arrived in California. He was put upon the stand, and testified in such a manner as to show that it was not his intention to remain in the state. The statute of California requires that a person requesting appointment as administrator, or requesting the appointment of another person, must be a "bona fide" resident of the state. The court very correctly held in that case, and under that statute, that the residence required was more than a mere actual residence. The case, therefore, has no controlling influence upon the determination of this matter.

We are confirmed in this conclusion by the further consideration that the wishes of a testator as expressed in his last will and testament are to be regarded as of controlling force, and are to be overturned only where some positive provision of law prevents the same being carried out. This is a well-known fundamental principle, universally recognized.

2. Counsel for appellants presented in their objections to the qualifications of Wilson to act as executor certain matters tending to show unfair or dishonest conduct toward the deceased in her lifetime, and here urge the same in a somewhat perfunctory manner. We do not understand them to seriously contend that, upon principle or authority, such objections can be successfully maintained. On the other hand, counsel for appellee have cited *Kidd v. Bates*, 120 Ala. 79, 41 L.R.A. 154, 74 Am. St. Rep. 17, 23 So. 735; *Re Bergdorf*, 206 N. Y.

309, 99 N. E. 714; *Clark v. Patterson*, 214 Ill. 533, 105 Am. St. Rep. 127, 73 N. E. 806; *Berry v. Hamilton*, 12 B. Mon. 191, 54 Am. Dec. 515—all of which are well-considered ^{—effect of testator's desire.} cases, and point out that the desire of the testator is a controlling factor in determining the right to administer an estate, and that it is only statutory disqualifications which may operate to defeat the will of the testator, aside from the common-law doctrine which excludes idiots and lunatics.

It follows from all of the foregoing that the judgment of the District Court was correct, and should be affirmed; and it is so ordered.

Raynolds, J., concurs.

Roberts, Ch. J., concurring:

While agreeing that the judgment in this case on the merits should be affirmed, I am unable to give assent to the view of the law as expressed in the majority opinion. As I understand this opinion, it is to the effect that the residence necessary to qualify an executor is simply actual residence or presence within the state at the time application for appointment is made. If by actual residence it is meant to hold that the person must, at the time of applying for letters, be a bona fide resident of the state, I would give ready assent to that. But the majority opinion, as I read it, does not require actual, bona fide residence within the state, but simply physical presence of the applicant for letters at the time the application is made. I am forced to this conclusion, because the opinion states "actual residence and presence within the state" is all that is required, and an attempt is made to distinguish this case from the case of *Re Mulford*, 217 Ill. 242, 1 L.R.A. (N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345, 3 Ann. Cas. 986. I think all who read this opinion will come to the conclusion that it is meant to hold that residence, as generally understood, is not required of the applicant for letters testamentary under our stat-

ute. I do not believe there is any basis for the attempted distinction, for the statute of Illinois (Ill. Anno. Stat. 1913, § 66) provides "that no nonresident of this state shall be appointed or act as administrator or executor," which means substantially the same thing as our § 2223, in this regard. It is true they have no provision similar to our § 2243, to the effect that a person may become a resident of the state after the probate of a will in which he is named as executor, whereupon he is eligible for appointment. But I cannot see how this provision can have the effect upon the other provision ascribed to it in the majority opinion. In the case of *Re Mulford*, 217 Ill. 242, 1 L.R.A. (N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345, 3 Ann. Cas. 986, Marion Mulford had been named as executor of the will of Harriet M. Richards. The testator was a resident of the county of Will in the state of Illinois. Mulford was a resident of Ohio. He testified that he was seventy-one years old, and had a wife and two daughters with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died. That he lived with his family on homestead property owned by himself, and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate, and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will, and that he still retained that fixed purpose, whatever time might be required therefor. After reciting the above facts, the court said:

"Nevertheless, the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. 24 Am. & Eng. Enc. Law, 2d ed. 697. 'A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's for-

mer inhabitance, does not constitute residence.' *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117.

"The court did not err in refusing to issue letters testamentary to the appellant."

In an earlier case (*Child v. Gratiot*, 41 Ill. 357), and before the enactment of the provision that no nonresident should be appointed or act as administrator or executor, the court held that a nonresident could not legally be appointed because of the provision of the statute which authorized the removal of an executor who became a nonresident of the state.

Other states have statutes prohibiting the appointment of a nonresident. The majority opinion seems to attach importance to the use of the word "bona fide" resident in the California statute. I attach no importance to this, as I assume that when the word "resident" is used in a statute it necessarily means a bona fide resident.

Arkansas has a statute (*Kirby & C. Dig. of Stat. (Ark.) 1916, § 14*) which, as our statute, uses the term "nonresident," and provides that a nonresident is not eligible for appointment. Likewise, Missouri, § 10, Rev. Stat. 1919. Under this statute, in the case of *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113, the court held that a nonresident, coming into the state and being appointed, must come with the bona fide intention of becoming a resident of Missouri. Georgia has a similar statute, § 3941, Code 1914; likewise Montana, § 7436, Code 1907. The courts of all these states hold, so far as I am advised, that actual, bona fide residence within the state, at the time of appointment, is essential.

I cite these for the purpose of showing that the importance attached to the use of the term "bona fide" in the California statute is not justified. Decisions under these statutes will be found collected in the note to the case of *Re Mulford*, 1 L.R.A. (N.S.) 341. See *Re Bailey*,

31 Nev. 377, 103 Pac. 232, Ann. Cas. 1912A, 743.

In our statute relative to venue in civil actions it is provided that transitory actions shall be brought in the county where the plaintiff or defendant, or some one of them in case there be more than one of either, resides. If this does not require bona fide residence in the county by the plaintiff where he sues in such county, then it will be possible for the plaintiff to temporarily go to some other county in the state, and there file the suit. To constitute "residence," as I understand the term, there must be an actual home where the person intends to reside permanently, or for a definite or indefinite length of time, and residence depends upon fact and intention.

But, entertaining these views as I do, I am still of the opinion that the judgment in this case should be affirmed. For the court found upon conflicting evidence that Joseph R. Wilson, on the 12th day of October, 1918, which preceded his appointment, and ever since that date, has been an actual and bona fide resident of the city of Albuquerque, county of Bernalillo, and under this finding his appointment as executor was justified. The fact that he came to New Mexico for the purpose of qualifying as executor under the will in question is not material, if in fact he came here with the intention of making Albuquerque his home to the exclusion of all other places. As said by the court in the case of *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113: "The rule is well established in every jurisdiction that the motive or purpose of a change of domicil or residence is not material. The only question is whether the change of residence is made by the party with the bona fide intention of becoming a resident of another state."

Here Wilson testified that he had given up his home in Philadelphia, and had come to Albuquerque with his wife and daughters with the intention of making Albuquerque his

permanent home, that he had either sold or removed his furniture and effects to Albuquerque, and had permanently abandoned his home in Philadelphia. The court had the right to believe this evidence offered by Wilson. It is true that witnesses testified to conversations with Wilson, prior to this time, which indicated that at that time Wilson contemplated making the change temporarily only, but it may be that thereafter he formed the fixed purpose and intention of permanently residing in Albuquerque. The evidence justified the finding. I do not attach any importance to the point made by appellants to the effect that the enumeration of certain disqualifications of persons from becoming executors of wills by § 2223, Code 1915, does not conclude the court from refusing letters testamentary upon grounds other than those named in the statute, such as bad character, insolvency, and antagonistic interest, as the court did not refuse the letters. A different question might be here if letters had been refused on some other than statutory grounds.

The only other point requiring consideration is the refusal of the court to admit in evidence a letter written by Wilson to the legatee under the will, but the statement as to the contents of the letter in the offer of evidence, I think, shows that no prejudice resulted by reason of the refusal. The offer was to show that the letter in question, written by Wilson to Mrs. Pauchet since the commencement of the proceedings to be appointed executor, and during Wilson's sojourn in New Mexico, stated in substance that he was coming here—obliged to come here—solely for the purpose of protecting the interest of Mrs. Pauchet in this estate, and in connection with the properties of the estate. As I have attempted to show heretofore, the motive prompting his taking up his residence in New Mexico was wholly immaterial.

It is urged that the evidence in this case is of such a nature that it

(— N. M. —, 201 Pac. 1061.)

ought not to be held that there was substantial evidence offered to establish the bona fide residence in New Mexico of Joseph R. Wilson. I do not agree with this statement. The court had the right to believe Wilson, if it so elected.

I agree that the opinion heretofore filed on the motion was erroneous, and for that reason consent to its withdrawal.

For the reasons stated, I concur in the affirmance.

ANNOTATION.

Nature of residence contemplated by statute or rule making residence within state qualification of executor or administrator.

It has been held that, under a statute making residence a qualification for the appointment of a personal representative, legal residence is essential, so that the competency of a person coming into the state to assume the administration of an estate depends on the existence of a bona fide intention to take up a residence there. *Re Donovan* (1894) 104 Cal. 623, 38 Pac. 456; *Re Newman* (1899) 124 Cal. 688, 45 L.R.A. 780, 57 Pac. 686; *Stevens v. Larwill* (1904) 110 Mo. App. 140, 84 S. W. 113.

Thus, in the case last cited, it was contended that the letters granted to the respondent should be revoked, because he was a nonresident. Denying this contention, the court said: "The facts as to his residence are that, up to March 15, 1901, he had been a resident of Oklahoma territory; having closed out his business there, he made a short visit to Ohio; from thence he went to Montana with a view of locating and going into business; he decided, however, not to remain in Montana, and was on the point of returning, when he received a telegram announcing the death of his brother, John C. Larwill, in Ohio. He went to Ohio to consult with the executors named in his brother's will about the estate, and there learned of the death of Miller Stevens, the agent in charge of the Kansas City real estate. Mr. Smith, one of the executors, suggested to respondent that he go to Kansas City and assume charge of the property. This suggestion was adopted, and respondent came to Kansas City, October 14, 1901, and attempted to take charge of

the property and collect the rents, but was prevented by the action of petitioners herein, in notifying tenants not to pay any rent to respondent. He testified that he was then without any permanent home, and he thereupon, on or about October 15, 1901, decided to become a resident of Kansas City, Missouri, and so declared his intention, engaged board and lodging, opened a bank account, and did other things evidencing his intention to become a resident here, and has resided in this city and state ever since. It may be conceded that the respondent became a resident of this state for the purpose of applying for letters of administration, having, under the will, one of the largest interests in said estate. . . . The rule is well established in every jurisdiction that the motive or purpose of a change of domicil or residence is not material. The only question is whether the change of residence is made by the party with the bona fide intention of becoming a resident of another state."

So, it was said in *Re Newman* (1899) 124 Cal. 688, 45 L.R.A. 780, 57 Pac. 686: "It is contended that petitioner was not a resident of California, and therefore was not entitled to letters. She testified that she came to this state because her husband left an estate here; that, if he had not left such an estate, she would not have come, but that, being here, it was her intention to remain and make this her future home. The court found in her favor. Her intention constituted the material issue, and there certainly was evidence to support the finding. The difference between this case and

the case of *Re Donovan* (1894) 104 Cal. 623, 38 Pac. 456, is that there the court found against the petitioner as to the fact. In each case this court must abide the conclusion."

Re Donovan (Cal.) *supra*, is sufficiently set out in the reported case (*RE CARDONER*, ante, 575).

The reported case (*RE CARDONER*) holds that the New Mexico statute, making residence a qualification for the appointment of an executor or an administrator, does not require an actual bona fide residence within the state, but simply the physical presence of the applicant for letters, at the time the application is made.

Similarly, under the Wyoming statute (Rev. Stat. § 4622) providing for the suspension of an executor when he "has permanently removed from the state," it was held in *Hecht v. Carey* (1904) 13 Wyo. 154, 110 Am. St. Rep. 981, 78 Pac. 705, that an executor who was personally present in the state, and attending to the business of the executorship, had not permanently removed from the state, not having permanently absented himself from the place where the business was to be transacted, or withdrawn himself beyond the process of the court.

On the other hand, in the case of *Re Mulford* (1905) 217 Ill. 242, 1 L.R.A.(N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345, 3 Ann. Cas. 986, the conclusion was reached that a nonresident who maintained a residence in another state, and who came into Illinois to remain only so long as was necessary to perform his duties as executor, was not qualified under a statute providing that "no nonresident shall be appointed or act as executor." That case is sufficiently set out in the reported case (*RE CARDONER*).

If the legal residence of an executor is maintained at the place where he was appointed, temporary absence is not ground for his removal.

In *Re McKnight* (1903) 80 App. Div. 284, 80 N. Y. Supp. 251, affirmed in (1904) 179 N. Y. 522, 71 N. E. 1134, wherein it was held that the temporary nonresidence of an executor, on account of the ill health of a member

of the family, does not constitute a removal from the state within a statute (§ 2569, subd. 6, Code Civ. Proc., now § 99, subd. 6, Surrogate Court Act) providing for the revocation of the letters of an executor who "has removed, or is about to remove, from the state." The court said: "It must be conceded that these averments in the answer certainly do amount to an admission of temporary nonresidence on the part of the executors, so that the case directly calls for the determination as to whether a residence of this character in another state constitutes a removal from New York state, within the meaning of the Code, so as to require the surrogate to revoke the letters testamentary. Not without considerable hesitation, I have reached the conclusion that it does not. It seems quite clear that a temporary absence from the state on account of ill health, or on account of business, or for purposes of travel or pleasure, would not necessarily establish the fact that an executor 'has removed' from the state, within the intent of the statute. The learned surrogate was evidently satisfied that the sojourn of these executors in New Jersey was nothing more than a departure from the state for the benefit of relatives, not designed to constitute a permanent change of abode, and contemplating a return to New York as soon as the purpose of their absence should be accomplished. In this view, I am inclined to think that he was right in refusing to hold that he was constrained to revoke the letters by the provisions of the Code to which I have referred."

In the case of *Re Magoun* (1903) 41 Misc. 352, 84 N. Y. Supp. 940, it was held that the fact that an executrix had resided without the state from the time of her appointment was not ground for her removal, where it appeared that she was the sole legatee, devisee, and executrix under the will of her husband; that she was the mother and general guardian of his only child, an infant; that she had omitted no step in her duties as the representative of her husband; and that she had denied any intention of becoming a nonresident. A. S. M.

A. T. HASTINGS, Receiver, etc., of Ross & Skinner, a Partnership, etc.,
Respt.,
v.

LINCOLN TRUST COMPANY, Appt.

Washington Supreme Court (Dept. No. 1)—April 20, 1921.

(— Wash. —, 197 Pac. 627.)

Pledge — delivery of unindorsed warehouse receipt.

1. The delivery of an unindorsed warehouse receipt which makes the property deliverable to storer or order is not sufficient to effect a pledge of the property stored, which will be valid against the creditors of the storer, represented by a receiver.

[See note on this question beginning on page 588.]

Receiver — extent of rights.

2. A receiver possesses no rights with respect to the trust property superior to those which would be possessed by the one for whom he was appointed, were the latter acting for himself.

[See 23 R. C. L. 56.]

Pledge — necessity of delivery.

3. Delivery of pledged property by the pledgeor to the pledgee is absolutely necessary to the life of the contemplated pledge.

[See 21 R. C. L. 642, 643.]

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff, in an action brought to recover the value of several automobiles alleged to have been wrongfully obtained and sold by defendant, and the proceeds thereof converted to its use.
Affirmed.

The facts are stated in the opinion of the court.

Messrs. McCarthy & Edge and George D. Lantz, for appellant:

The delivery of a public warehouse receipt is of the same legal effect upon the property in the warehouse as the physical transfer of possession of other property; it constitutes a symbolic delivery of possession of the property covered by the receipt.

Marsh v. Wade, 1 Wash. 538, 20 Pac. 578; Brockway v. Abbott, 37 Wash. 263, 79 Pac. 924; Reed v. Bank of Commerce, 8 Wash. 539, 36 Pac. 494; Vincent v. Snoqualmie Mill Co. 7 Wash. 566, 35 Pac. 396; Kidder v. Beavers, 38 Wash. 635, 74 Pac. 819; Mutual Invest. Co. v. Walton Mach. Co. 91 Wash. 298, 157 Pac. 682; 23 R. C. L. 56; Lawson v. Warren, 34 Okla. 94, 42 L.R.A.(N.S.) 194, 124 Pac. 46, Ann. Cas. 1914C, 139; 40 Cyc. 416; Frontier Mill. & Elevator Co. v. Roy White Co-op. Mercantile Co. 25 Idaho, 478, 138 Pac. 825; Morris v. Burrows, — Tex. Civ. App. —, 180 S. W. 1108; Whitney v. Tibbits, 17 Wis. 359; Bush v. Export Storage Co. 136

Fed. 918; Shingleur-Johnson Co. v. Vanton Cotton Warehouse Co. 78 Miss. 875, 84 Am. St. Rep. 655, 29 So. 770; Sloan v. Johnson, 20 Pa. Super. Ct. 643; National Union Bank v. Shearer, 225 Pa. 470, 74 Atl. 351, 17 Ann. Cas. 664; State v. Loomis, 27 Minn. 521, 8 N. W. 758; Toner v. Citizens' State Bank, 25 Ind. App. 29, 56 N. E. 731; Allen v. St. Louis Nat. Bank, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; St. Louis Nat. Bank v. Ross, 9 Mo. App. 399; Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; Callahan v. Marshall, 163 Cal. 552, 126 Pac. 358.

Mr. E. B. Quackenbush, for respondent:

Even though it should be conceded that defendant held the car in question as a pledge for security, the manner of its sale rendered it liable for conversion, and the verdict and judgment must stand.

Nagel v. Ham, Yearsley & Ryrrie, 88 Wash. 99, 152 Pac. 520; Richardson v. Foster, 100 Wash. 57, 170 Pac. 321;

Wilson v. Mears, 105 Wash. 296, 177 Pac. 815.

"Delivery," as used in the warehouse law of this state, is defined by the Warehouse Act, and its effect declared.

Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; Keyes v. Sabin, 101 Wash. 625, 172 Pac. 835; Lyon v. Nourse, 104 Wash. 309, 176 Pac. 359.

The receiver can contest, as the representative of the creditors, a lien which is ineffective as to them because of a failure to comply with the statute in acquiring it.

Keyes v. Sabin, 101 Wash. 625, 172 Pac. 835.

Defendant not having perfected its lien by obtaining an indorsement of the receipt, or by notifying, or having some arrangement with, the warehouseman to hold it for the defendant at the time the receiver was appointed, could not perfect its lien thereafter.

Mutual Invest. Co. v. Walton Mach. Co. 91 Wash. 298, 157 Pac. 682; Haskins v. Fidelity Nat. Bank, 93 Wash. 66, 159 Pac. 1198; Anderson v. Breneman, 44 Mich. 198, 6 N. W. 222; Lyon v. Nourse, *supra*.

Parker, Ch. J., delivered the opinion of the court:

The plaintiff, Hastings, as receiver of Ross & Skinner, an insolvent partnership, sought recovery in the superior court for Spokane county from the defendant trust company of the value of several automobiles which he alleged it wrongfully obtained the possession of, and sold, and converted the proceeds thereof to its own use; the automobiles being at the time a portion of the trust property of the receivership in his hands for the benefit of the creditors of Ross & Skinner. Trial upon the merits before the court, sitting with a jury, resulted in verdict and judgment awarding to the plaintiff recovery against the defendant in the sum of \$1,050, the value of one of the automobiles in question. From this disposition of the cause in the superior court the defendant has appealed to this court.

There is, we think, no substantial ground for controversy over the facts determinative of the rights of the parties to this cause. They may

be summarized as follows: On May 21, 1918, Ross & Skinner were indebted to appellant trust company for sums then and theretofore loaned by it to them, aggregating several thousand dollars. On that day Ross & Skinner placed in storage in the warehouse of the McAllister Warehouse Company the automobile in question, which storage was evidenced by the warehouse company issuing and delivering to them its warehouse receipt, which, in so far as we need here notice its terms, reads as follows:

"Commercial Warehouse Receipt.

"Spokane, Wash., May 21, 1918.

"This is to certify that we have received and hold on storage (1) one Elgin auto No. 175,386, and *will deliver the same to Ross & Skinner or order, at our warehouse, as and when directed, upon the surrender of this receipt, properly indorsed, and on payment of charges and advances.*

"McAllister Warehouse Co.,
"by J. H. McAllister."

We have italicized the words of this receipt which call for particular notice. Looking to partially securing the indebtedness then owing by Ross & Skinner to appellant, they delivered this warehouse receipt to appellant, but without any indorsement or other written evidence of their assignment of it to appellant. Thereafter, on June 17, 1918, respondent was, by the superior court for Spokane county, duly appointed receiver of Ross & Skinner because of their insolvency, for the purpose of winding up their business and subjecting their property to the payment of their creditors. At that time the automobile in question remained on storage in the McAllister warehouse, the warehouse receipt therefor being still in the possession of appellant, and more than \$1,050 of the indebtedness owing by Ross & Skinner to appellant remained unpaid. Thereafter, in September, 1918, these conditions as to the possession of the automobile remaining unchanged, and the indebtedness

owing by Ross & Skinner to appellant still exceeding \$1,050, appellant induced the warehouse company to deliver to it the automobile upon surrender of the warehouse receipt therefor, which receipt had not been indorsed or otherwise assigned in writing by Ross & Skinner to appellant. Thereafter appellant sold the automobile for the sum of \$1,050 and applied that sum in part payment upon the indebtedness owing to it by Ross & Skinner. The evidence fully warranted the jury in concluding that the \$1,050 received by appellant from the sale of the automobile was its fair value.

The principal claims of error here made in behalf of appellant, the correct disposition of which, we think, will become decisive of this whole case, are, in substance: That the trial court erred in refusing to withdraw from the consideration of the jury and decide as a matter of law that there was, by virtue of the delivery of the warehouse receipt by Ross & Skinner to appellant, a constructive or symbolic delivery of the automobile to appellant, such as would in law support a pledge of the automobile as security for the indebtedness owing by Ross & Skinner to appellant, and that the trial court erred in giving to the jury instructions which, it is claimed and may be conceded, told the jury in substance that the mere delivery of the warehouse receipt by Ross & Skinner to appellant did not, in law, constitute a delivery of the possession of the automobile to appellant, thus, in effect, deciding as a matter of law that there was no such delivery of the possession of the automobile as would support a pledge as security for the indebtedness owing by Ross & Skinner to appellant, and resulting in leaving to the jury only the question of the value of the automobile as respondent's measure of recovery from appellant.

Now it may be that the mere delivery of the warehouse receipt by Ross & Skinner to appellant, accompanied by an agreement between

them that the automobile should be thereby considered as pledged to appellant as security, did have the effect of creating such an inchoate equitable lien upon the automobile in favor of appellant as could in equity be perfected and enforced as between them. But, conceding that to be the effect of such delivery of the warehouse receipt, the question here to be decided would, we think, still remain unanswered. Counsel for appellant invoke at the outset what they conceive to be the general rule that a receiver, assignee, or other trustee of an insolvent concern, appointed for the purpose of winding up its affairs and subjecting its property to the payment of its creditors, stands in the shoes of such concern and possesses no rights with respect to the trust property superior to those which would be possessed by such concern, were it a going concern acting for itself. This Receiver—extent of rights.

may be conceded to be a general rule of law applicable to many controversies which may arise in the settlement of such a trust, but it is, we think, not a controlling rule of law which can be successfully invoked as against the rights of creditors of an insolvent concern, represented by such a receiver or trustee, when it comes to deciding the question of whether or not a mortgage, pledge, or other lien against the property of the insolvent in favor of one of its creditors has been perfected in the manner required by law before insolvency, and the passing of the property and affairs of the insolvent into the hands of such a receiver or trustee. Our decision in *Keyes v. Sabin*, 101 Wash. 618, 172 Pac. 835, is, we think, a holding, in substance, that a lien in favor of a creditor of an insolvent, in order to become effective as against the creditors of such concern represented by a receiver or other trustee, must be a lien perfected, as the law requires, prior to the time of the passing of the insolvent's property and affairs into the hands of such receiver or trustee.

for the benefit of creditors. In that case there was involved the validity of an unrecorded chattel mortgage, the mortgagors having, after execution of the mortgage, made a common-law assignment of their property to one Sabin for the benefit of their creditors, the mortgage not being recorded until after the making of such assignment and the taking of the possession of the property by the assignee. Holding that the mortgage was void as against the assignee as the representative of the creditors, Judge Fullerton, speaking for the court, said: "It is argued that the assignee takes only such title as the assignor had, and, as the mortgage was good as between the mortgagors and the mortgagee, it is good as between the assignee and the mortgagee. But we cannot think the relation here assumed correctly represents the assignee's position. It is true, unquestionably, that if there was a valid and subsisting lien on the property assigned, good as against all the world, or if the title to any of the property was defective in the assignors, the assignee would take the property subject to such lien or defect. But it does not follow that he takes the property subject to all inchoate or imperfect liens, invalid as to certain persons, although valid as between the parties thereto. The assignee holds the property in trust for certain designated persons; in this instance, the creditors of the assignors. In his individual right he acquired nothing by the assignment. He is but the mediary through whom the title to the assigned property was conveyed to creditors. If, therefore, these creditors, the actual beneficiaries of the assignment, could have acquired a valid title against any inchoate or imperfect lien upon the property by an assignment made directly to them, they can acquire such a right by an assignment made to another for their benefit. It cannot be doubted, we think, that if the assignment had been made directly to the creditors, and the mortgage the

appellant seeks to assert is invalid as against them, they could assert its invalidity in any suit against them brought to enforce the mortgage. If they could do this in their individual capacities, there is no reason why they cannot do it through their representative."

It is true that mention is made in that decision, following the above-quoted language, of the fact that the assignee took full legal title to the property by the assignment for the benefit of creditors, as furnishing a possible distinction between that decision and certain of our former decisions which seemed somewhat out of harmony with the views expressed in the above-quoted portion of that decision. Further reflection, however, leads us to conclude that the above-quoted portion of that decision states a correct view of the law applicable to our present inquiry. It seems to us to be of little or no consequence whether we regard the technical legal title to the property as passing to an assignee by formal voluntary assignment for the benefit of creditors of the assignor, or control and dominion over the property passing to a receiver or other trustee for the benefit of creditors of its owner by virtue of an order of a court of competent jurisdiction. The owner is as completely divested of control and dominion over the property in the one case as in the other, and the creditors, as beneficiaries, acquire the same rights—no more, no less,—to have the trust property administered to the end that they be paid from the proceeds thereof, in the one case as in the other. A critical reading of our decision in *Keyes v. Sabin* will, we think, disclose that it was, in its last analysis, rested upon the invalidity of the chattel mortgage as to creditors of the assignee, though good as between the parties, because of the want of its timely recording as required by § 3660, Rem. Code, which makes chattel mortgages "void as against all creditors of the mortgagor, both existing and subsequent,

whether or not they have or claim a lien upon such property. . . ."

The holding in that case, it seems to us, means that an inchoate lien as to creditors of the owner of the property, whether sought to be created by mortgage, pledge, or in any other manner recognized by law, becomes void and of no effect in so far as the rights of the creditors of the owner of the property are concerned, not only upon the passing of the property into the hands of an assignee under a voluntary assignment made by the owner for the benefit of his creditors, but also upon the passing of the property and affairs of the owner, because of insolvency, into the hands of a receiver or other trustee lawfully appointed by a court of competent jurisdiction, for the benefit of creditors.

It is elementary law that the delivery of pledged property by the pledgeor to the pledgee is absolutely

Pledge—necessity of delivery. necessary to the life of the contemplated pledge. It is well

said in *Security Warehousing Co. v. Hand*, 74 C. C. A. 186, 195, 143 Fed. 41: "Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession."

See 21 R. C. L. 643.

It is, of course, not necessary under all circumstances that the delivery be an actual physical movement of the property from the hands of control of the pledgeor to the pledgee; but it must in any event be of such nature that the control and dominion over the property pass from the pledgeor into the absolute control and dominion of the pledgee. Did such possession of this automobile pass from Ross & Skinner to appellant? Now, the real question here is not whether there was such agreement between, or acts on the part of, Ross & Skinner and appellant as would in equity enable appellant to compel the perfection of an inchoate unperfected pledge; but,

in principle, as in *Keyes v. Sabin*, above quoted from, the real question here is whether or not there was such a delivery of the possession of the automobile by Ross & Skinner to appellant, effected by the delivery of the unindorsed warehouse receipt, as in law perfected the contemplated pledge as against the respondent receiver, representing the creditors of Ross & Skinner. In other words, the question is not what claimed rights of appellant could be enforced as against Ross & Skinner, but whether or not there was delivery of possession of the automobile by Ross & Skinner to appellant; for until such a delivery be made there could be no legal pledge. Indeed, in our present inquiry, we can ignore the question of transfer of title by the mere delivery of an unindorsed warehouse receipt such as the one here in question. A mere delivery of such a receipt might be held to transfer the title to the property for which it was issued, accompanied by an agreement to that effect, and still not have the effect of transferring the possession of the property. Possession of this automobile is of the very essence of this controversy, and when we decide who had possession of it, as between appellant and respondent, we will have decided this case.

Recurring to the language of the warehouse receipt, we read that the warehouse company "will deliver the same to Ross & Skinner or order, at our warehouse, as and when directed, upon the surrender of this receipt, properly indorsed." This language of the warehouse receipt all but conclusively shows that one to whom it may be delivered without indorsement or written assignment would not be entitled to receive possession of the automobile from the warehouse company. Such a holder manifestly could not enforce the delivery of the automobile to him by the warehouse company. How, then, can it be said that such a holder of this warehouse receipt acquires constructive, symbolic, or

any other form of possession of the automobile, in the sense that the possession of the warehouse company is his possession? Manifestly, the warehouse company does not become the servant of such a holder of the warehouse receipt so that its possession becomes his possession; but the warehouse company remains the servant of the one to whom the receipt is issued—in this case, Ross & Skinner—as long as the warehouse receipt remains undorsed and untransferred in some form of writing as required by its terms. These considerations, it seems to us, leave no escape from the conclusion that the possession of this auto-

—delivery of
undorsed
warehouse
receipt.

mobile by the warehouse company at all times remained in Ross & Skinner, and, in turn, in the receiver of their property and affairs, until it was wrongfully taken possession and disposed of by appellant.

It may be, because of the negotiable character of this warehouse receipt, in the light of the provisions of our statute relating to warehouse receipts, that, had appellant, even after the appointment of respondent as receiver, procured the indorsement upon it of Ross & Skinner, and then presented it to the warehouse company and demanded possession of the automobile, offering to surrender the receipt so indorsed, the warehouse company would have freed itself from all liability by surrendering the possession of the automobile to appellant. But that is not this case. We are not here concerned with the question of how the warehouse company might have been freed from liability by the doing of something on its part strictly in keeping with the terms and negotiable character of

the receipt. This is an action wherein recovery is sought from appellant because of its wrongful act in acquiring possession of this automobile at a time when it had no legal right to the possession of the automobile, either as against the warehouse company, or respondent as receiver representing the creditors of Ross & Skinner.

Our statute relating to bills of lading and warehouse receipts (Rem. Code § 3369) furnishes abundant ground for arguing that a warehouse receipt in the form of the one here in question can be transferred only by indorsement. Counsel for appellant, however, cite authority supporting the view that similar statutes relative to the transfer of warehouse receipts do not prevent valid transfers thereof by methods recognized as effectual in the absence of the statute. If we were here confronted with the sole question of the transfer of the title to this automobile as between Ross & Skinner and appellant, it would probably be necessary to enter upon an inquiry as to whether or not transfer by indorsement of such a warehouse receipt is, because of the statute, an exclusive method of transferring such a receipt and the title to the property therein described. But, as we have seen, we have here a question of the transfer of the possession of this automobile; and we think the very terms of the warehouse receipt answer in the negative the question of whether or not the mere delivery of such an undorsed warehouse receipt constitutes delivery of possession of the automobile.

The judgment is affirmed.

Holcomb, Bridges, and Mackintosh, JJ., concur.

ANNOTATION.

Lack of indorsement or irregular indorsement of warehouse receipt or bill of lading as affecting pledge of goods.

I. General rule, 589.

II. Transfer of warehouse receipt, 590.

III. Transfer of bill of lading by consignee, 592.

IV. Transfer of bill of lading by person other than consignee, 595.

V. Effect of statute making bill or receipt negotiable:

a. Uniform Warehouse Receipts Act, 603.

I. General rule.

The general rule unaffected by statute is that a sufficient symbolical delivery of goods to support a pledge may be effected by a mere transfer to the pledgee of a warehouse receipt, or bill of lading, describing the goods. The validity of the pledge is not destroyed by a lack of indorsement, or by an irregular indorsement, on such a document of title.

United States.—*Re Levin* (1909) 173 Fed. 119; *New York C. & H. R. R. Co. v. Bank of Holly Springs* (1911) 236 Fed. 562, affirmed on this point in (1912) 115 C. C. A. 358, 195 Fed. 456; *National Bank v. Bradley* (1920) 264 Fed. 700.

Arkansas.—*Bank of Newport v. Hirsch* (1894) 59 Ark. 225, 27 S. W. 74. And see *infra*, V. c.

Illinois.—*Michigan C. R. Co. v. Phillips* (1871) 60 Ill. 190; *Peters v. Elliott* (1875) 78 Ill. 321; *Lewis v. Springville Bkg. Co.* (1897) 166 Ill. 311, 46 N. E. 743.

Indiana.—*Jeffersonville, M. & I. R. Co. v. Irvin* (1894) 46 Ind. 180. See also *Toner v. Citizens' State Bank* (1900) 25 Ind. App. 29, 56 N. E. 731.

Iowa.—*Morse v. Chicago, R. I. & P. R. Co.* (1887) 73 Iowa, 226, 34 N. W. 825; *Shaffer Bros. v. Rhynders* (1902) 116 Iowa, 472, 89 N. W. 1099; *What Cheer Sav. Bank v. Mowery* (1910) 149 Iowa, 114, 128 N. W. 7.

Kentucky.—*Petitt v. First Nat. Bank* (1868) 4 Bush, 334; *Sabel v. Planters Nat. Bank* (1901) 110 Ky. 299, 61 S. W. 367; *Kentucky Ref. Co. v. Bank of Morillon* (1905) 28 Ky. L. Rep. 486, 89 S. W. 492.

Louisiana.—*Blanc v. Germania Nat. Bank* (1905) 114 La. 739, 38 So. 537.

Massachusetts.—*Merchants' Nat. Bank v. Bangs* (1869) 102 Mass. 291; *First Nat. Bank v. Dearborn* (1874) 115 Mass. 219, 15 Am. Rep. 92; *Fifth Nat. Bank v. Bayley* (1874) 115 Mass. 228. See also *Allen v. Williams* (1832) 12 Pick. 297, dictum.

V.—continued.

b. Uniform Bills of Lading Act, 604.

c. Other statutes, 605.

VI. Rule in Georgia, 609.

Missouri.—*Davenport Nat. Bank v. Homeyer* (1869) 45 Mo. 145, 100 Am. Dec. 363; *Skilling v. Bollman* (1878) 6 Mo. App. 76, affirmed in (1881) 73 Mo. 665, 39 Am. Rep. 537; *Clary v. Tyson* (1903) 97 Mo. App. 586, 71 S. W. 710; *American Zinc, Lead & Smelting Co. v. Markle Lead Works* (1903) 102 Mo. App. 158, 76 S. W. 668. See also *infra*, V. c.

New York.—*Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290; *City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 136; *Cayuga County Nat. Bank v. Daniels* (1872) 47 N. Y. 631; *Marine Bank v. Wright* (1871) 48 N. Y. 1; *Merchants Bank v. Union R. & Transp. Co.* (1877) 69 N. Y. 373; *Becker v. Hallgarten* (1881) 86 N. Y. 167; *Commercial Bank v. Pfeiffer* (1888) 108 N. Y. 242, 15 N. E. 311; *First Nat. Bank v. New York C. & H. R. R. Co.* (1895) 85 Hun, 160, 32 N. Y. Supp. 604; *Driggs v. Dean* (1895) 87 Hun, 319, 34 N. Y. Supp. 342, dictum; *Sather Bkg. Co. v. Hartwig* (1898) 23 Misc. 89, 51 N. Y. Supp. 677; *Canandaigua Nat. Bank v. Southern R. Co.* (1909) 64 Misc. 327, 118 N. Y. Supp. 668. See also *Cartwright v. Wilmerding* (1862) 24 N. Y. 521. But see *infra*, V. b.

Ohio.—*Emery v. Irving Nat. Bank* (1874) 25 Ohio St. 360, 18 Am. Rep. 299. See also *Hunt v. Bode* (1902) 66 Ohio St. 255, 64 N. E. 126.

Pennsylvania.—*Holmes v. German Secur. Bank* (1878) 87 Pa. 525; *Holmes v. Bailey* (1879) 92 Pa. 57; *Richardson v. Nathan* (1895) 167 Pa. 513, 31 Atl. 740. See also *Bissell v. Steel* (1871) 67 Pa. 443. And see *infra*, V. c.

Texas.—*Campbell v. Alford* (1882) 57 Tex. 159; *Prendergast v. Williamson* (1894) 6 Tex. Civ. App. 725, 26 S. W. 421; *National Bank v. Citizens' Nat. Bank* (1906) 41 Tex. Civ. App. 535, 93 S. W. 209; *West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (1917) — Tex. Civ. App. —, 194 S. W. 835. Compare *Carter v. Farmers' Nat.*

Bank (1920) — Tex. Civ. App. —, 224 S. W. 265, decided under a specific statute relating to a certificate issued by a public weigher.

With respect to an objection made by counsel in *Blanc v. Germania Nat. Bank* (1905) 114 La. 739, 38 So. 537, to the effect that the act of pledge did not describe or identify the warehouse receipts as required by statute, the court said: "The clear distinction between this case and that of *Pierson v. Metropolitan Bank* (1901) 106 La. 298, 30 So. 885, is that in that case the pledged receipts did not describe the property. Here, for all that appears, the receipts may have contained a perfect description of the property. The one receipt that is in the record does so. It identifies the packages by the mark and the number of each. So true is this that the complaint is not, as it was in the *Pierson Case*, that the receipts do not identify the packages, but that the act of pledge does not identify the receipts. The receipts were actually delivered into the possession of the pledgee, than which no better identification could be desired. In fact, the mere delivery was sufficient, without other formality whatever. Act 157 of 1900, p. 239."

In *Scharff v. Meyer* (1896) 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858, wherein the rights of a pledgee as against an attaching creditor of the shipper were involved, the court made the following explanation: "Section 2482, Louisiana Code, does not, as supposed, provide that the only means of the transfer of a bill of lading shall be by indorsement. The law merchant is part of the common law; by it bills of lading are transferable by delivery, and statutes in derogation thereof should be strictly construed. Therefore, the statutes of the state which provide that indorsement and delivery of bills of lading shall pass title should not be so construed as to mean that such bills may not be transferred by delivery for a valuable consideration."

II. Transfer of warehouse receipt.

In several cases it has been held that a delivery of a warehouse receipt without an indorsement is a transfer

of the possession of the goods described therein which will support a pledge. *Bank of Newport v. Hirsch* (1894) 59 Ark. 225, 27 S. W. 74; *Cartwright v. Wilmerding* (1862) 24 N. Y. 521; *Driggs v. Dean* (1895) 87 Hun, 819, 34 N. Y. Supp. 342; *National Bank v. Citizens' Nat. Bank* (1906) 41 Tex. Civ. App. 535, 93 S. W. 209. See also *Hunt v. Bode* (1902) 66 Ohio St. 255, 64 N. E. 126. Compare *Toner v. Citizens' State Bank* (1900) 25 Ind. App. 29, 56 N. E. 731. But see the reported case (*HASTINGS v. LINCOLN TRUST Co.* ante, 583).

In *National Bank v. Citizens' Nat. Bank* (Tex.) supra, it appeared that a bank, as security for advances to the owner of certain goods, received warehouse receipts therefor, one of which made the goods deliverable to the owner, the others directly to the bank. The receipts contained a provision that they were not negotiable. The goods were sold to a purchaser under an agreement that the pledge to the bank should continue as security for the purchase money. In holding that the lien of the bank was superior to the rights of a creditor of the purchaser who levied on the goods, the court said: "Bills of lading and warehouse receipts, under the law, are not considered negotiable in the sense that bills, notes, etc., are considered, but are regarded as representatives of the property covered by them, and when delivered, with or without indorsement, in deference to the agreement of parties, are a sufficient constructive delivery. *Campbell v. Alford* (1882) 57 Tex. 159, supra; *Adoue v. Seeligson* (1881) 54 Tex. 595; *Osborn v. Koenigheim* (1882) 57 Tex. 92, supra. The compress company recognizes the right of appellee to the property, for its custom and usage were to consider the holders of the receipts as the owners of the property and entitled to demand same when desired. Under this view the appellee was entitled to this action, unless, by the deal with Witherspoon, as shown by the fact, appellee was divested of the pledge. We are unable to see that the relation of appellee to the property was changed in any manner by such deal.

Dement parted with his interest in the cotton, and Witherspoon simply took his position, the understanding being that the cotton should remain pledged for the purchase money. The receipts remaining with appellee, and Witherspoon agreeing and consenting thereto, did not alter appellee's relations to the property in any sense."

In *Cartwright v. Wilmerding* (1862) 24 N. Y. 521, it was held that there was a valid pledge of goods described in warehouse receipts of a government bonded warehouse, where it appeared that an advance was made by the pledgee at the date of the transfer of the receipts to him, though no indorsements were made thereon until a few days later, when it was discovered that they had been inadvertently omitted. Although the New York Factors' Act of 1830 was discussed in the opinion as to other points in the case, the question relating to the indorsement of the receipts appears to have been determined in accordance with the custom of the trade and the rules of common law.

In *Driggs v. Dean* (1895) 87 Hun, 319, 34 N. Y. Supp. 342, it appeared that a depositor of goods in a warehouse delivered the warehouse receipts to a bank as collateral security for the payment of his note to the bank. In holding that the warehouseman was entitled to collect storage charges from a guarantor of the note, who paid it, received the receipts, and exercised rights of ownership over the goods, the court said: "It will thus be seen, as already said, that the real question upon this appeal is, Did the defendants, on the transfer and delivery of the warehouse receipts to them, become the owners of the property covered by such receipts? We do not regard this as being any longer an open question. In *Colebrooke on Collateral Securities* it is said: 'Section 413. . . . The transfer for value, as collateral security, of warehouse receipts, by indorsement and delivery, or by delivery only, where such receipts are made payable to "holder" or "only upon the return of this receipt," vests the legal title and possession of the property in the pledgee, and is equivalent to an actual delivery of the

property. The warehouseman at once, without notice, becomes the bailee of the lender of money upon the receipt he has issued. The title to the property passes by such transfer to the pledgee, under the law merchant, independent of any statute. A formal assignment of the document is not required, as the indorsement of itself sufficiently indicates the intention of the pledgeor to pass the title and possession. . . . Section 414. . . . The pledgee of warehouse receipts, receiving the same, with or without indorsement, as collateral upon a bona fide loan or discount of commercial paper, stands in the same privileged position as a bona fide purchaser for value of like receipts. An indefeasible title to the property represented by the receipts is vested in the bona fide pledgee for value, and he is entitled to its possession. . . . Such innocent pledgee is a bona fide holder in the usual course of business, and has something more than a mere lien for his advances, taking the title to the property and the right to its actual possession. . . . The pledgee of warehouse receipts is under no obligation to notify the warehouseman of the transfer to him of such receipts as collateral security.' "

It has been held, moreover, that where goods had been pledged to one person by a delivery of warehouse receipts, a second pledge subject to the first one could be made by a written agreement of the pledgeor and the second pledgee, and a written notice to the first pledgee, and that the second pledge was valid as against the general creditors of the pledgeor. Apparently there was no indorsement on the warehouse receipts to the second pledgee. Whether there was such an indorsement to the first pledgee is not stated in the report of the case. *Hunt v. Bode* (1902) 66 Ohio St. 255, 64 N. E. 126.

In *Toner v. Citizens' State Bank* (1900) 25 Ind. App. 29, 56 N. E. 731, it was held that a warehouse receipt delivered by a depositor to the plaintiff, without indorsement, for the purpose of securing a debt created at the date of the transfer, gave to the plaintiff an equitable interest in the wheat

described in the receipt, but that the security was subject to claims of the warehouseman against the depositor, arising before they were notified of the transfer of the receipt.

III. Transfer of bill of lading by consignee.

In a large number of cases it has been held that where a bill of lading of goods is transferred by the person to whose order they are deliverable, to a bank, to secure an advance to him by the bank, a valid pledge of the goods is consummated, though the bill of lading is not indorsed, or is irregularly indorsed.

United States.—*New York C. & H. R. R. Co. v. Bank of Holly Springs* (1911) 236 Fed. 562, affirmed on this point in (1912) 115 C. C. A. 358.

Illinois.—*Peters v. Elliott* (1875) 78 Ill. 321.

Kentucky.—*Sabel v. Planters Nat. Bank* (1901) 110 Ky. 299, 61 S. W. 367; *Kentucky Ref. Co. v. Bank of Morillion* (1905) 28 Ky. L. Rep. 486, 89 S. W. 492.

Massachusetts.—*Fifth Nat. Bank v. Bayley* (1874) 115 Mass. 228.

Missouri.—*Skilling v. Bollman* (1878) 6 Mo. App. 76, affirmed in (1881) 73 Mo. 665, 39 Am. Rep. 537.

New York.—*City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 136; *Merchants' Bank v. Union R. & Transp. Co.* (1877) 69 N. Y. 373; *First Nat. Bank v. New York C. & H. R. R. Co.* (1895) 85 Hun, 160, 32 N. Y. Supp. 604.

Pennsylvania.—*Richardson v. Nathan* (1895) 167 Pa. 513, 31 Atl. 740.

Texas.—*West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (1917) — Tex. Civ. App. —, 194 S. W. 835.

In *Merchants' Bank v. Union R. & Transp. Co.* (1877) 69 N. Y. 373, the court said: "This evidence abundantly shows that a draft was drawn, advances made, and that the teas were hypothecated, as already stated, to secure the amount to the plaintiff. As the evidence stood, the plaintiff made out a clear and unquestioned right to the teas by indisputable facts showing the transaction, which was also supported by a possession of the bill of lading, and the other papers essential to establish its claim to the teas. And

unless it was necessary that the bill of lading should be actually indorsed by Thorel & Company, its title was beyond any dispute. We think the plaintiff's title was perfect and complete without such indorsement. The rule is well settled that property or goods shipped by a bill of lading drawn to order may be transferred by delivery to a third person without any indorsement. . . . Bills of lading are choses in action, and no rule is better established than that instruments of this character may be transferred for a valuable consideration by delivery only. Although the plaintiff was not a party to the bill of lading, it cannot affect his right to the contract contained in the same, if he acquired it lawfully."

In *New York C. & H. R. R. Co. v. Bank of Holly Springs* (1911) 236 Fed. 562, affirmed on this point in (1912) 195 Fed. 456, it appeared that a bank received warehouse receipts on cashing checks for the purchase of cotton, that thereafter the warehouse receipts were given to the purchasers of the cotton to enable them to resell it, and bills of lading made out to the shippers' order, but not indorsed, were delivered to the bank, and drafts with the bills of lading attached were forwarded by it for collection. Fictitious bills of lading for the same cotton were delivered for value to a third person, and the cotton was delivered by the defendant railroad company to the holder of the fictitious bills. In granting a decree in favor of the bank and against the railroad company for the conversion of the cotton, the court held that the pledge of the cotton to the bank for the money or credit advanced by it was not affected by the fact that the bills of lading which it received were not indorsed. It appeared that, after the drafts with the genuine bills of lading attached were dishonored and returned to the bank, the bills of lading were indorsed by the shippers, but that indorsement was apparently made after the delivery of the goods on the fictitious bills of lading, and no importance was given to it in the decision.

In *Skilling v. Bollman* (1878) 6 Mo. App. 76, affirmed in (1881) 73 Mo. 665,

39 Am. Rep. 537, it appeared that bills of lading were made out in triplicate for goods deliverable to the order of the shipper, a corporation. One of the bills of lading was secretly taken from the office of the corporation by one of its officers, who accompanied the shipment of goods and made a sale thereof to the defendants. Another bill of lading was indorsed by another officer of the corporation, who ordinarily transacted such business, to factors of the corporation, and deposited with the plaintiff bank as security for a prior indebtedness. It was held that the right of the plaintiff to the goods as security for the debt due to it, as against the defendants, depended on whether the transfer of the bill of lading to it preceded the sale to the defendants. The court of appeals stated that no indorsement on the bill of lading was necessary to perfect the symbolical delivery of the property to the plaintiff. The supreme court in its opinion affirming the judgment of the court of appeals did not directly refer to the lack of an indorsement of the bill of lading to the plaintiff bank, but its decision was apparently to the same effect, since the only indorsement mentioned was one to the factors of the shippers.

In *West Texas Nat. Bank v. Wichita Mill & Elevator Co.* (1917) — *Tex. Civ. App.* —, 194 S. W. 835, it appeared that a person presented to a bank a draft drawn by the shipper on a purchaser of a carload of wheat, and a bill of lading made out to the order of the shipper, and indorsed by the person presenting it in the shipper's name. It further appeared that the bank discounted the draft, which was thereafter forwarded through intermediate agencies to another bank for collection, and was paid by the drawee, the purchaser of the wheat. In a proceeding against the collecting bank to garnish the amount realized on the draft as the property of the shipper, it was held that the bank which discounted the draft acquired a valid lien on the carload of wheat, and was entitled to be reimbursed out of the proceeds therefrom, the court saying: "The draft was drawn by Allen in
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favor of the Big Springs bank. To it was attached shipper's order bill of lading in favor of Allen. These facts, standing alone, would make the Big Springs Bank the owner of the funds when collected, unless they had been in turn assigned to its correspondents. . . . The fact that the bill of lading was not indorsed by Allen would not, we think, under the circumstances, make any difference. The assignment could be proven in other manner than by indorsement either of the draft or the bill of lading. *National State Bank v. Ricketts* (1912) — *Tex. Civ. App.* —, 152 S. W. 648; *Singletary v. Goeman* (1909) 58 *Tex. Civ. App.* 5, 123 S. W. 436. The bill of lading being attached to a draft drawn by Allen in favor of the Big Springs Bank, with notation on the face of the draft to the bill of lading attached, would be, we think, itself a sufficient assignment of the bill of lading upon its delivery with the attached draft, to the bank; at any rate, all the parties to this transaction so treated it, or recognized that the indorsement of Allen's name by Hatch was sufficient; for otherwise the *Wichita Mill & Elevator Company* would have had no right to the possession of the wheat when it took up the draft and bill of lading. When the further fact is developed that Hatch, and not Allen, took the draft to the bank, and himself collected the proceeds of the draft, does this discharge the burden and show that Hatch was acting wrongfully, and that the bank knew that he was doing so? Ordinarily, no presumption of wrongdoing exists, and when, as in this case, Hatch presented to the Big Springs Bank a draft drawn by Allen in favor of said bank on a third person, at the same time indorsing Allen's name to the bill of lading, and collecting the proceeds from the bank, it would seem to us that one who has assumed the burden of attacking the transaction should show that Hatch was acting without authority from Allen; and no presumption that Hatch was guilty of forgery, and the bank officials aiding and abetting him in the commission of the crime, could be invoked by appellee as discharging the burden of proof upon it."

Even though a bill of lading made out to the shipper's order is indorsed specially to a person other than one who receives it as collateral security for a debt, it has been held that the latter has a special property in the goods described in the bill of lading, which is superior to the rights of another creditor of the shipper, who, after such delivery of the bill of lading, attaches the goods. *Fifth Nat. Bank v. Bayley* (1874) 115 Mass. 228; *City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 136; *Richardson v. Nathan* (1895) 167 Pa. 513, 31 Atl. 740.

In *Fifth Nat. Bank v. Bayley* (Mass.) supra, it appeared that bills of lading were issued by a carrier for certain barrels of flour which were made deliverable to the shipper's order. The shipper indorsed on each bill of lading, "Deliver the within to the order of E. Williams & Co. R. H. Sage," and turned them over to a bank as collateral security for advances made by the bank in discounting bills of exchange drawn on E. Williams & Company. The bills of exchange were not accepted, and were returned to the bank. Thereafter the drafts and bills of lading were returned to the shipper, and the bills of lading were transmitted to the railroad company. New drafts were given to the bank, to which were attached bills of lading indorsed, "Deliver to the order of Crockett Bros. R. H. Sage." The drafts with the bill of lading attached were forwarded from Chicago to Boston for collection. A part of the flour was attached in Boston in an action brought by a creditor of the shipper. After the attachment, and after Crockett Brothers refused to accept the drafts, the bank exchanged the bills of lading for new bills of lading indorsed to the bank. In an action brought by the bank against a deputy sheriff who made the attachment, it was held that the delivery of the bills of lading to the bank as collateral security for its allowance gave to it, at least, a special property in the flour, coupled with a right of immediate possession, on which it could maintain an action of replevin.

In *Richardson v. Nathan* (Pa.) supra, it appeared that bills of lading were issued by a carrier for two carloads of iron, consigned to the order of the shipper with a direction to notify J. H. Richardson & Company. The bills of lading were indorsed by the shipper, "Deliver to the order of J. H. Richardson & Co.," and delivered to a bank as security for the amount of a draft on J. H. Richardson & Company, discounted by the bank. After J. H. Richardson & Company refused to accept or pay the draft, the indorsements on the bills of lading were erased, and they were indorsed in blank by the shipper. In holding that the validity of the pledge of the iron to the bank was not affected by the special indorsement to J. H. Richardson & Company, the court said: "We think the indorsements on the bills of lading cannot, under the circumstances shown by the special verdict, be justly considered as injuriously affecting the rights of the appellant to the property specified in the bills. The delivery of them was obviously made, accepted, and intended as a pledge of the property as security for the sum advanced or paid on the draft to which they were attached. The purpose of the parties being evident, delivery without indorsement was sufficient to accomplish it. *Holmes v. German Secur. Bank* (1878) 87 Pa. 525. The indorsements which are thought by the appellee's counsel to afford his clients some advantages, and to abridge the rights of the appellant in this contest, were in the following words, to wit: 'Deliver to the order of J. H. Richardson & Co.' These indorsements were probably regarded by the consignor as nothing more than a direction to the pledgee to deliver the property specified in the bills to the appellees, on their acceptance and payment of the draft, together with charges for transportation, storage, etc. His cancellation of the indorsements on their refusal to honor his draft is in accord with this view and with what we have seen was his purpose in delivering the bills. The indorsements were not intended to qualify the rights of the pledgee, and we cannot assent to a

construction of them which would defeat the common purpose of the parties to the transaction, which, we think, should be considered in the determination of this issue as if the indorsements had not been made. Thus considered, the effect of it was to invest the appellant with the rights of a purchaser of the property, so far as it might be necessary to exercise such rights for its protection. 2 Am. & Eng. Enc. Law, p. 243, and cases there cited. In other words, the appellant, after the delivery of the bills, must be deemed and taken to have been the owner of the property for the accomplishment of the purpose for which it was pledged. Act of September 24, 1867, P. L. 1363, Purdon's Dig. p. 145."

In *City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 186, it appeared that grain was consigned to the order of the shipper, and that he delivered the bills of lading therefor to a bank as security for its advance to the shipper in discounting drafts drawn on the purchaser. On the bills of lading there were indorsed orders to deliver the grain described therein to the purchaser, on his payment of the accompanying drafts, but there was no indorsement to the bank. The shipper, after the drafts were protested for nonpayment, directed the sale of the grain by the partner of the purchaser, who sold the entire shipment, and a delivery of a large part of it was made under the sale, although the bills of lading were not presented. The court of appeals following *Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290, held that, although there was no indorsement of the bills of lading to the bank, their delivery on the discounting of the drafts constituted a valid pledge of the grain, and conferred on the bank a title to the property on which it could base an action of replevin against a carrier.

The delivery of an unindorsed bill of lading to the shipper's order has, moreover, been held to be a transfer of possession sufficient to support a pledge, though the words "not negotiable" were printed on the back of the order bill of lading, and a penal stat-

ute imposed a fine or term of imprisonment on an agent or officer of a railroad company for the delivery of goods shipped under a bill of lading, unless the words "not negotiable" were plainly written or stamped on the face of the instrument. *First Nat. Bank v. New York C. & H. R. R. Co.* (1895) 85 Hun, 160, 32 N. Y. Supp. 604. In that case the court said: "As the printing of the words 'not negotiable' on the back of the bill did not comply with the statute, it may be doubtful whether they in any way affected the rights of the Rochester bank. It had a right to assume that the defendant would not deliver the property without production of the bill, and so it would be able to obtain payment of the draft. Aside from this, by reference to condition No. 9, it was apparently within the contemplation of the parties that if the consignment was in the form which it in fact appears to be on the face of the bill, it then became the subject of transfer, and the rights of third parties might intervene, and so the property must not be delivered without surrender of the bill. I am of the opinion that the Rochester bank had a valid claim on the property to the extent of the draft, and this inured to the benefit of the plaintiff, although the property had passed from defendant's control before the plaintiff made its advancement. . . . The improper delivery by defendant did not relieve it from its liability."

Similarly, it was held in *Peters v. Elliott* (1875) 78 Ill. 321, that, although a shipping receipt contained a stipulation that it was not transferable, a bank which accepted it as security for a debt thereby became a pledgee of the goods, and the bank's lien on the goods was superior to the rights of attaching creditors of the consignor. Apparently there was no indorsement or assignment on the shipping receipt, though that fact is not definitely stated in the report of the case.

IV. Transfer of bill of lading by person other than consignee.

Though the shipper of goods is not named in a bill of lading as consignee, it has frequently been held that, if he

has retained the instrument, he may make a valid pledge of the goods by transferring it without indorsement, as collateral security for an advance to him.

Illinois.—*Michigan O. R. Co. v. Phillips* (1871) 60 Ill. 190.

Indiana.—*Jeffersonville, M. & I. R. Co. v. Irvin* (1874) 46 Ind. 180.

Iowa.—*Morse v. Chicago, R. I. & P. R. Co.* (1887) 73 Iowa, 226, 34 N. W. 825; *Shaffer v. Rhynders* (1902) 116 Iowa, 472, 89 N. W. 1099; *What Cheer Sav. Bank v. Mowery* (1910) 149 Iowa, 114, 128 N. W. 7.

Kentucky.—*Petitt v. First Nat. Bank* (1868) 4 Bush, 334.

Massachusetts.—*Merchants' Nat. Bank v. Bangs* (1869) 102 Mass. 291; *First Nat. Bank v. Dearborn* (1874) 115 Mass. 219, 15 Am. Rep. 92.

Missouri.—*Davenport Nat. Bank v. Homeyer* (1869) 45 Mo. 145, 100 Am. Dec. 363; *Clary v. Tyson* (1903) 97 Mo. App. 586, 71 S. W. 710; *American Zinc, Lead & Smelting Co. v. Markle Lead Works* (1903) 102 Mo. App. 158, 76 S. W. 668.

New York.—*Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290; *Cayuga County Nat. Bank v. Daniels* (1872) 47 N. Y. 631; *Marine Bank v. Wright* (1871) 48 N. Y. 1; *Becker v. Hallgarten* (1881) 86 N. Y. 167; *Commercial Bank v. Pfeiffer* (1888) 108 N. Y. 242, 15 N. E. 311; *Sather Bkg. Co. v. Hartwig* (1898) 23 Misc. 89, 51 N. Y. Supp. 677.

Ohio.—*Emery v. Irving Nat. Bank* (1874) 25 Ohio St. 360, 18 Am. Rep. 299.

Pennsylvania.—*Holmes v. German Secur. Bank* (1878) 87 Pa. 525; *Holmes v. Bailey* (1879) 92 Pa. 57. See also *Bissell v. Steel* (1871) 67 Pa. 443.

In *First Nat. Bank v. Dearborn* (Mass.) *supra*, it appeared that a receipt issued by a railroad company for certain barrels of flour received for shipment contained the essential averments of a straight bill of lading, and was transferred by the shipper, without indorsement, to a bank as security for a credit by the bank on the shipper's account, for the amount of a draft transferred to it. In holding that the bank was entitled to replevin the flour in the hands of a

deputy sheriff, under a writ of attachment in favor of another creditor of the shipper, the court said: "It is true that a receipt of this kind does not purport on its face to have the quasi negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But, independently of any indorsement or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In *Haille v. Smith* (1796) 1 Bos. & P. 563, 126 Eng. Reprint, 1066, Eyre, Ch. J., uses this language: 'I see no reason why we should not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent to carry the substance of that agreement into execution.' In *Allen v. Williams* (1832) 12 Pick. (Mass.) 297, 301, Shaw, Ch. J., in delivering the judgment of the court, says: 'Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs.' It is true that he adds that it was not necessary to place the case upon that ground. But this dictum was cited with entire approbation, in a case raising that exact point, in the court of appeals of the state of New York. *Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290, in that case, as in this, the plaintiff had discounted a draft drawn against a quantity of flour, and its title, as in this case, depended upon a carrier's receipt, delivered to it without any written indorsement. The court held that the plaintiff thereby acquired a sufficient title to the property, and

could call the consignee to account for it, he having converted the property to his own use without accepting the draft. It is not necessary to hold that the plaintiff was absolute owner of the property; it is enough that it had a right of property and of possession to secure the payment of the particular draft; and the right of the former owner, Parks, in the specific property, had become divested, leaving him only a right in the surplus money which might remain after a sale of the flour, and a payment of the draft from the proceeds." See to the same effect, *Clary v. Tyson* (1903) 97 Mo. App. 586, 71 S. W. 710.

In *Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290, it was held that, where a carrier's receipt was delivered without indorsement to a bank as security for an advance by the bank, the latter could claim as a pledgee a special property in the goods, and maintain an action of trover against the purchaser of the goods described in the receipt, who obtained possession of them without accepting the draft drawn on him for their payment. It appeared that the consignee named in the receipt or informal bill of lading was the purchaser.

In *Emery v. Irving Nat. Bank* (1874) 25 Ohio St. 360, 18 Am. Rep. 299, it was held that where a bill of lading stated that goods were received from one Mirrieles, and were "for Thos. Emery's Sons," Mirrieles could, before they were delivered by the carrier to "Thos. Emery's Sons," make a valid pledge of the goods by a transfer, without indorsement, of the bill of lading to a bank for an advance of the purchase price. The court said: "It is claimed, however, that these bills of lading were not transferable by delivery merely, for the reason that they were not made so negotiable by their terms. Bills of lading are not, and cannot be made, by any form of words, negotiable in the sense that commercial paper payable to bearer, or order, or assigns, is negotiable. If such words of negotiability be contained in them, they only indicate the intention of the shipper as to the person for whose use the consignment

is made. If the goods be deliverable, by the terms of the bill, to the consignee or his order, there can be no doubt that the person to whom the bill may be transferred by the consignor would be charged with notice of the rights of the consignee; and, on the other hand, if the bill be made to the use of the consignor, or his order, or his assigns, the consignee would be charged with notice of the rights of those to whom the bill may have been transferred. But, in either case, the question is open to inquiry as to what such rights may be, and can be determined only by inquiry into the real nature and character of the transaction. A bill of lading, being symbolical of the property described in it, like the property it represents, may be transferred by delivery merely, and this is so without regard to the presence or absence of words of negotiability on its face. It is unlike commercial paper, however, in this: the assignee cannot acquire a better title to the property thus symbolically delivered than his assignor had at the time of assignment. It is also claimed that these bills of lading were not transferred to the bank until after the consignees had obtained possession of the goods, and a right had thereby accrued to them to hold the goods, or the price thereof, for the satisfaction of the claims due them from their consignor. This claim is based on the theory that the possession of the carrier was the possession of the consignees, and has already been answered. We do not understand it to be claimed that the goods were, in fact, delivered to the consignees by the carrier, before the transfer to the bank of the bills of lading. But, if it were so claimed, we could not disturb the finding of the court below on that question. From the weight of the testimony, we think the bills of lading had been transferred to the bank before the goods arrived at the place of their destination."

The following cases are, apparently, to the same effect, though the reports of the facts do not state explicitly that the bills of lading were not indorsed to the pledgee: *Cayuga County Nat. Bank v. Daniels* (1872) 47 N. Y. 631;

Marine Bank v. Wright (1871) 48 N. Y. 1; *Commercial Bank v. Pfeiffer* (1888) 108 N. Y. 242, 15 N. E. 311; *Sather Bkg. Co. v. Hartwig* (1898) 23 Misc. 89, 51 N. Y. Supp. 677.

In *Morse v. Chicago, R. I. & P. R. Co.* (1887) 73 Iowa, 226, 34 N. W. 825, it appeared, that the plaintiffs contracted to sell certain grain to a firm of grain dealers. The grain was loaded in cars, and possession was given to the latter firm for the purpose of inspection, though title did not pass, under the prevailing custom and general rules of law, until the price was paid. A shipment of the grain was made by the purchaser from Minneapolis, under bills of lading naming the purchaser as consignor and a third party at Davenport, Iowa, as consignee. Drafts drawn on the consignee, with the bills of lading unindorsed, were presented to a bank in Minneapolis which discounted them, credited the purchaser with the amount thereof, and cashed a check of the latter firm drawn against the credit on the draft. The bank sent the drafts to the consignee who accepted them, but refused to pay them on being notified that the plaintiffs claimed the ownership of the grain. Under a statute of Minnesota protecting purchasers and creditors of a vendee in possession by virtue of a contract of conditional sale, it was held that the bank, as a pledgee, became the owner of the grain as security for the payment of the drafts. The trial court made the following statements in its conclusions of law, which were adopted by the supreme court and incorporated in its opinion: "By discounting the drafts, the bank became the owner of the property represented by the bills of lading; and the fact that the bills were not indorsed is immaterial. *Colebrooke, Collateral Securities*, §§ 382, 383; *Security Bank v. Luttgen* (1882) 29 Minn. 363, 13 N. W. 151; *Holmes v. Bailey* (1879) 92 Pa. 57; *Emery v. Irving Nat. Bank* (1874) 25 Ohio St. 360, 18 Am. Rep. 299. The bank became the owner of the grain, however, merely as pledgee, and as security merely for the payment of the drafts. The intervener, Herman, by accepting the drafts, be-

came liable to the bank. *Hoffman v. National City Bank* (1871) 12 Wall. (U. S.) 181, 20 L. ed. 366, and cases cited. But by such acceptance he did not become the owner of the grain, but, upon payment of the draft, he would succeed to the ownership of the grain to the extent of such payment. The recovery by the bank in this case will extinguish the draft, the liability of Herman thereon, and whatever contingent interest he may have in this controversy. It is accordingly found that the intervener bank recover of plaintiffs, in each case, the amount due on said draft, and that the draft be delivered up to the clerk of the court for cancelation upon payment of this judgment, which may be entered in favor of bank."

Likewise, in *American Zinc, Lead, & Smelting Co. v. Markle Lead Works* (1903) 102 Mo. App. 158, 76 S. W. 668, it was held that where a purchaser obtained possession of a quantity of ore before paying therefor, and, on receiving from a carrier bills of lading consigning the ore to a third person, delivered them, without indorsement, to a bank, to secure it for an advance in cashing drafts to which the bills of lading were attached, the bank acquired a property interest in the ore superior to the rights of the unpaid seller.

In *Jeffersonville, M. & I. R. Co. v. Irvin* (1874) 46 Ind. 180, it appeared that the consignors named in a straight bill of lading presented to the plaintiffs a draft on the consignees with the bill of lading attached. The plaintiffs discounted the draft and held the bill of lading as collateral security. In regard to the lack of an indorsement on the latter instrument, the court said: "In support of a motion for a new trial, and to show that the court erred in overruling it, it is insisted that there is no evidence tending to show a transfer of the bill of lading to *McEwen & Jones*. They had possession of it, and of the draft which was drawn against it, and these facts made at least a prima facie case for the plaintiffs. See authorities above cited. Also *Gibson v. Stevens* (1850) 8 How. (U. S.) 384, 400, 12 L. ed. 1128, 1129. In *Bank of Roches-*

ter v. Jones (1851) 4 N. Y. 505, 55 Am. Dec. 290, referring to Nathan v. Giles (1814) 5 Taunt. 558, 128 Eng. Reprint, 808, it is said: "The property in a cargo for which the master of a ship has signed bills of lading may be transferred by delivery, without indorsement of the bill of lading." See also Allen v. Williams (1832) 12 Pick. (Mass.) 297. The case in 8 How., and the cases in 47 and 49 N. Y. [Cayuga County Nat. Bank v. Daniels (1872) 47 N. Y. 631, and Bailey v. Hudson River R. Co. (1872) 49 N. Y. 70], fully establish the proposition that the delivery of the bill of lading transfers the title to the property. A formal assignment is not necessary. In the case of 47 N. Y. supra, it was held that the delivery of a bill of lading to a bank for the purpose of securing the payment of drafts drawn by the consignor upon the consignee, and discounted by the bank, is sufficient to transfer the title to the property covered by the bill of lading, subject to be divested by the acceptance and payment of the drafts. In our judgment, the delivery of the bill of lading to, and the payment of the draft by, McEwen & Jones, vested in them the title to the flour; and it was not divested by the acceptance of the draft by Comstock & Company, they not having paid the same."

In Shaffer Bros. v. Rhynders (1902) 116 Iowa, 472, 89 N. W. 1099, it appeared that a shipment of a carload of horses was made, and billed to a firm in Buffalo. The shipper drew a bill of exchange on the consignee in favor of a bank which advanced money for the purchase of the horses, and delivered to the bank the draft, and the bill of lading as security for its payment. It does not appear in the report of the case that the bill of lading was not indorsed, but the question of indorsement seems to have been considered immaterial. In holding that the bank received title to the horses, and that its title was superior to the rights of attaching creditors of the shipper, the court said: "The fact that the money was furnished by the bank, as alleged in its petition, is shown without dispute, as is also the further fact that the bill of lading

was duly turned over to the bank to secure the payment of the draft made on Crandall & Company. The effect of the delivery of the bill of lading and draft was to transfer whatever title and interest Rhynders had in the property to the intervener, until the amount of the draft should be paid." See to the same effect, What Cheer Sav. Bank v. Mowery (1910) 149 Iowa, 114, 128 N. W. 7.

In Petitt v. First Nat. Bank (1868) 4 Bush (Ky.) 334, it appeared that bills of lading were issued by a carrier showing that a quantity of cotton was received from the owners for transportation to a certain consignee. The shippers presented a letter to the bank authorizing them to draw on the consignees for a part of the value of the cotton, and on the faith thereof the bank discounted two bills of exchange drawn on the consignees, and received from the shippers the bills of lading as security for the advance. It was held that, although the bills of lading were not indorsed, the bank, as a pledgee, acquired an interest in the cotton superior to the rights of attaching creditors of the shippers.

In Becker v. Hallgarten (1881) 86 N. Y. 167, the court stated, in holding that the delivery of a bill of lading unindorsed, to secure an advance to vendees of the goods described therein, deprived the vendors of the right of stoppage of the goods in transit: "The transaction between Goldstein and the vendees was effectual to pass the property to him, and so deprive the vendors of the right of stoppage, if it otherwise existed. That right may always be defeated by indorsing and delivering a bill of lading of the goods to a bona fide indorsee for a valuable consideration, without notice of the facts on which the right of stoppage would otherwise exist. This was held in Lickbarrow v. Mason (1787) 2 T. R. 63, 100 Eng. Reprint, 35, 5 T. R. 367, 683, 101 Eng. Reprint, 206, 380, 1 H. Bl. 357, 126 Eng. Reprint, 209, 6 East, 21, note, 102 Eng. Reprint, 1192, note, 4 Bro. P. C. 57, 2 Eng. Reprint, 39, 4 Eng. Rul. Cas. 756, and has since been deemed established. It does not impair the force of this position that the money was, in fact, advanced before

the delivery of the bill of lading. The goods were in the possession of Goldstein when he paid over the money. The bill of lading was promised and was part of the consideration on which the money was paid, but, more than all, he had the right, under the authority given to him by B. & S., to take the bill of lading in any form, and it was made out for his benefit. *City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 136. Nor is it material, unless made so by the German law, that the bill of lading was not indorsed. Hallgarten & Company were Goldstein's agents, subject to his control, and, in making the bill of lading in their names as consignees, all was effected which the indorsement of a bill taken in the name of B. & S. would have accomplished. The cases cited by the respondent (*Meyerstein v. Barber* (1866) L. R. 2 C. P. (Eng.) 45; *Short v. Simpson* (1866) L. R. 1 C. P. (Eng.) 255, 1 Harr. & R. 181, 35 L. J. C. P. N. S. 147, 12 Jur. N. S. 258, 13 L. T. N. S. 674, 14 Week. Rep. 307) show that a bill so indorsed has the same effect, even if the ship containing the goods was at sea, as delivery of the goods themselves. Here there was a delivery of the goods to Goldstein, and the bill of lading followed the possession. The German law, as set out in evidence, has no application to the case in hand. It applies when the bill of lading is taken in the name of the vendee, or of some person through whom the party claiming its benefit must make title."

In *Merchants' Nat. Bank v. Bangs* (1869) 102 Mass. 291, it was held that, where an unindorsed bill of lading which named the purchaser as consignee was attached to a draft on the purchaser and delivered by the seller and consignor to a bank, there was a question of fact for the jury as to whether there was a symbolical delivery of the goods which would constitute a pledge, or whether the bank was merely an agent of the consignor to deliver the bill of lading on payment of the draft. The reporter of the case states that there was evidence introduced by the plaintiff bank tending to show that the bank advanced the full amount of the draft to the

consignor on receiving the draft and bill of lading. That fact, if sufficiently proved, would seem to be decisive of the question of the intention of the parties, which the court apparently regarded as determining whether there was a pledge. In the opinion, however, the evidence of an advance made by the bank was not mentioned. As to whether the delivery of the bill of lading without indorsement constituted a pledge, the court said: "The facts stated in this case are not sufficiently distinct and decisive to make it clear, as a matter of law, that the transaction between David Schwartz & Company and the plaintiffs was an actual transfer of property to them by way of pledge or security. The draft, in the ordinary course of the mails, would be presented for payment before the arrival of the property upon which it was drawn, and David Schwartz & Company would have been notified, by telegraph or otherwise, of its nonpayment, in time to prevent the property from coming to the possession of the defendant. It is argued that the facts are equally consistent with a purpose to constitute the bank only an agent to deliver the bill of lading to the defendant, to whom the property, by its terms, was consigned on payment of the draft; and that the right of action, if any, for the alleged conversion, is still in David Schwartz & Company. In the case of *Stone v. Swift* (1827) 4 Pick. (Mass.) 389, 16 Am. Dec. 349, it was held that a bill of lading, sent unindorsed in a letter, containing no words of transfer, did not give the party receiving it a claim to the property."

In *Bissell v. Steel* (1871) 67 Pa. 443, the court, in holding that the plaintiffs, to whom bills of lading were delivered without indorsement, on their making advances to the consignor, were not the absolute owners of the goods described in the instruments, intimated that they were pledgees; but the latter point was not decided, as it was not an issue in the case.

In *Holmes v. German Secur. Bank* (1878) 87 Pa. 525, it appeared that the consignees named in a bill of lading were factors who sold goods for the consignor on commission, and that

they refused to pay a draft drawn on them by the consignor, because the latter was indebted to them on account of prior overdrafts. They received, however, the goods against which the draft was drawn, and sold them. The court held that the plaintiffs, to whom the bill of lading was transferred, without indorsement, as security for advances to the consignor, acquired a valid pledge of the goods as against the consignees, who received and sold them after refusing to pay the draft with the bill of lading attached, and therefore after notice of the rights of the plaintiff. See to the same effect, *Holmes v. Bailey* (1879) 92 Pa. 57, wherein the court said: "This case, we think, cannot be distinguished from *Holmes v. German Secur. Bank* (Pa.) *supra*. It was held in that case that, where a bill of lading is attached to a draft as security for its payment, and transferred for a valuable consideration, it is an appropriation of the property contained in the bill, whether it is indorsed or not. We do not see that the fact that the draft in this case was for more than the proceeds of the shipment makes any difference. The consignee was entitled to a receipt from the holder as his voucher, and an indorsement of the part payment on the draft would have made him perfectly secure."

In *Michigan C. R. Co. v. Phillips* (1871) 60 Ill. 190, it was held that, where the person named as consignee in a bill of lading was a factor or other agent of the shipper, the shipper could make a valid pledge of the goods described in the bill of lading, by surrendering that instrument, without an indorsement, to a bank, on the latter's discounting a draft to which the bill of lading was attached. The court said: "The question remains to be considered whether the bank stands in the relation of a bona fide purchaser for a valuable consideration, without notice, and is entitled to the benefit belonging to such position. The exact position of the bank is to be regarded as that of pledgee, it holding the high wines as collateral security for money advanced; but whether it has an absolute property, or but a lien upon the goods, is not material, as respects

the right to maintain this defense. In *Grosvenor v. Phillips* (1841) 2 Hill (N. Y.) 153, it is said a conventional lien, by way of pledge or mortgage, may as well be raised in the hands of a carrier, as a right by absolute sale. It is objected that there was no valid transfer of title, because the bill was not indorsed. Where the shipper is the owner of the goods, and no opposing interest or claim arises on the part of the carrier, consignee, or prior indorsee of the bill of lading, but, on the contrary, the carrier, as in this case, admits and sets up the interest claimed to be derived from the shipper, it is not perceived why the indorsement of the bill of lading should be deemed necessary for the transfer of the title to the goods embraced in it. The shipper's title, where he is owner, does not depend upon the bill of lading, but is independent of and before it. The mere insertion of the name of the consignee in the bill of lading does not vest in him the ownership of the goods. In this case, the consignees were merely the factors and commission merchants of the shipper; by the bill of lading the wines were to be delivered to them or the owner, it being the design, manifestly, to vest the property in the consignees only in case of their acceptance of the accompanying drafts, which were drawn on them." See to the same effect, *Davenport Nat. Bank v. Homeyer* (1869) 45 Mo. 145, 100 Am. Dec. 363, wherein it was said: "In a qualified and restricted sense, a bill of lading has the attribute of negotiability. Various authorities cited by the defendants' counsel show that this is so, and that such contracts may be transferred by indorsement and delivery. This is undoubtedly the accepted doctrine on that subject. It does not thence follow, however, that a transfer by manual delivery, merely, would be nugatory or ineffectual as against the consignor's factor, to whom the goods described in the bill of lading may have been shipped, as in the present case. But this is the defendant's point. It is plausible, but not sound. Nor is it sustained by the authorities cited in its support. *Law v. Hatcher* (1837) 4 Blackf. (Ind.) 364, goes no

further than to affirm the proposition that the title to goods conveyed by a bill of lading would pass from the consignor to a purchaser, by an indorsement and delivery of the bill of lading to the vendee. This is but the common doctrine affirmed by all the cases. The question whether a mere manual delivery of the bill, without a written indorsement, would not have had the same effect, is a point not noticed in the case. Nor is it raised in the other cases to which the defendants' counsel refers us. *Stone v. Swift* (1827) 4 Pick. (Mass.) 389, 16 Am. Dec. 349, was a suit for malicious prosecution. It was there decided that the holder of an unindorsed bill of lading could not sue upon it in his own name. In *Buffington v. Curtis* (1819) 15 Mass. 497, 8 Am. Dec. 115, it was held that an indorsement of the bill of lading, without a delivery of it, did not transfer the title to the goods. In *Allen v. Williams* (1832) 12 Pick. (Mass.) 297, it was held that, where the bill of lading was filled up with the name of a particular consignee or bearer, the mere delivery of the bill by the shipper, for value, passed the property as against the named consignee. And the court says that whether the transferee acquired by delivery of the bill of lading an absolute property in the goods, or a lien only, was immaterial. But it is urged that, although it be true that the delivery of a bill of lading, without indorsement, conveys the title to the goods it covers, when by the terms of the bill the goods are deliverable to 'bearer,' still, it would be otherwise when, as in this case, the bill contained no word or provision of equivalent force or meaning. This distinction is not shown to be recognized by any adjudicated case. The adjudication in the *Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290, sustains fully the proposition that the delivery of a bill of lading for value, although unindorsed, and containing no provision for the delivery of the goods to bearer, carries with it the property in the goods covered by the bill, as against the consignor's factor; and this, although the consignor was indebted to his factor for advances made on account of prior

shipments. That case, and the case at bar, are quite identical in all their material facts and circumstances. The bill of lading represents the property therein described, and a delivery of the bill is treated as a symbolical delivery of the property. A written indorsement may be necessary to transfer the contract so as to enable the transferee to sue on it in his own name, as in *Buffington v. Curtis*; but the delivery of the bill of lading, without indorsement, for value, transfers the property in the goods. In *Bank of Rochester v. Jones*, the court says: 'The true ground on which to sustain this transfer of property is by regarding the transaction as a sale to the bank in trust to deliver the property to the consignee, in case he accepted the drafts; and, if he refused to accept, then to sell the flour, and to retain out of the proceeds the amount of the drafts, and to pay the surplus to the consignor.' In the case at bar, the shippers were the owners of the flour, and had absolute control over it. They consigned it to the defendants, and drew upon them against the shipments, delivering over to the plaintiff the bills of lading as collateral to the drafts which the plaintiff discounted. The defendants having refused to accept, they were not at liberty to appropriate the flour, or the proceeds of it, to their own use. It was the property of the plaintiff for the purpose of meeting the dishonored drafts."

In *Prendergast v. Williamson* (1894) 6 Tex. Civ. App. 725, 26 S. W. 421, it was held that, even where a seller delivered goods to a carrier and received bills of lading naming the purchasers as both consignors and consignees, the seller could pledge the goods by delivering the bills of lading to a bank making advances to him on the security thereof, and that the bank holding the bills of lading had an interest in the goods, to the extent of its advances, which was superior to the rights of the purchasers and of another bank which had made advances to the seller under an agreement that the bills of lading should be delivered to it. Apparently the bills of lading were not indorsed, and, if

they had been, the indorsements would have been irregular, since they were not made by the consignees. See to the same effect, *Canandaigua Nat. Bank v. Southern R. Co.* (1909) 64 Misc. 327, 118 N. Y. Supp. 668. In the latter case it was also held that the printed words "Not negotiable," on the margin of a bill of lading, did not affect the rights of a pledgee receiving the instrument without indorsement. The court said: "This action is against the carrier for delivering the goods without the production of the bill of lading, and there is no evidence that the carrier knew that the bill of lading had been assigned to the plaintiff. Section 683 of the Penal Code makes it a misdemeanor for a common carrier to deliver goods for which a bill of lading has been issued, without the production of the bill of lading, unless the words 'Not negotiable' are written or stamped upon the bill. These words are printed upon this bill; and accordingly no right of action arises out of that section of the Penal Code. But, notwithstanding the words 'Not negotiable' which are printed upon this bill of lading, it is made to the order of J. W. Neumann & Company. The goods were not billed 'straight,' and the language of the bill of lading makes it negotiable, in the sense in which bills of lading are negotiated as security for advances upon shipments such as this was; and immediately following the words 'Not negotiable' is the positive statement that the surrender of the bill of lading, properly indorsed, shall be required before the delivery of the property, pursuant to § 9 of the conditions on the back of the bill; and § 9, quoted above, is an unqualified assertion that, if the word 'order' is written on the bill before the name of the consignee, the surrender of the bill, properly indorsed, shall be required before the property is delivered; and, if any other form of consignment is used, it shall be optional with the carrier to deliver the property with or without a surrender of the bill of lading. Now, these conditions are not only for the protection of the carrier, but they afford an assurance to bankers, to whom application may be

made for advances upon the security of the bills of lading, that the conditions expressed therein will be respected by the carriers; and, in my opinion, a cause of action exists here in favor of the plaintiff, against the defendant, for the delivery of the apples in question, without the production of the bill of lading."

The delivery of a bill of lading to the person who is named therein as the consignee, pursuant to an agreement to pledge the goods to him as security for advances, is clearly sufficient to effect the pledge of the goods, even though the bill of lading is not indorsed. *Campbell v. Alford* (1882) 57 Tex. 159.

V. Effect of statute making bill or receipt negotiable.

a. Uniform Warehouse Receipts Act.

The general rule as to a pledge of goods by a transfer of a warehouse receipt or bill of lading appears to be materially altered in jurisdictions where the Uniform Warehouse Receipts Act or the Uniform Bills of Lading Act has been adopted. The following provisions of the former act, it would seem, apply to pledges as well as to other transfers:

"Section 42. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferrer, the title of the goods, subject to the terms of any agreement with the transferrer. If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferrer or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the warehouseman by the transferrer or a subsequent purchaser from the transferrer of a sub-

Even though a bill of lading made out to the shipper's order is indorsed specially to a person other than one who receives it as collateral security for a debt, it has been held that the latter has a special property in the goods described in the bill of lading, which is superior to the rights of another creditor of the shipper, who, after such delivery of the bill of lading, attaches the goods. *Fifth Nat. Bank v. Bayley* (1874) 115 Mass. 228; *City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 136; *Richardson v. Nathan* (1895) 167 Pa. 513, 31 Atl. 740.

In *Fifth Nat. Bank v. Bayley* (Mass.) supra, it appeared that bills of lading were issued by a carrier for certain barrels of flour which were made deliverable to the shipper's order. The shipper indorsed on each bill of lading, "Deliver the within to the order of E. Williams & Co. R. H. Sage," and turned them over to a bank as collateral security for advances made by the bank in discounting bills of exchange drawn on E. Williams & Company. The bills of exchange were not accepted, and were returned to the bank. Thereafter the drafts and bills of lading were returned to the shipper, and the bills of lading were transmitted to the railroad company. New drafts were given to the bank, to which were attached bills of lading indorsed, "Deliver to the order of Crockett Bros. R. H. Sage." The drafts with the bill of lading attached were forwarded from Chicago to Boston for collection. A part of the flour was attached in Boston in an action brought by a creditor of the shipper. After the attachment, and after Crockett Brothers refused to accept the drafts, the bank exchanged the bills of lading for new bills of lading indorsed to the bank. In an action brought by the bank against a deputy sheriff who made the attachment, it was held that the delivery of the bills of lading to the bank as collateral security for its allowance gave to it, at least, a special property in the flour, coupled with a right of immediate possession, on which it could maintain an action of replevin.

In *Richardson v. Nathan* (Pa.) supra, it appeared that bills of lading were issued by a carrier for two carloads of iron, consigned to the order of the shipper with a direction to notify J. H. Richardson & Company. The bills of lading were indorsed by the shipper, "Deliver to the order of J. H. Richardson & Co.," and delivered to a bank as security for the amount of a draft on J. H. Richardson & Company, discounted by the bank. After J. H. Richardson & Company refused to accept or pay the draft, the indorsements on the bills of lading were erased, and they were indorsed in blank by the shipper. In holding that the validity of the pledge of the iron to the bank was not affected by the special indorsement to J. H. Richardson & Company, the court said: "We think the indorsements on the bills of lading cannot, under the circumstances shown by the special verdict, be justly considered as injuriously affecting the rights of the appellant to the property specified in the bills. The delivery of them was obviously made, accepted, and intended as a pledge of the property as security for the sum advanced or paid on the draft to which they were attached. The purpose of the parties being evident, delivery without indorsement was sufficient to accomplish it. *Holmes v. German Secur. Bank* (1878) 87 Pa. 525. The indorsements which are thought by the appellee's counsel to afford his clients some advantages, and to abridge the rights of the appellant in this contest, were in the following words, to wit: 'Deliver to the order of J. H. Richardson & Co.' These indorsements were probably regarded by the consignor as nothing more than a direction to the pledgee to deliver the property specified in the bills to the appellees, on their acceptance and payment of the draft, together with charges for transportation, storage, etc. His cancellation of the indorsements on their refusal to honor his draft is in accord with this view and with what we have seen was his purpose in delivering the bills. The indorsements were not intended to qualify the rights of the pledgee, and we cannot assent to a

construction of them which would defeat the common purpose of the parties to the transaction, which, we think, should be considered in the determination of this issue as if the indorsements had not been made. Thus considered, the effect of it was to invest the appellant with the rights of a purchaser of the property, so far as it might be necessary to exercise such rights for its protection. 2 Am. & Eng. Enc. Law, p. 243, and cases there cited. In other words, the appellant, after the delivery of the bills, must be deemed and taken to have been the owner of the property for the accomplishment of the purpose for which it was pledged. Act of September 24, 1867, P. L. 1863, Purdon's Dig. p. 145."

In *City Bank v. Rome, W. & O. R. Co.* (1870) 44 N. Y. 136, it appeared that grain was consigned to the order of the shipper, and that he delivered the bills of lading therefor to a bank as security for its advance to the shipper in discounting drafts drawn on the purchaser. On the bills of lading there were indorsed orders to deliver the grain described therein to the purchaser, on his payment of the accompanying drafts, but there was no indorsement to the bank. The shipper, after the drafts were protested for nonpayment, directed the sale of the grain by the partner of the purchaser, who sold the entire shipment, and a delivery of a large part of it was made under the sale, although the bills of lading were not presented. The court of appeals following *Bank of Rochester v. Jones* (1851) 4 N. Y. 497, 55 Am. Dec. 290, held that, although there was no indorsement of the bills of lading to the bank, their delivery on the discounting of the drafts constituted a valid pledge of the grain, and conferred on the bank a title to the property on which it could base an action of replevin against a carrier.

The delivery of an unindorsed bill of lading to the shipper's order has, moreover, been held to be a transfer of possession sufficient to support a pledge, though the words "not negotiable" were printed on the back of the order bill of lading, and a penal stat-

ute imposed a fine or term of imprisonment on an agent or officer of a railroad company for the delivery of goods shipped under a bill of lading, unless the words "not negotiable" were plainly written or stamped on the face of the instrument. *First Nat. Bank v. New York C. & H. R. R. Co.* (1895) 85 Hun, 160, 32 N. Y. Supp. 604. In that case the court said: "As the printing of the words 'not negotiable' on the back of the bill did not comply with the statute, it may be doubtful whether they in any way affected the rights of the Rochester bank. It had a right to assume that the defendant would not deliver the property without production of the bill, and so it would be able to obtain payment of the draft. Aside from this, by reference to condition No. 9, it was apparently within the contemplation of the parties that if the consignment was in the form which it in fact appears to be on the face of the bill, it then became the subject of transfer, and the rights of third parties might intervene, and so the property must not be delivered without surrender of the bill. I am of the opinion that the Rochester bank had a valid claim on the property to the extent of the draft, and this inured to the benefit of the plaintiff, although the property had passed from defendant's control before the plaintiff made its advancement. . . . The improper delivery by defendant did not relieve it from its liability."

Similarly, it was held in *Peters v. Elliott* (1875) 78 Ill. 321, that, although a shipping receipt contained a stipulation that it was not transferable, a bank which accepted it as security for a debt thereby became a pledgee of the goods, and the bank's lien on the goods was superior to the rights of attaching creditors of the consignor. Apparently there was no indorsement or assignment on the shipping receipt, though that fact is not definitely stated in the report of the case.

IV. Transfer of bill of lading by person other than consignee.

Though the shipper of goods is not named in a bill of lading as consignee, it has frequently been held that, if he

our decisions, an indorsement of a warehouse receipt, though payable to bearer, is necessary to convey the legal title. *Allen v. Maury* (1880) 66 Ala. 10; *Lehman v. Marshall* (1872) 47 Ala. 362. The section is enabling, and was specially designed to provide the mode, in respect to such documents, of passing the legal title, so as to enable the real owner to prosecute an action thereon in his own name. So far as it relates to the passing of title by the delivery of warehouse receipts and similar documents, the statute is an innovation on the mercantile law, and will not be construed as abrogating or modifying it, further than is expressed, or is absolutely required to effectuate the purposes. By § 6 of the Act of February 28, 1881, being the other statute relied on, warehouse receipts given for cotton stored or deposited may be transferred by indorsement; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the property, so far as to give validity to any pledge, lien, or transfer, made or created by such person; and no cotton shall be delivered except on surrender and cancelation of the original receipt, or the indorsement thereon of the delivery, in case of a partial delivery. Acts 1880-1, 133. This statute does not imperatively require indorsement. The intention is to protect the warehouseman against a mistaken or wrongful delivery, and to protect the holder for value of such indorsed receipts against latent equities and rights. The statute, being permissive, does not prevent the passing of title and delivering possession in any mode previously effectual. *Rice v. Cutler* (1863) 17 Wis. 351, 84 Am. Dec. 747; *Jones, Pledges*, § 301. Notwithstanding § 2099 requires indorsement to convey the legal title, neither statute operates to prevent the transfer of a special property and constructive possession, by the delivery of the receipt without indorsement, sufficient to create a valid pledge, as between the parties, and as to third persons not having acquired prior or intervening rights."

Under a statute providing that warehouse receipts shall be negoti-

able, and that they may be transferred by indorsement and delivery, it has been held that a valid pledge of goods may be made by a transfer of warehouse receipts therefor by the depositor, without indorsement, and, when the receipts are thus received by the pledgee as collateral security for a loan, the pledge is not subject to a secret agreement between the depositor and the warehouseman. *National Union Bank v. Shearer* (Pa.) *supra*. In the opinion of the trial court, which was adopted by the supreme court, the following explanation was made: "If the receipt stands as the symbol of the goods, the owner of the latter, to whom it is issued, has the same power to pass title to the goods by delivery of the receipt as he has to pass title to the goods in his manual possession by a delivery of them. *Empire Transp. Co. v. Steele* (1871) 70 Pa. 190. Delivery of the one is, in law, delivery of the other. Manifestly, therefore, it is immaterial whether the receipt be written to his order or to bearer, or not, except where, as is emphasized in *Hallgarten v. Oldham* (1883) 135 Mass. 1, 46 Am. Rep. 433, it is by statute required to be 'negotiable in form.' Neither, if the delivery of the receipt is a delivery of the goods, is its indorsement or nonindorsement of any consequence with respect to the completeness of the transaction. The effect of indorsement is not to impart original negotiability to an instrument not originally negotiable. It is not an independent contract, says *Gibson, Ch. J.*, in *Patterson v. Poindexter* (1843) 6 Watts & S. (Pa.) 234, 40 Am. Dec. 554, but a parasite, which takes the hue of the thing with which it is connected, and operates one way when attached to a negotiable instrument, and another way when attached to other choses in action. As already seen, it does not, when put upon a warehouse receipt, import a guaranty of title. But it is asserted by defendant's counsel with much confidence that our statute makes it indispensable to the legal transfer of title. The statute does not say so. It does not say that warehouse receipts are negotiable by indorsement. It says, in guarded and

significant language, they 'shall' be negotiable, and 'may' be transferred by indorsement, and when so transferred shall be deemed and taken, etc. In other words, it peremptorily gives to all warehouse receipts a certain quality which does not in any degree derogate from the character they had before, and then permissively provides for a specified method of transfer, not, in terms, exclusive of any other, and attaches to such additional method, if pursued, consequences differing, if at all, only in part from those incident to transfer by mere delivery. It is worthy of note that in *Empire Transp. Co. v. Steele* (1871) 70 Pa. 188, the decision, involving certain bills of lading, which are included in the Act of 1866 with warehouse receipts, proceeded expressly without reference to that statute. Nor is it insignificant that the supplement to the same of June 13, 1874, P. L. 285, relating to attachments of goods in the hands of warehousemen who have issued receipts therefor, speaks of these as having been 'negotiated and transferred by indorsement or delivery, as provided in the act to which this is a supplement,' and makes 'the holder . . . to whom the same shall have been transferred or delivered as aforesaid' the garnishee. It is doubtless true that a mistaken opinion of the law on the part of the legislature does not avail to change the law. *Bank of Pennsylvania v. Com.* (1852) 19 Pa. 156; *Seiders v. Giles* (1891) 141 Pa. 100, 21 Atl. 514. On the other hand, in the interpretation of a statute, it is very well settled that the understanding of it evidenced by the legislature in subsequent enactments is to be treated as of great weight. *Folk v. State Capital Sav. & L. Asso.* (1906) 214 Pa. 529, and cases cited at p. 538, 63 Atl. 1013."

In *Whitney v. Tibbits* (1863) 17 Wis. 359, it appeared that the owner had stored flour in a warehouse of the defendants, and received a warehouse receipt therefor. A third party agreed to purchase the flour if he could get a loan on it in the warehouse. The owner delivered to him the receipt to enable him to procure the loan, and the buyer, on obtaining a loan from

the plaintiff, transferred to him the receipt, which was not indorsed. After a garnishment proceeding was brought by the owner for the amount due to him on the sale, the plaintiff brought suit to recover the flour. It was held that the delivery to him of the receipt without an indorsement was sufficient to effect a pledge, when so intended by the parties, and that the validity of the pledge was not affected by a statute which provided that warehouse receipts might be transferred by indorsement.

A statute of Missouri to the effect that a warehouse receipt or bill of lading may be transferred by a written indorsement thereon, and delivery, and that any person to whom it may be transferred shall be deemed to be the owner of the goods so far as to give validity to any pledge made on the faith thereof, has been held not to authorize a factor or agent for sale to pledge the goods of his principal by a transfer of warehouse receipts without indorsement, even though the receipts ran to bearer. *Allen v. St. Louis Nat. Bank* (1887) 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460. The court held that, in the absence of an indorsement, the common-law rule prevailed which made invalid a pledge by a factor of the goods of his principal.

Likewise, under the Missouri statute, an unindorsed receipt providing for the delivery of goods "to bearer" has been held not to have a negotiable character which would give validity to a pledge of the goods by one who stole the receipt and delivered it to another as security for a loan. *Erie & Pacific Dispatch v. St. Louis Cotton Compress Co.* (1878) 6 Mo. App. 172. That decision is not in conflict with the cases upholding the validity of a pledge by the owner of the goods through the transfer of an unindorsed warehouse receipt, or bill of lading, describing them, since, even in the absence of a statute on the subject, the owner could thus effect a pledge, but a thief of the document of title could not. On this point the court said: "The transfer of a warehouse receipt, in the absence of some statutory provision giving them a negotiable char-

acter, can convey to the transferee no greater rights than would be acquired by the transfer of the goods themselves, of which the receipts are the symbol. The pledgeor in this case could not give a valid pledge of the goods themselves, because he did not own and had no authority to pledge them." In the opinion of a later Missouri case (*St. Louis Nat. Bank v. Ross* (1880) 9 Mo. App. 399), the court, in the following language, denied that a valid pledge could not in any case be effected by the transfer of an unindorsed warehouse receipt: "The court properly refused instructions, asked by appellant, to the effect that there could be no pledge of the cotton by Dowell & Company without a written indorsement of the warehouse receipts. Where the party has the right to pledge the cotton, the delivery of the warehouse receipt would be as effectual as the delivery of the cotton itself, and it could make no difference that the warehouse receipt was not indorsed by the pledgeor. There is nothing in this at variance with anything decided or said by this court in *Erie & Pacific Dispatch v. St. Louis Cotton Compress Co.* (Mo.) supra. The transfer of a warehouse receipt, not made negotiable by indorsement and delivery, can convey to the transferee no greater rights than would be acquired by a transfer of the goods which the receipt represents. That we have said. But it does not follow, from that, that one may not pledge cotton by delivering to the pledgee the bales themselves."

In *Fourth Nat. Bank v. St. Louis Cotton Compress Co.* (1882) 11 Mo. App. 333, the court said: "Warehouse receipts made payable to bearer, not transferred by indorsement, are not negotiable as mercantile paper; and the transfer of these cotton notes gave the plaintiff no greater rights than it would have acquired by the transfer of the goods themselves. But the warehouse receipt, or cotton note, represented the cotton itself, and the pledge of the cotton note was as effectual as a pledge of the cotton itself would have been. *St. Louis Nat. Bank v. Ross* (Mo.) supra. Had Moss obtained the cotton notes, or the cotton which

they represented, by robbery or larceny, he could have passed no title, as against the real owner, to an innocent purchaser. But the doctrine is that fraud practised by the vendee of a chattel, whereby he obtains the sale and delivery of it to himself, will not authorize the vendor to retake it from one who has subsequently purchased it for value without notice of the fraud. *Ditson v. Randall* (1851) 33 Me. 202; *Hoffman v. Noble* (1843) 6 Met. (Mass.) 68, 39 Am. Dec. 711. Goods pledged by a factor may also be recovered by the innocent pawnee. *St. Louis Nat. Bank v. Ross* (Mo.) supra. In these cases, the owner is not divested by his own act of his right of property. But in the case at bar the vendor seems to have made a sale; the goods sold were marked and set apart to the vendee; and the vendor delivered the warehouse receipts, made out in the vendor's name, to the transportation agent of the vendee. It is true that this was done on the faith of a statement of the vendee that the transportation agent would not issue bills of lading for the goods until certain receipts were delivered to him by the vendor, which receipts the vendor would not give up until the cotton was paid for; it is also true that the transportation agent seems to have made such an arrangement with the vendee; but of all this the pledgee of these warehouse receipts had no notice. The vendor, though desirous of retaining a lien, was deceived by the vendee into allowing the indicia of property and possession to pass into the hands of the vendee in such a way as to enable the vendee to pledge the goods; and we see no principle upon which it can be held that the loss, which must fall somewhere, should fall upon the innocent pledgee, rather than upon the vendor who put it in the power of the pledgeor to hold himself out as the sole owner, and alone entitled to the possession of these goods, under circumstances that must have deceived the most vigilant."

In *Turner v. Israel* (1897) 64 Ark. 244, 41 S. W. 806, the plaintiff sought to recover the possession of two barrels of whisky for which she had advanced the purchase price, and had

taken bills of lading, and later a mortgage, as security. In holding that the plaintiff had a lien on the whisky superior to the rights of a general creditor of the lienor, the court said: "A bill of lading represents the property for which it was given. It is a muniment of title. At common law the property may be transferred by the delivery of the bill of lading, without indorsement. Delivery with intent to transfer the title is sufficient. Jones, Pledges, § 262, and cases cited. But the statutes of this state make it negotiable, by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes. Sandels & H. Dig. §§ 509, 510. Assuming that a written indorsement, under the statutes, is necessary to transfer the legal title, a transfer of it without the indorsement, like the delivery of an unindorsed note, would nevertheless be sufficient to pass the equitable title. Mrs. Turner at least acquired an equitable title to the bills of lading, which were delivered to her under the agreement with Surridge & Turner, and a lien on the whisky to secure the payment of the money advanced to pay the charges thereon for the purchase money, and a right to the possession thereof. The mortgage was a continuation of the same lien in another form. She held and retained the lien and right to the possession first acquired until the mortgage was executed, acknowledged, and filed for record, when she delivered the whisky to Surridge & Turner to be sold, with the understanding that the proceeds should be paid to her until she was reimbursed. They acquired no right to the possession until they acquired it from her, and officers had no right to seize the property under process before that time; and, after that, there was no period of time when Mrs. Turner's lien and incidental rights did not exist, and the liens of process could have acquired priority."

In *State Sav. & T. Co. v. Kinsolving* (1916) 195 Mo. App. 326, 190 S. W. 379, the court said: "By § 11,956, Rev. Stat. 1909, bills of lading are made negotiable, and § 11,957 provides that they may be transferred by indorse-

ment in writing; yet they are transferable without indorsement for value, and then carry with them the property in the goods they cover. *Scharff v. Meyer* (1896) 133 Mo. 449, 54 Am. St. Rep. 672, 34 S. W. 858. A general discussion and citation of cases on the method of transfer of bills of lading, and the effect it has on the title to the property shipped, will be found in 4 R. C. L. 30 et seq., §§ 34 and 35."

VI. Rule in Georgia.

By the express provision of a Georgia statute, property may be pledged as security for a debt by a mere delivery of a warehouse receipt issued to the owner of the property. *Citizens' Bkg. Co. v. Peacock* (1897) 103 Ga. 171, 29 S. E. 752; *Farmers & M. Bank v. Bennett* (1904) 120 Ga. 1012, 48 S. E. 398. In the case last cited the court said: "The suit was properly brought in the name of the Farmers & Merchants Bank. In this state, by express statute, property may be pledged as security for a debt by mere delivery of a warehouse receipt issued to the owner of the property. Civ. Code, § 2956. 'The transfer or surrender of warehouse receipts, or other symbols representing cotton, may very properly be regarded as equivalent to an actual physical delivery of the cotton itself, and therefore will operate as a constructive delivery passing title.' *Central Georgia Land & Lumber Co. v. Exchange Bank* (1897) 101 Ga. 353, 28 S. E. 863. At the time the defendant is alleged to have made a conversion of the cotton which had been pledged to the bank as security, the legal title to this cotton was in the bank; and it had its election to either bring an action of trover against the defendant, or to waive the tort and sue in assumpsit to recover the market value of the cotton. The pledgeor, Graybill, had merely the equitable title to the property; and, therefore, the trial judge rightly declined to allow the petition to be amended, as proposed by the plaintiff bank, so that the suit might proceed in the name of Graybill for its use."

In *Coker v. First Nat. Bank* (1900) 112 Ga. 71, 37 S. E. 122, there is a dictum to the effect that, where a

bank accepts a bill of lading, without indorsement, as security for money advanced in discounting a draft to which the bill of lading is attached, no title to the goods described in the instrument passes to the bank. The court said: "In one portion of his charge the judge, in effect, instructed the jury that delivery to the bank of bills of lading covering the shipments of corn, with drafts attached, passed

title to the corn into the bank. This charge is excepted to on the ground that mere delivery of bills of lading, unindorsed by the consignor, cannot operate to pass title. The criticism on the charge is well founded; but the error thus committed was harmless, because the evidence showed that the bills of lading referred to were properly indorsed, and as to this fact there was no controversy." W. S. R.

MARY HARRINGTON

v.

BORDER CITY MANUFACTURING COMPANY.

Massachusetts Supreme Judicial Court—November 25, 1921.

(— Mass. —, 132 N. E. 721.)

Negligence — duty to foresee injury.

1. The owner of a lot adjoining the highway who permits ball playing thereon cannot be said to be negligent towards a passer-by who is struck by a batted ball, if there is nothing to indicate that he should have foreseen or anticipated that such passer-by would, or might, be struck by a stray ball coming from the field.

[See note on this question beginning on page 614.]

Nuisance — baseball near highway.

2. Permitting employees to play baseball on a lot near a public highway during hours of intermission is not a nuisance.

[See 20 R. C. L. 419, 420.]

Highway — negligent injury — act on adjoining property.

3. One owning land adjoining a highway is liable for negligent acts of its employees thereon, which injure persons on the highway.

— effect of stopping upon street.

4. A pedestrian does not lose his rights in a highway by stopping for a moment to speak to another person.

[See 13 R. C. L. 292.]

Master and servant — liability for act of employee during intermission.

5. One permitting his employees to play ball on his property near a highway during intermission, when they

are free from their obligation to him, is not answerable for their acts as employees.

Negligence — permitting ball playing adjoining highway.

6. The owner of a large field adjoining a highway is not negligent in permitting it to be used for ball playing, although the ball has gone into the highway two or three times.

Evidence — "res inter alios acta" — other accident.

7. Upon the question of negligence in permitting employees to play ball in a lot near a highway to the injury of a passer-by, evidence is not admissible that a short time before plaintiff's injury another person was injured in the same way, where the defendant contended that such injury was caused by persons playing in the street.

[See 10 R. C. L. 937, 940.]

EXCEPTIONS by plaintiff to rulings of the Superior Court for Bristol County (Sisk, J.) made during the trial of an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence, which resulted in a verdict in its favor. *Overruled.*

The facts are stated in the opinion of the court.

(— Mass. —, 132 N. E. 721.)

Messrs. David R. Radovsky and H. William Radovsky, for plaintiff:

A baseball game played under certain attendant circumstances may become a legal nuisance, whether because of the unavoidable descent of balls upon neighboring premises, or because of other conditions naturally following upon the performance of such a game.

Cronin v. Bloemcke, 58 N. J. Eq. 313, 43 Atl. 605; Seastream v. New Jersey Exhibition Co. 67 N. J. Eq. 178, 58 Atl. 532; Gilbough v. West Side Amusement Co. 64 N. J. Eq. 27, 53 Atl. 289; Alexander v. Tebeau, 24 Ky. L. Rep. 1305, 71 S. W. 427.

An owner of land abutting on the highway, who retains the potential control of his premises, and who authorizes, or permits, or negligently fails to prevent, a condition or use of his land which injures any person on the highway, is liable for the injury caused.

Wetherbee v. Partridge, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894; Woodman v. Metropolitan R. Co. 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, 12 Am. Neg. Cas. 80; Smethurst v. Independent Cong. Church, 148 Mass. 268, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387; Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Rockport v. Rockport Granite Co. 177 Mass. 246, 51 L.R.A. 779, 58 N. E. 1017, 9 Am. Neg. Rep. 298.

A duty is imposed upon the occupant of land abutting on the highway to such extent that if a person on the highway is injured by objects or parcels falling from defendant's premises, or out of the doorway or window of defendant's building, "res ipsa loquitur" will apply.

Scott v. London & St. K. Docks Co. 3 Hurlst. & C. 596, 159 Eng. Reprint, 665, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 410; Byrne v. Boadle, 2 Hurlst. & C. 722, 159 Eng. Reprint, 299, 33 L. J. Exch. N. S. 18, 9 L. T. N. S. 450, 12 Week. Rep. 279; Ahern v. Melvin, 21 Pa. Super. Ct. 462; Briggs v. Oliver, 4 Hurlst. & C. 403, 35 L. J. Exch. N. S. 163, 14 L. T. N. S. 412, 14 Week. Rep. 658; Connor v. Koch, 89 App. Div. 33, 85 N. Y. Supp. 93; Loughrain v. Auto-phone Co. 77 App. Div. 542, 78 N. Y. Supp. 919, 13 Am. Neg. Rep. 182; Lowner v. New York, N. H. & N. R. Co. 175 Mass. 166, 55 N. E. 805; Man-

ning v. West End Street R. Co. 166 Mass. 230, 44 N. E. 135.

It is one of defendant's business purposes to provide a ball field for its male employees, and he is liable for their negligent acts.

Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Birch v. Abercrombie, 50 L.R.A.(N.S.) 59, note; McNeal v. McKain, 41 L.R.A.(N.S.) 775, note.

A person in control of premises has to maintain the premises reasonably safe for invitees, and is liable even if the unsafe condition was brought about by the acts of third persons.

Goodale v. Worcester Agri. Soc. 102 Mass. 402; Blakely v. White Star Line, 154 Mich. 635, 19 L.R.A.(N.S.) 772, 129 Am. St. Rep. 496, 118 N. W. 482; Wright v. Perry, 188 Mass. 268, 74 N. E. 328, 18 Am. Neg. Rep. 461; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; Holmes v. Drew, 151 Mass. 578, 25 N. E. 22; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Gregoric v. Percy-Lasalle Min. & Power Co. 52 Colo. 495, 122 Pac. 785, Ann. Cas. 1913E, 1030, 1 N. C. C. A. 715; Strobel v. Gerst Bros. Mfg. Co. 148 Mo. App. 22, 127 S. W. 421; Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603, 42 So. 73, 5 Ann. Cas. 709.

Messrs. Wood & Brayton, for defendant:

The defendant's duty as landowner towards those on the highway was not that of an insurer of their safety, and was not within the rule laid down in Fletcher v. Rylands, L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129.

Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Smethurst v. Independent Cong. Church, 148 Mass. 261, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387; Cork v. Blossom, 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61; Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324.

Defendant's duty towards the plaintiff was only that which a landowner is under towards a mere licensee.

Moffatt v. Kenny, 174 Mass. 311, 54

N. E. 850, 6 Am. Neg. Rep. 564; Scanlon v. Wedger, 156 Mass. 462, 16 L.R.A. 395, 31 N. E. 642; Frost v. Josselyn, 180 Mass. 389, 62 N. E. 469; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; Hart v. Cole, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644; Harobine v. Abbott, 177 Mass. 59, 58 N. E. 284; Cole v. Wilcutt, 214 Mass. 453, 101 N. E. 995; Stevens v. Nichols, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150.

There is no evidence of negligence on the part of the defendant, its servants, or agents.

Holmes v. Drew, 151 Mass. 578, 25 N. E. 22; Carleton v. Franconia Iron & Steel Co. 99 Mass. 216; Hart v. Cole, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644; Nicholson v. Erie R. Co. 41 N. Y. 525; Shaw v. Ogden, 214 Mass. 475, 102 N. E. 61; Gunning v. King, 229 Mass. 177, 118 N. E. 233.

Plaintiff assumed the risk.

Shaw v. Ogden, 214 Mass. 475, 102 N. E. 61; Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464, 15 Am. Neg. Cas. 686; Scanlon v. Wedger, 156 Mass. 462, 16 L.R.A. 395, 31 N. E. 642; Stevens v. Nichols and Moffatt v. Kenny, *supra*; Benton v. Watson, 231 Mass. 582, 121 N. E. 399; Hunt v. Economic Machinery Co. 231 Mass. 155, 120 N. E. 416; Sullivan v. Ridgway Constr. Co. 236 Mass. 75, 127 N. E. 543; Pigeon v. Massachusetts N. E. Street R. Co. 230 Mass. 392, 119 N. E. 762.

The plaintiff's offer of evidence in regard to the alleged accident to Mary Todd was rightfully excluded.

McDowell v. Connecticut F. Ins. Co. 164 Mass. 394, 41 N. E. 669; George v. Haverhill, 110 Mass. 506; Whitney v. Gross, 140 Mass. 232, 5 N. E. 619; Collins v. Dorchester, 6 Cush. 396; Robinson v. Fitchburg & W. R. Co. 7 Gray, 96; Menard v. Boston & M. R. Co. 150 Mass. 386, 23 N. E. 214.

Crosby, J., delivered the opinion of the court:

This is an action of tort for personal injuries. The plaintiff testified that in the latter part of August, 1916, she was struck in the back by a baseball; that for a considerable period of time before and after the injury she had been employed by the defendant; that the accident

occurred during the noon hour, and while she was on Weaver street, an "ordinary street" in Fall River, returning to the mill where she worked; that the defendant operated three cotton mills employing several thousand men; that at the time she was struck some of these men were playing baseball on a lot of the defendant about 25 or 30 feet from the street, and adjacent thereto; that she had seen them there every day, in summer, while she worked there. On cross-examination she testified that she was accustomed to take a walk during the noon hour, and almost every day passed the lot where the boys were playing; that girls gathered there to watch the play; that while she was employed at the mill she had seen the ball "two or three times come out onto the street;" that when injured she was about 3 feet from the fence nearest to the side of the field where the game was played, and had been standing there about a minute to speak to some girls. She further testified that the ball game was being played in the meadow in the vacant lot at the foot of the bank, and the lot stretched for a considerable distance; that it was a long, wide field without any buildings on it.

The due care of the plaintiff is not in issue. The only question is whether a finding of negligence on the part of the defendant would have been warranted.

It is plain, upon the facts as disclosed by the record, that for the defendant to allow its employees, during the noon hour, to engage in games of ball for pleasure and recreation on a large vacant field owned by it, could not be found to constitute a nuisance.

If we assume, without deciding, that Weaver street, which is described as an "ordinary street," was a public highway, the defendant could not, by acts permitted or authorized on its land, negligently injure the

Nuisance—
baseball near
highway.

Highway—negligent injury—
act on adjoining
property.

(— Mass. —, 138 N. E. 721.)

plaintiff while she was lawfully on the highway; and she would not lose

her rights as a traveler if she stopped for a minute to

—effect of stopping upon street. speak to other persons. Judd v. Fargo, 107 Mass. 264; Smethurst v. Independent Cong. Church, 148 Mass. 261, 266, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387; Com. v. Henry, 229 Mass. 19, 22, L.R.A. 1918B, 827, 118 N. E. 224.

Cases which hold that the owner of land abutting on a highway may be liable to a person lawfully thereon, for injuries caused from objects falling from the premises, are not applicable to the facts in the case at bar. Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Smethurst v. Independent Cong. Church, 148 Mass. 261, 266, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387; Woodman v. Shepard, 238 Mass. 196, 13 A.L.R. 982, 130 N. E. 194.

As the persons playing ball at the time the plaintiff was injured were not so engaged during the hours of employment, the defendant is not liable for any negligence of such persons as employees.

If the plaintiff were entitled to the rights of an invited person on the defendant's land, she could not recover without proof of negligence on its part; there was nothing dangerous in allowing ball games to be played in a large field; the testimony of the plaintiff that she had been in the defendant's employ for about two years, and had passed the lot almost every day and seen boys and men playing ball there during the

summer time, and "had seen the ball two or three times

come out onto the street," falls far

—Negligence—permitting ball playing adjoining highway. short of establishing negligence of the defendant in permitting games to be played on its lot. As it could not have been inferred that the defendant should have foreseen or anticipated that the plaintiff would or might be struck by a stray ball coming from the field, it follows that the defendant violated no duty which it owed to her. As she failed to sustain the burden resting on her to establish neg- —duty to foresee injury. ligence of the de-

fendant, a verdict against her was ordered rightly. Harnois v. Cutting, 174 Mass. 398, 54 N. E. 842; Childs v. American Exp. Co. 197 Mass. 337, 84 N. E. 128; Shaw v. Ogden, 214 Mass. 475, 102 N. E. 61; Gunning v. King, 229 Mass. 177, 118 N. E. 233.

The plaintiff offered to show that two weeks before the accident another employee of the defendant was struck by a baseball during the noon hour, while the defendant's employees were playing in the same lot; the defendant offered to show that that accident occurred while the men were playing on the street. This evidence was excluded subject to the plaintiff's exception. The injury to an employee other than the plaintiff was plain-

—Evidence—"res inter alios acta"—other accident. ly res inter alios; its admission would have presented collateral issues and was rightly excluded. Whitney v. Gross, 140 Mass. 232, 5 N. E. 619; Menard v. Boston & M. R. Co. 150 Mass. 386, 388, 23 N. E. 214; McDowell v. Connecticut F. Ins. Co. 164 Mass. 394, 41 N. E. 669; Noyes v. Boston & M. R. Co. 213 Mass. 9, 11, 12, 99 N. E. 457.

Exceptions overruled.

ANNOTATION.

Liability of owner for injury to person in street in consequence of games or sports which he allows on his premises.

Aside from the reported case (*HARRINGTON v. BORDER CITY MFG. Co.* ante, 610), there appears no other authority on the specific question under annotation. It, however, seems to fall within the general principle, as laid down in 13 R. C. L. 324, that an abutting owner has a right to use his property for every lawful purpose for which he may desire to use it, and is required to exercise only ordinary care in order to relieve him from liability and damages on account of injuries incidentally resulting to a traveler on the highway.

A case of interest, perhaps, on the question under annotation, is *Ward v. Abraham* [1910] 47 Scot. L. R. 252, which held that the owner of a back yard in which a game of cricket was being played was not liable for injuries inflicted upon a child who, while playing in a neighboring back yard, was struck by a ball which had been hit over the fence in the course of the game of cricket. Lord Dundas, in rendering his decision, said: "I do not think it can be laid down as an abstract proposition that it is illegal to play cricket or bat and ball in a back green or garden. One could, of course, quite well figure a case which might be stated where obviously the conditions and manner of the playing would be such as to infer damages for negligence. On the other hand, one can equally well imagine a game being played in a back green or garden under obviously legitimate conditions. The point at this stage is to determine whether this pursuer has or has not stated a

relevant case to the effect that this game in this back green was being carried on in an illegal manner. I think that he has not done so. The pursuer avers in condescendence 2 that these greens 'are primarily for the purpose of a drying green, and not a playground;' but it is not said that to play cricket of any sort in them is forbidden, and I gather from condescendence 5 that such a thing is not unprecedented. The averments of 'fault' are of the most vague and general nature. The mere fact that a regrettable accident has occurred cannot, of course, by itself, infer damages as for fault or negligence. The record as a whole seems to me to contain no definite facts from which the conclusion ought necessarily or reasonably to be deducted that this game of bat and ball, such as it was, was dangerous and illegal in this back green."

In view of the holding in the reported case (*HARRINGTON v. BORDER CITY MFG. Co.*) that permitting the playing of the game did not amount to a nuisance, attention is called to *Royse Independent School Dist. v. Reinhardt* (1913) — *Tex. Civ. App.* —, 159 S. W. 1010, a suit to enjoin the conducting of baseball games, where relief was denied because the evidence disclosed that the noises and incidents of the games of ball played were such only as usually attend games of that character, the court saying that an injunction against the games would not be grant-

J. H. B.

ed simply because it was feared that they might become a nuisance.

CITIZENS' TELEPHONE COMPANY, Impleaded, etc., Appt.,
v.
CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILROAD
COMPANY.

Kentucky Court of Appeals—June 7, 1921.

(192 Ky. 399, 233 S. W. 901.)

Railroads — right to complain of wires crossing tracks.

1. A railroad company having a mere easement for its right of way cannot complain that a telephone company crosses the right of way without its consent, with wires strung so high as to constitute no obstruction to the full enjoyment of the easement.

[See note on this question beginning on page 619.]

Telephone — franchise to maintain wires — extent.

2. A franchise granted by a county to a telephone company to maintain and operate its lines along the roads and highways of the county is limited to the roads and highways under the jurisdiction of such county.

Highways — construction of telephone line — additional burden.

3. The construction of a telephone line along a public highway is not an additional burden on the fee.

[See 10 R. C. L. 110; *2 R. C. L. Supp. 974, 975.]

Railroads — height of easement for right of way.

4. An easement for a railroad right of way extends to a height sufficient for the safe and convenient passage of all trains and their burdens, of whatever nature.

[See 22 R. C. L. 865.]

Easement — dimensions.

5. A right of way is a limited estate in land,—limited as to dimension,—width, height, depth, and length; and the grantee must keep within such limitation or he at once becomes a trespasser.

[See 9 R. C. L. 785, 786.]

APPEAL by the Citizens' Telephone Company from a judgment of the Circuit Court for Grant County in favor of plaintiff in a suit brought to enjoin and restrain defendants from maintaining telephone wires across plaintiff's right of way, and from erecting other lines. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Myers & Howard, for appellant:

The additional-servitude rule does not obtain in Kentucky.

Cumberland Teleph. & Teleg. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955; Lexington & O. R. Co. v. Applegate, 8 Dana, 289, 33 Am. Dec. 497; Louisville Bagging Mfg. Co. v. Central Pass. R. Co. 95 Ky. 50, 44 Am. St. Rep. 203, 23 S. W. 592; Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. Rep. 578, 76 S. W. 148; Ashland & C. Street R. Co. v. Faulkner, 106 Ky. 332, 43 L.R.A. 554, 45 S. W. 235, 51 S. W. 806.

Where telephone poles are not set on the railroad right of way, no invasion of a property right, or trespass, is committed by stringing wires over the right of way, when it does not

interfere with the use and enjoyment of the easement held by the railroad company.

Illinois C. R. Co. v. Centerville Teleph. Co. 135 Tenn. 198, 186 S. W. 90; 9 R. C. L. 797; Flaherty v. Fleming, 58 W. Va. 669, 3 L.R.A.(N.S.) 461, 52 S. E. 857; Bittello v. Lipson, 80 Conn. 497, 16 L.R.A.(N.S.) 193, 125 Am. St. Rep. 126, 69 Atl. 21; Burnham v. Nevins, 144 Mass. 88, 59 Am. Rep. 61, 10 N. E. 494; Grafton v. Moir, 30 N. Y. S. R. 314, 9 N. Y. Supp. 3; Stevenson v. Stewart, 7 Phila. 293; Lipsky v. Heller, 199 Mass. 310, 85 N. E. 453; Baker v. Willard, 171 Mass. 220, 40 L.R.A. 754, 50 N. E. 620; Weed v. McKeg, 37 Misc. 105, 74 N. Y. Supp. 250.

Messrs. De Jarnette & Harrison for appellee.

Sampson, J., delivered the opinion of the court:

Sometime before January, 1915, appellant Home Telephone Company, Incorporated, erected over and across the right of way of appellee, Cincinnati, New Orleans, & Texas Pacific Railroad Company, in Grant county, a line of telephone wires without first obtaining from said railroad company in any manner a right to do so. About two years later this action was brought by the railroad company against the telephone company and C. J. Daly to enjoin and restrain them from maintaining said wires across the railroad right of way, and from erecting other lines.

The answer of the telephone company admits the erection and maintenance of the telephone wires over and across the right of way of the railroad company, but denies the right of the railroad company to require it to remove them. The telephone company further says that the wires were and are erected in a substantial and permanent manner at a height which does not and will not interfere with the operation of the trains of the railroad company and the free and unobstructed use of the right of way. The evidence taken on both sides relates only to the manner, nature, durability, strength, and height above the rails of the telephone wires. The chancellor found the defendant telephone company, previous to the filing of this action, set telephone poles on each side of plaintiff's right of way, and strung two telephone wires over and across said right of way, at or near the residence of defendant Daly; "that said defendant did not, before stringing said wires on said right of way, procure by contract plaintiff's consent so to do, or undertake any condemnation proceedings to procure such right; that each of said lines of telephone so constructed is a private, not a commercial line, and serves only the residences of Daly and Foree." A judgment was entered, enjoining the telephone company from main-

taining the said wires over and across the railroad right of way until the telephone company acquired, in one of the ways allowed by law, the right to do so, and the telephone company appeals. Daly, who was made a defendant, did not answer below, nor is he a party to this appeal.

The sole question is, May a telephone company, without obtaining in one of the ways allowed by law a right to do so, erect and maintain over and across a railroad right of way, not at a highway crossing, a line of wires to be used by it in connecting one or more of its patrons with its telephone exchange? This question has never been passed upon by this court, nor do we find but few cases in point from other jurisdictions, and these are not entirely harmonious.

The telephone company in this case claims no right in or across the railroad right of way which is not common to all persons and companies. If the appellant Home Telephone Company may, without grant from the railroad company or condemnation, erect and maintain a line of wires over the railroad right of way, surely anyone may do so. Its Telephone-franchise to maintain wires—extent. franchise, granted it by Grant county, to "maintain and operate its telephone lines for the accommodation of the public, on and along all the roads and highways of said county," gave no right to erect and maintain its lines upon or over the railroad right of way, or on any road or highway except such as were under the jurisdiction of the Grant fiscal court, which gave the franchise.

It is the contention of the telephone company that, as the railroad company only has an easement in its right of way, and does not own the fee thereto, it has no right to have its right of way open to the sky, but only to such height as to insure free and unobstructed passage for its trains and employees in the conduct of its business, for which the right of way was granted in the first

place. This is undoubtedly true as to the owner of the fee in the servient estate over which the right of way extends; but what right has a stranger, as against the first and dominant easement holder, to cross or use the right of way of a railroad company?

Our rule with respect to rights of way for a public highway is to hold that the owner of the servient estate has no right or power to interfere with or claim damages for the erection and maintenance of telephone lines along the highway where the grant is made by public authority. This is on the theory that a grant for a public use and purpose is not violated by the employment of the right of way for telephone lines, which is also a public purpose. We

Highways—construction of telephone line—additional burden.

have held that this is not an additional servitude. Street railroads, interurban lines, and tele-

graph lines are embraced in this exception. *Cumberland Teleph. & Teleg. Co. v. Avritt*, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955; *Georgetown & L. Traction Co. v. Mulholland*, 25 Ky. L. Rep. 578, 76 S. W. 148; *Magee v. Overshiner*, 150 Ind. 127, 40 L.R.A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111.

This rule rests upon the theory that the grant for a public purpose includes every public use and purpose to and for which the grant may reasonably be employed, and that telephone, telegraph, and interurban lines are and were such public facilities as were actually contemplated by the grant of the right of way, and therefore do not constitute an additional servitude for which the owner of the servient estate may demand and have compensation. The grant in such case is to the public, and the public makes use of it. But the telephone company, a private corporation, claims no grant whatever in this case to erect and main-

tain its lines at any place except over and above the public highways of Grant county. Its trunk line is along the Covington and Lexington pike, a highway of Grant county, which parallels but is located some distance from the right of way of appellee railroad company. To reach the home of Daly, one of its patrons, with a wire, it set two poles, one on either side of the right of way, 170 feet apart, and stretched the wires over the right of way between the two poles. The evidence shows that after the commencement of this litigation the telephone company reconstructed and brought up to standard its line over the railroad by putting in taller, larger, and more substantial posts, and stringing copper instead of steel wire thereon. Since its reconstruction, it is admitted by the railroad company that the line complies with its specifications for such work.

The petition does not aver that the railroad company owns the fee to the right of way, and in the absence of such averment we must presume that it had merely an easement which allows the operation of the railroad in its regular business, and reverts to the owner of the fee when that use ceases. If it owns the fee, it has the exclusive right of occupancy of the right of way indefinitely upward, and can enjoin the stringing of wires or the erection of any structure whatsoever over the same. But if the railroad company owns merely the easement or right of use of the land on which its road is constructed, it cannot complain that

Railroads—right to complain of wires crossing tracks.

another, even a stranger, as is the telephone company in this case, has entered over the easement at an elevation so high as to give no obstruction to the full enjoyment of the easement for the purposes for which it was granted, and there maintains a wire or wires in connection with its telephone business.

To what height an easement extends where there are no dimen-

sions fixed depends upon the facts of each case. For a railroad the height must be sufficient

—height of easement for right of way.

for the safe and convenient passage of all trains and their burden, of whatever nature. This is usually fixed at about 25 to 30 feet above the top of the steel rails of the track. So long as the structure above the track does not interfere with the full enjoyment of the right of way, and is of such permanent and substantial nature as not to be a menace to those who have to pass under it, the owner of the easement has no right to require its removal, nor can such owner maintain an action for such purpose, for its domain has not been invaded, nor has it suffered a wrong, although the fee owner may maintain such action.

The ownership of an easement extends only to such height as reasonably to permit the full and free enjoyment thereof for the purpose for which it was granted or acquired, and no further. The easement holder would be as much a trespasser if he ascended and occupied the realm above the right of way for some purpose not contemplated by the grant as would be a stranger. One who has a lease or easement to enjoy the first floor of a building cannot prevent a stranger from occupying the second floor if, in so doing, the stranger does not invade the realm of the holder of the first floor. In other words a right of way is a limited estate in land,—limited as to dimension,—width, height, depth, and length; and the grantee must

Easement—
dimensions.

keep within such limitations or he at once becomes a trespasser. Whatever may happen to the estate outside these limitations is of no concern to the holder of the right of way unless it directly or indirectly affects such right of way. But he can protect from wrongful invasion the whole of the right of way. Beyond this he has no legal concern.

In the case of *Stevenson v. Stewart*, 7 Phila. 293, where a foot pass-

way was involved, it was held that a grantee of an easement had no right to have the right open to the sky or any other height except so far as necessary and convenient for the footway reserved, sufficient in height and breadth for the purpose expressed in the grant. *Baker v. Willard*, 171 Mass. 220, 40 L.R.A. 754, 68 Am. St. Rep. 445, 50 N. E. 620.

The owner of the soil may make any use of the land which does not interfere with a reasonable use of the right of way granted for the purposes intended, even to erecting bridges, roofs, and other structures over the same. *Flaherty v. Fleming*, 58 W. Va. 669, 3 L.R.A. (N.S.) 461, 52 S. E. 857.

In *Cook on Telegraph Law* (1920) page 64, the text is: "A railroad company owning only a right of way, and not the fee, cannot object to telegraph or telephone wires crossing such right of way, even though not on the highway, inasmuch as 'the railroad company is not entitled to have its way kept open to the sky.'"

A case almost exactly like the one under consideration was decided by the supreme court of Tennessee in 1916, styled *Illinois C. R. Co. v. Centerville Teleph. Co.* reported in 135 Tenn. 198, 186 S. W. 90. In that case the telephone company had erected its wires over the railroad's right of way without leave or license, as in this case, and the railroad sought to have them removed, but the court said:

"Having only an easement, the railroad company is not entitled to have its way kept open to the sky, and the grant to it is not interfered with by constructing overhead telephone wires, so long as the reasonable and safe use of the easement is not impaired. 9 R. C. L. p. 799. In notes under *Flaherty v. Fleming*, 3 L.R.A. (N.S.) 461, and *Bitello v. Bipson*, 16 L.R.A. (N.S.) 193, numerous cases sustaining the foregoing statement are collected. In these cases it is shown that the owner of the fee may build a bridge for

his convenience over the easement or passageway, and the owner of the easement has no ground of complaint, provided the use of his easement is not seriously obstructed.

"There is no question of light and air in this case. Neither is it alleged that the wires of defendant telephone companies interfere with the telegraph or telephone lines of the railroad company, maintained along the right of way. The only interference with the railroad company's use of its easement suggested is the possibility that wires crossing the track may fall and injure a passenger or employee on a train beneath."

Both upon reason and authority we are of the opinion that appellee railroad company had no such property in the right of way as would enable it to maintain this action to enjoin the telephone company from maintaining at a reasonable height a properly constructed and managed line or lines of telephone wires, even without grant from the railroad company or other authority, as against all but the owner of the fee.

It follows that the judgment of the lower court must be reversed for proceedings consistent with this opinion.

Petition for rehearing denied October 18, 1921.

ANNOTATION.

Right to string wires across railroad right of way.

The books contain comparatively little about the right to cross a railroad right of way with wires. Sometimes the statutes prescribe the height of crossing wires.

It has been held in several cases that a railroad company not owning the fee may not restrain the stringing of wires across its line at a proper height and properly supported. CITIZENS' TELEPH. CO. v. CINCINNATI, N. O. & T. P. R. CO. (reported herewith) ante, 615; St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co. (1908) 134 Mo. App. 406, 114 S. W. 586; Illinois C. R. Co. v. Centerville Teleph. Co. (1916) 135 Tenn. 198, 186 S. W. 90.

A railroad company which does not own the fee is not entitled to have its way kept open to the sky, and the grant to it is not interfered with by stringing and maintaining overhead telephone wires across the right of way, so long as the reasonable and safe use of the railroad company's easement is not impaired. Illinois C. R. Co. v. Centerville Teleph. Co. (Tenn.) supra.

In a case where the rights of way of both railroads were merely easements, while the plaintiff railroad company was occupying its line

through a city, a second railroad company condemned a line crossing at an angle the plaintiff's line near the plaintiff's station grounds, and contracted with the defendant telephone company, granting it the right and privilege to construct, maintain, and operate, for a term of twenty-five years, its line and system of telephones over and along the right of way of the second railroad company, for the purpose of serving that railroad company in the operation of its road; but the telephone company also contemplated serving the general public. In virtue of this contract, the second railroad company was granted the right to attach to the poles and cross arms of the telephone company, and to maintain thereon, such wire or wires as were owned by the second railroad company for its telegraph line, and the telephone company granted free service over its system to the officers and agents of such railroad company concerning railroad business. The telephone company proceeded, under the right obtained by this contract, to erect its line of telephone along the right of way of the second railroad company, and was engaged in the act of planting its poles and constructing its line across

the right of way of the plaintiff, on the right of way theretofore condemned by the second railroad company, when the plaintiff brought this action for injunctive relief. The telephone company relied solely on its contract with the second railroad company, but the plaintiff claimed that the intended use of the telephone by the public made an additional burden on its right of way. The court denied the injunction, holding that the second railroad company might erect in proper manner, or contract with another to erect the line, and furnish the telegraph or telephone service necessary for the operation of its road, and that the commercial use of the telephone constituted no additional interference with the plaintiff's easement. *St. Louis, I. M. & S. R. Co. v. Cape Girardeau Bell Teleph. Co.* (1908) 134 Mo. App. 406, 114 S. W. 586, *supra*.

In *Cumberland Valley & W. R. Co. v. Chambersburg & G. Electric R. Co.* (1903) 15 Pa. Dist. R. 965, the court stated that the property rights of a railroad company not owning the fee in its right of way "do not extend upwards beyond a line necessary to transport its passengers and employees with safety and despatch, or downward below a line of support for their tracks and superstructures. The line of demarcation has not been, and probably cannot be, defined in feet."

In *Southwestern Teleg. & Teleph. Co. v. Clark* (1917) — *Tex. Civ. App.* —, 192 S. W. 1077, an action by a brakeman against a telephone company for personal injuries due to his being caught while on top of a car by defendant's wire, which crossed the railway line, the court said: "In acquiring easements for the construction and operation of railways, such corporations are entitled to so much of the space above the territory appropriated as may be necessary for the use and enjoyment of their franchises. That space is as much a part of the railway right of way as the ground which it covers. The telephone companies have no right to invade that zone in placing wires across the tracks, without the consent of the

railway company whose property is affected, or by legal condemnation proceedings. In the absence of a right to share this space, it was the duty of the appellant, in placing its wires across the track at the point where the injury occurred, to put them at an elevation which would allow the unobstructed use of the railway right of way for all legitimate railway purposes. That elevation could be determined only by taking into consideration the general and probable uses essential to railway operation. 1 *Joyce, Electricity*, §§ 409 and 419. To arbitrarily go below that altitude would be an unlawful invasion and obstruction of the railway right of way."

(In *Southwestern Teleg. & Teleph. Co. v. Corbett* (1912) — *Tex. Civ. App.* —, 148 S. W. 826, it was held that if a private person, without authority from the railroad company, employs a telephone company to string a wire across the railroad track to his home, and the telephone company so strings the wire as to injure an employee of the railroad company, the telephone company cannot escape liability because it acted for the private person.)

Where an employee of a railroad company, on the instructions of his superior, cut a crossing telephone line, the court affirmed his conviction of the offense of wilfully cutting a telephone line, holding that it was no defense that the owner of the telephone line, without the consent of the railroad company, and without condemnation proceedings, had crossed the right of way of the railroad company, where the facts were that the line crossed the tracks and right of way of the railroad company at a public road crossing, that the poles upon which the telephone wire was strung were not on the right of way of the railway company, and that the wire at the public road crossing, where it crossed the tracks of the railroad, was 35 feet high above the tracks, and 5 or 6 feet above the telegraph wires, strung on poles and running parallel with the railroad, and used by the railroad company, in the operation of its trains. *McGowan v. State* (1906)

40 So. 142, also briefly reported in 146 Ala. 679.

And in *Alt v. State* (1911) 88 Neb. 259, 35 L.R.A.(N.S.) 1212, 129 N. W. 432, the court, without passing upon the question whether there was an invasion of the rights of the railroad company in stringing telephone wires across its right of way at a highway crossing, without permission of, or compensation to, the railroad company, which owned the fee subject to an easement for highway purposes at the locus in quo, held that, even if there was such an invasion, the railroad company was not justified in cutting the wires as a nuisance, it appearing that they did not in any way endanger the company's employees, or interfere with the moving of trains or with the right of way.

But in *St. Louis, I. M. & S. R. Co. v. Batesville & W. Teleph. Co.* (1906) 80 Ark. 499, 97 S. W. 660, which was a suit for double damages provided for in a statute making it a misdemeanor to wilfully and intentionally destroy, injure, or obstruct any telegraph or telephone line, it was held that the statute was not applicable where a railroad company, along whose route the telephone line was constructed for several miles, crossing it several times, removed the poles and wires after repeated notice to the telephone company to do so, under the belief that it seriously menaced the operation of its trains, although the jury found as a matter of fact that it did not,—that at most it was only shown that the railroad company made a mistake in removing the line, which was far from proving the bad intent and evil motive necessary to convict it under the criminal statute.

(It may be noted that, in an action by a brakeman against the railroad company, his employer, for personal injuries from a telephone wire, the court said: "The telephone line being established when the track of the railway company was constructed, it is to be presumed that it was rightfully so established; and we are of opinion that the railway company had no right to demand that the telephone company should elevate its wire, in

the absence of some contract, or of appropriate proceedings condemning the right of way under the wire, and conferring the right to entail upon the telephone company the burden of elevating its line at the point of intersection." *Dillingham v. Crank* (1894) 87 Tex. 104, 27 S. W. 93.

In *New York C. & H. R. R. Co. v. Central Massachusetts Electric Co.* (1915) 219 Mass. 85, L.R.A.1915B, 822, 106 N. E. 566, it was held that municipal authority to maintain electric light wires along a public highway does not include the right to carry them along the line of the street, over an intersecting railroad, upon the relocation of the street so as to pass under the railroad tracks, under statutory authority to abolish the grade crossing.

In this connection it may be noted that in *South Eastern R. Co. v. European & American Electric Printing Teleg. Co.* (1854) 9 Exch. 363, 156 Eng. Reprint, 154, 2 C. L. R. 467, 23 L. J. Exch. N. S. 113, on a construction of English statutes it was held that a telegraph company, in crossing a railway line at a place where that crossed the highway at a level, could not lay the wires under the track, but must cross overhead.

While the crossing of railroad tracks by street railways is beyond the scope of this annotation, some of those cases may be referred to on the subject of crossing trolley wires.

It seems that a street railway company may not be denied the right to cross a railroad track in a city because of the use of trolley wires, where it is otherwise entitled to cross, and the trolley wires do not interfere with the operation of the trains. *Philadelphia, W. & B. R. Co. v. Wilmington City R. Co.* (1897) 8 Del. Ch. 134, 38 Atl. 1067; *West Jersey R. Co. v. Camden, G. & W. R. Co.* (1893) 52 N. J. Eq. 31, 29 Atl. 423.

The crossing of a steam railroad in a city by an electric railroad may be reasonable and feasible although the trolley wires overhead will be a source of danger in the operation of trains, and electric cars may stop on the crossing from failure of the current, and the passage of the regular

trains on the railroad will delay the street cars. *Louisville & N. R. Co. v. Bowling Green R. Co.* (1901) 110 Ky. 788, 63 S. W. 4, where the Constitution provided: "All railway, transfer, belt lines and railway bridge companies shall allow the tracks of each other to unite, intersect and cross at any point where such union, intersection and crossing is reasonable or feasible."

In *Cincinnati & H. Electric Street R. Co. v. Cleveland, H. & I. R. Co.* (1898) 12 Ohio C. D. 118 (affirmed in (1901) in supreme court without report, see note to 12 Ohio C. D. 113), the court, in enjoining the defendant from interfering with the plaintiff in putting in crossings of the defendant's line in a city street, said: "So long as it is a settled law of this state that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railroad company's right to use a street is founded on that easement, that long it must be held that the right of such a street railroad to cross over the tracks of a steam railroad laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such street." The court said also: "The law . . . expressly provides that 'all telegraph, telephone, electric light or other wires of any kind constructed over the line of any steam railroad within the state of Ohio . . . to clear the top of the rails at least 25 feet, except in cases of trolley wire crossings, when such height, as may be agreed upon is approved by the commissioner of railroads and telegraphs, shall govern.' It is very evident that the only wire that can be strung at a less height above the tracks of a steam railroad than 25 feet is the trolley wire, and this wire can only be placed at a less height by agreement of the parties, when approved by the commissioner of railroads and telegraphs. If the trolley wire is placed 25 feet above the track, the same as the other wires, there is no necessity for the approval of the commissioner of railroads and telegraphs."

It has been stated that, in respect to a mere crossing, a railroad company is not an abutting owner to a street car company. *Pennsylvania R. Co. v. Greensburg, J. & P. Street R. Co.* (1896) 176 Pa. 559, 36 L.R.A. 839, 35 Atl. 122; *North Pennsylvania R. Co. v. Inland Traction Co.* (1903) 205 Pa. 579, 55 Atl. 774.

The question of wires does not seem to be discussed in *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* (1894) 139 Ind. 297, 26 L.R.A. 337, 47 Am. St. Rep. 264, 38 N. E. 604, where it was held that an electric street railway need not pay compensation to a steam railroad company for the privilege of intersecting the railroad tracks where they cross a city street, if it makes the crossing as passable as it was before, or as nearly so as practicable.

It may be noted that in *Louisville & N. R. Co. v. Allen* (1914) 67 Fla. 257, L.R.A.1915C, 20, 65 So. 8, where the lines crossed at the crossing of city streets, it was held that it is negligence on the part of an electric street railway company, in the construction and establishment of its road, so to place one of its trolley wires over the track of a steam railway company as not to afford sufficient space for the latter's trains to pass easily and conveniently, without risk of danger and injury to its servants and employees. It is negligence on the part of a steam railway company to permit an electric street car company so to construct and maintain over the track of the steam railway company a trolley wire that it will endanger the lives of its servants and employees. In the event of an injury to an employee of the steam railway company, while in the discharge of his duty, occasioned by his coming in contact with such wire, the electric company and the steam railway company are jointly liable as tort-feasors for such injury.

For right and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, see the annotation to *Query v. Postal Telegr.-Cable Co.* 8 A.L.R. 1290.

B. B. B.

ETTA YOUNG McDOWELL, Exrx., etc., of J. R. McDowell, Deceased,
Appt.,
v.

A. S. McDOWELL et al.

Tennessee Supreme Court — October 29, 1921.

(— Tenn. —, 234 S. W. 319.)

Trust — conversion of property — tracing funds.

1. Owners of an interest in bonds pledged by a trustee as collateral for his own note cannot recover the amount from the insolvent estate of the trustee without tracing the proceeds of the note into possession of the representative of the estate.

[See note on this question beginning on page 626.]

Appeal — master's finding of facts — conclusiveness.

2. A finding of facts by the master, approved by the chancellor, will not be disturbed by the supreme court.

[See 2 R. C. L. 210, 211.]

Bonds — negotiable — collateral — innocent holder.

3. The owners of an interest in ne-

gotiable bonds pledged by one having possession of them as trustee to a bank as collateral for his own debt cannot recover their interest in specie, since the bank holds them as an innocent purchaser for value.

[See note in 12 A.L.R. 1048.]

APPEAL by the executrix from a decree of the Chancery Court for Knox County (Brown, Ch.), confirming the finding of the master in favor of intervening petitioners in a proceeding to wind up the insolvent estate of J. R. McDowell, deceased. *Modified.*

The facts are stated in the opinion of the court.

Messrs. Fowler & Fowler for appellant.

Mr. Henry Hudson, for intervening petitioners:

Property in the possession of the debtor, which is established to belong to a third party, must be surrendered to that third party.

39 Cyc. 529; Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691; Bromley v. Cleveland, C. C. & St. L. R. Co. 103 Wis. 569, 79 N. W. 741; Dowie v. Humphrey, 91 Wis. 98, 64 N. W. 315.

A court of equity will go as far as it can in tracing and following trust property.

39 Cyc. 545; Little v. Chadwick, 151 Mass. 109, 7 L.R.A. 570, 23 N. E. 1005.

A trustee may be compelled by a court of equity to refund money misappropriated.

39 Cyc. 510; Hassam v. Barrett, 115 Mass. 256; Roosevelt v. Land & River Improv. Co. 3 App. Div. 563, 38 N. Y. Supp. 242; 2 Perry, Trusts, § 844;

Fowlet v. Herbert, 1 Ves. Jr. 297, 30 Eng. Reprint, 352; Pocock v. Reddington, 5 Ves. Jr. 794, 31 Eng. Reprint, 862; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Mansell v. Mansell, 2 P. Wms. 681, 24 Eng. Reprint, 913; Vernon v. Vaudrey, Barnard, Ch. 303, 27 Eng. Reprint, 655; Freeman v. Cook, 41 N. C. (6 Ired. Eq.) 375; Norman v. Cunningham, 5 Gratt. 72.

If property be bought with partnership funds, a trust results, no matter how the title is taken.

Wells v. Stratton, 1 Tenn. Ch. 328; Brocchus v. Morgan, 3 Shannon, Cas. 671.

Green, J., delivered the opinion of the court:

The insolvent estate of J. R. McDowell is being wound up in this cause in the court below. This appeal arises upon the validity and alleged priority of two claims presented by intervening petitions.

During his lifetime J. R. McDow-

ell had in his possession ten bonds of the par value of \$1,000 each. McDowell pledged these bonds to a Knoxville bank to secure a note for \$10,000. The petitioners assert that they were interested in and part owners of said bonds. Petitioner Williams claims to have owned a one-third interest in one of the bonds, and petitioner Wilson claims to have owned a one-third interest in all of the ten bonds. They came into this cause asserting claims against the estate for the value of their respective interests in said bonds, and they also alleged that they were entitled to preferential payment of their claims out of the general assets of the deceased.

The master found that these petitioners did own the interests in the bonds which they asserted, and he allowed them to recover the value of their interests as general creditors of said estate. The chancellor confirmed the finding of the master as to the interests of said petitioners in said bonds, and in addition directed that their claims for the value of the bonds, converted by the deceased, be paid in full out of the funds of said estate, which estate, as said before, is insolvent.

Error is assigned in this court upon the allowance of the Wilson claim and upon the priority in payment given to both the Wilson and the Williams claims by the chancellor.

Both the said claims have been found just demands against the estate of the deceased by the master and the chancellor. This presents a concurrent finding upon an issue of fact which is supported by evidence in the record, and we will not go behind said finding.

The only question in this court is upon the chancellor's action in directing preferential payment of these claims. In this we think his Honor erred.

According to the stipulation of counsel, McDowell pledged said

bonds to the bank as his own property and to secure an indebtedness of his own. The bank had no knowledge of the interests of the petitioners in said bonds, and took them as the property of McDowell. Moreover, the bonds appear to have been negotiable in form.

McDowell's note was unpaid, and the bank held said bonds as collateral security at the time of his death. Later, by agreement of all parties, steps were taken to realize upon the bonds, and there was obtained from this source something over \$7,000, which was paid over to the bank. It was agreed that the bank should take and hold the proceeds of the bonds just as it held the bonds themselves, and that the rights of none of the parties would be affected by the proceedings had to collect said bonds.

The petitioners justify their claim to payment in full on the theory that McDowell held said bonds as a trustee for them to the extent of their several interests. They insist that, having converted the bonds to his own use, they were entitled in the first instance to have his estate redeem these securities from the bank to the extent of the petitioners' interests in them. Or, what is the same thing, the estate not having redeemed the bonds, petitioners should be allowed to recover from the estate the value of their property in the hands of deceased and misappropriated by him.

They cannot recover their interests in the bonds in specie as a matter of course, for the bank acquired the whole of said bonds as an innocent purchaser for value. Neither do we think that the petitioners are entitled to recover on the theory of tracing the proceeds of trust property.

Since *Moffitt v. McDonald*, 11 Humph. 457, it has been held in this state if a trustee converts a trust fund in his hands into another species of property, and its identity can be traced, it will be held in its new

Appeal—
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Bonds—
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collateral—
innocent holder.

form liable to the rights of the cestui que trust. All of our cases, however, emphasize the necessity of identifying the proceeds of the trust property misappropriated, and following such proceeds into some specific investment. This was done, or attempted, in *Treadwell v. McKeon*, 7 Baxt. 445; *Wells v. Stratton*, 1 Tenn. Ch. 328; and *Brocchus v. Morgan*, 3 Shannon, Cas. 671, relied on by the petitioners.

In *Brocchus v. Morgan*, supra, which is pressed upon our consideration, the trust fund was traced into a particular bank account. The presumption was applied that money thereafter checked from that account was the trustee's own money deposited first, and that the amount remaining represented the proceeds of the embezzled fund.

This court has never accepted the doctrine announced in some jurisdictions that, if one's general estate has been swelled by the proceeds of trust property, the trust may be established against the general assets although the estate be insolvent. This view formerly prevailed in some jurisdictions, but seems to have been abandoned almost everywhere now. We cannot undertake to review all the cases, but the trend of decision on the subject will be shown in an elaborate note under *Macy v. Roedenbeck*, 142 C. C. A. 42, 227 Fed. 347, following the report of that case in L.R.A.1916C, 12.

No effort is made to trace the proceeds of the note to which McDowell attached these bonds as collateral security. Whether the money thus obtained was used to pay debts, or whether it came into his general estate, does not appear. If it came into his estate, it is not followed into any assets now in the hands of his executrix. So far as the record shows, the amount realized on said note was mingled with McDowell's assets generally, and cannot now be distinguished.

In *Moffitt v. McDonald*, supra, the court declared this rule with respect 18 A.L.R.—40.

to tracing the proceeds of a trust fund: "It must, however, be clearly established that the property upon which the trust is sought to be fastened has been paid out of the specific trust fund. It is not sufficient to prove that the purchaser of the property had a fund belonging to another in his hands, unless the employment of that particular fund in the purchase be also proved."

We have three cases in which negotiable instruments were placed in the hands of banks, as agents to collect and remit the proceeds. These collections were mingled with the general funds of the collecting banks, and assignments were made by them before remittances. In each of these cases it was held that no trust could be imposed on funds in the hands of the assignee, even though the particular collection was made by the assignor as agent,—this because the fund collected had not been kept separate and could not be identified. *Akin v. Jones*, 93 Tenn. 353, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669; *Sayles v. Cox*, 95 Tenn. 579, 32 L.R.A. 715, 49 Am. St. Rep. 940, 32 S. W. 626; *Klepper v. Cox*, 97 Tenn. 534, 34 L.R.A. 536, 56 Am. St. Rep. 823, 37 S. W. 284.

The same rule is announced in *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3, with reference to the proceeds of goods said to have been held on consignment, which was sold, and the proceeds thereof mingled by the insolvent firm with its own assets.

There is no reason for applying a different rule as to assets in the hands of an executor or administrator. *Moffitt v. McDonald*, supra, was an effort to fix a trust on property in the hands of the personal representative of a decedent. In *Richardson v. Vick*, 125 Tenn. 536, 545, 145 S. W. 177, it is said: "The general principles applicable to assignments for the benefit of creditors and proceedings in bankruptcy

Trust—conversion of property—tracing funds.

are much the same as those governing the administration of the estates of insolvent decedents."

In order to follow trust money there must be specific property, capable of being identified, into which the trust money has gone. We have here only the general estate of the deceased, and there is no showing that any part of it came from the money secured by the pledge of these bonds.

A case almost exactly parallel to this is *Lowe v. Jones*, 192 Mass. 94, 6 L.R.A.(N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 Ann. Cas. 551. In that case certain securities were pledged by a trustee for his individual benefit. The trustee died

insolvent, and it was sought to compel his representative to redeem the trust property pledged by the deceased. The court denied this relief in a well-reasoned opinion, and said that the effort was merely one to impress a trust on the general estate of the deceased to the amount of the securities misappropriated by him.

The Chancellor's decree will be modified as herein indicated. The petitioners are entitled to share in the assets of the estate of deceased as general creditors, but are not entitled to preferential payment. The petitioners will pay the costs of this court, and the cause will be remanded for further proceedings.

Petition for rehearing denied.

ANNOTATION.

Right of cestui que trust to have trust property wrongfully pledged by trustee for his personal debt redeemed by money belonging to his insolvent estate.

In order to entitle a cestui que trust to have trust property wrongfully pledged by the trustee as security for a personal debt redeemed by money belonging to the trustee's insolvent estate, it is necessary that he be able to trace, not the trust property itself, but its proceeds. See the reported case (*McDOWELL v. McDOWELL*, ante, 623); *Lowe v. Jones* (1906) 192 Mass. 94, 6 L.R.A.(N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 Ann. Cas. 551.

The view has been entertained in some cases that it is sufficient to entitle the cestui que trust to a preference over the general creditors of the trustee's insolvent estate, to show that the assets of such estate have been augmented by the proceeds of the trust property without identifying them in any form; but most, if not all, of these cases have been overruled or greatly limited or qualified, and the generally accepted rule at the present time is that it must appear that the trust property or its proceeds have found their way directly into the estate of the trustee, that the property must be found to reside in

the assets at the time when the claim is asserted, and must not have been expended or dissipated for any purpose in the business of the trustee. See 26 R. C. L. pp. 1355, 1356.

The view that the proceeds of the trust property must be traced into some specific property or fund is adhered to in *Lowe v. Jones* (Mass.) supra, and in the reported case (*McDOWELL v. McDOWELL*).

Although the cestui que trust may not be entitled to have the trust property redeemed at the expense of the trustee's insolvent estate, he may nevertheless assert his claim thereto, subject to such rights as the pledgee may have acquired as a bona fide purchaser for value.

Thus, he may claim from the pledgee the surplus remaining after satisfaction of the loan, provided the pledgee has not turned it over to the trustee before receiving notice of the claim of the cestui que trust thereto (see *Thompson v. Bank of California* (1906) 4 Cal. App. 660, 88 Pac. 987); and he may recover such surplus from the trustee in bankruptcy of the pledgor, to whom the pledgee has turned

over such surplus (see *Hutchinson v. LeRoy* (1902) 51 C. C. A. 159, 113 Fed. 202).

He may, by notice to the pledgee, require him to resort first to other collateral held by him. See *Furber v. Dane* (1909) 203 Mass. 108, 89 N. E. 227.

See also in this connection, *Woodside v. Graffin* (1900) 91 Md. 422, 46 Atl. 968, in which it was held that where the trustee pledged stock held by him in trust as security for a loan for his individual benefit, which loan was refused by his assignee for the benefit of creditors upon the pledge of the same stock together with other stock belonging to the trustee individually, which individually owned stock was sold by the assignee for a sufficient amount to pay off the whole loan, the beneficiaries were entitled to a return of their stock, and the assignee was not entitled to

be subrogated, as against their claim, to the rights of the pledgee of the stock, though he had used funds of the estate to discharge the debt, upon the ground that the assignee occupied no better position than the trustee, who, had he redeemed the stock before making the assignment, could not have withheld it from the beneficiaries.

If the pledgee is chargeable with notice that the subject of the pledge is trust property, or if he is not a purchaser for value, as where the pledge was to secure an antecedent debt, the cestui que trust may claim the property without first discharging the debt for which it was pledged. As to the right of the beneficial owner to recover property or funds transferred by the trustee or fiduciary to pay or secure his own antecedent indebtedness, see annotation in 12 A.L.R. 1048. E. S. O.

OLIN S. WRIGHT, Appt.,

v.

PALESTINE C. WRIGHT.

Florida Supreme Court — April 4, 1921.

(— Fla. —, 87 So. 156.)

Divorce — desertion — refusal to condone.

1. The refusal by a deserted spouse to resume marital relations after the obstinate, wilful, and continued desertion for a period of a year does not deprive him or her of the right to a divorce on the ground of such desertion.

[See note on this question beginning on page 630.]

Husband and wife — desertion — duty to condone.

2. Where there has been wilful, obstinate, and continued desertion by either the husband or wife for a period of a year, there is no obligation on the part of the deserted spouse thereafter to resume the marital relations, and the refusal to do so does not extinguish the cause of action.

[See 9 R. C. L. 373.]

Divorce — acquiescence — effect.

3. Where a husband or wife wilfully and wrongfully deserts the other, the willingness for, or tacit acquiescence in, the desertion, on the part of the deserted spouse, will not defeat the cause of action, if such wilful desertion is obstinate and continued for the period of a year.

[See note in 3 A.L.R. 503.]

Headnotes by BROWNE, Ch. J.

APPEAL by complainant from a decree of the Circuit Court for Hillsborough County (Robles, J.), dismissing a bill filed for a divorce. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Martin Caraballo, for appellant:

An offer to discontinue the desertion and return to and live with the deserted spouse, though made in good faith and before the institution of any suit for divorce, cannot, unless accepted, constitute any defense to such suit.

Benkert v. Benkert, 32 Cal. 468; **Fishli v. Fishli**, 2 Litt. 337; **Cargill v. Cargill**, 1 Swabey & T. 235, 27 L. J. Prob. N. S. 69, 4 Jur. N. S. 764, 6 Week. Rep. 870; **Brookes v. Brookes**, 1 Swabey & T. 326, 28 L. J. Prob. N. S. 38; **Basing v. Basing**, 3 Swabey & T. 516, 33 L. J. Prob. N. S. 150, 10 Jur. N. S. 806, 10 L. T. N. S. 756; **Hesler v. Hesler**, **Wright (Ohio)** 210; **M'Lauchlan v. M'Lauchlan**, 1 Sc. Sess. Cas. 2d series, 294; **Muir v. Muir**, 6 Sc. Sess. Cas. 4th series, 1353, 16 Scot. L. R. 785.

When a husband or wife, without cause, abandons the other, and makes no offer to resume the marital relation, a divorce will not be denied.

Fielding v. Fielding, 67 Fla. 143, 64 So. 546.

Where one spouse drives the other, who is innocent of any offense against the marital relation, from the matrimonial domicile, the former is guilty of deserting the latter.

Hudson v. Hudson, 59 Fla. 529, 29 L.R.A.(N.S.) 614, 138 Am. St. Rep. 141, 51 So. 857, 21 Ann. Cas. 278.

Mr. William H. Malone also for appellant.

Mr. G. B. Wells for appellee.

Browne, Ch. J., delivered the opinion of the court:

This is an appeal from a decree denying the prayer of the bill for divorce and dismissing the bill. The divorce was sought on the ground of the wilful, obstinate, and continued desertion, for the period of one year, of **Olin S. Wright**, by his wife, **Palestine C. Wright**. **Dr. Wright** and his wife had lived for many years in a house belonging to **Mrs. Wright**. In the latter part of April, 1915, **Mrs. Wright** informed her husband that she was going away and that her house had sheltered him as long as it could, and that he must move out, as she wanted to rent it. She told him that he had a room over his office that he could

occupy, and he took up his lodging there.

During their married life she frequently told him to move out of her house, but on this occasion it seems she took more care to see that her wishes were complied with by moving out of the house herself, and renting it for a boarding house or hotel. During their married life there was considerable faultfinding on the part of the wife, and when her husband would not agree to her wishes or demands she would threaten separation.

Mrs. Wright remained away from **Plant City** from May, 1915, to January, 1917. She admits that she rented her house and told her husband that he could live over his office, where he had plenty of room, and that she left **Plant City** in May, 1915, but says her reason for leaving him was to keep her children in school. She spent the time that she was away from her husband in **Gainesville, Florida**; **Atlanta, Georgia**; **Hiddenmire, North Carolina**; **Gainesville, Georgia**; **New York city**, and **Atlantic City, New Jersey**. She also admits having told her husband some time prior to her putting him out of the house that she wanted him to get a divorce.

Dr. Wright's testimony is corroborated by other witnesses. **Mrs. Evers** testified that in April or May, 1915, she rented from **Mrs. Wright** the house in which they were living at that time. She says she was anxious to secure some boarders and asked **Mrs. Wright** what was to become of **Dr. Wright** and his son, to which **Mrs. Wright** replied: "She had furnished shelter over their heads long enough, and it was time for them to get out." She reserved one room in the house for a son by a former husband. **Mrs. Evers** testified that she wanted to have **Dr. Wright** and his son board with her, but that **Mrs. Wright** said they would get out.

The deputy sheriff who served the subpoena in chancery on **Mrs. Wright** testified that she asked him

what it was for, and he told her he supposed it was a divorce proceeding, and that she told him that she had insisted on that for several years. He told her that she would not have to appear in court if she did not want to, if that was the way she felt about it.

The only conclusion to be reached from all the testimony is that for some time prior to Mrs. Wright putting her husband out of the house she desired a divorce, and that she no longer cared to live with him; but, as they were living in her house and she could not abandon him without leaving him in possession, she adopted the alternative of putting him out, renting the house, and, in order that all semblance of relations between them might be severed, she objected to the party to whom she rented the house letting her husband remain there even as a boarder.

At the time she left, instead of arranging their affairs so that whenever she returned their marital relations could be easily resumed, she, on the contrary, took the precaution to see that he was not even permitted to board in their former home, and had him move into a room over his office, which, while it might have been an admirable bachelor's apartment, was hardly suitable for a married couple.

An effort is made to show an attempt at reconciliation on the part of Mrs. Wright, but it came twenty months after the desertion and eight months after the cause of action accrued. Whatever may be the duty of either spouse during the period when the cause of action on the ground of desertion is incubating, there is no obligation upon the part

Husband and wife—desertion—duty to condone.

of either, after the desertion has been wilful, obstinate, and continued for

the period of a year, to resume the marital relations.

The testimony in support of the contention that Mrs. Wright, after twenty months' absence, wanted to resume marital relations with her

husband, consists only of a statement by her to her husband, that she had gotten the house fixed up and that she was to begin eating there that day, and when he got ready he could come over. This the chancellor properly construed to be only an invitation to dinner, but, even if it had been an offer on her part to resume marital relations, it came too late, as the desertion had been obstinate, wilful, and continued for a year, and after such a desertion the injured party is within his rights if he declines to resume marital relations.

Divorce—desertion—refusal to condone.

The decree in this case is predicated upon the erroneous doctrine that if a husband or wife deserts the other there must be no willingness or acquiescence in such desertion on the part of the deserted spouse. We know of no such rule, and there is nothing in the statute to warrant grafting that doctrine upon it.

A drunken husband may make his wife's life so wretched that his desertion may come as a relief, and it would be a strange and harsh doctrine if, in order to procure a divorce on the ground of wilful, obstinate, and continued desertion for a year, she would have to establish, in addition to the desertion, the fact that she had grieved her heart out at the loss of her drunken husband.

The frame of mind of the deserted spouse in no way lessens the gravity of the offense of a wilful, obstinate, and continued desertion.

—acquiescence—effect.

We think the evidence sustains the allegations of the bill, and as the question of whether the complainant was pleased or not at his wife's desertion does not affect the issue, the chancellor erred in refusing to grant the divorce and dismissing the bill, and the decree is therefore reversed.

Taylor, Whitfield, Ellis, and West, JJ., concur.

ANNOTATION.

Divorce: offer after lapse of statutory period of desertion to resume marital relations.

An offer by the offending party, after the lapse of the statutory period of desertion, to resume marital relations, comes too late.

California. — *Benkert v. Benkert* (1867) 32 Cal. 467; *Vosburg v. Vosburg* (1902) 136 Cal. 195, 69 Pac. 694; *Walker v. Walker* (1910) 14 Cal. App. 487, 112 Pac. 479. See also *Kenniston v. Kenniston* (1907) 6 Cal. App. 657, 92 Pac. 1037.

Florida. — *WRIGHT v. WRIGHT* (reported herewith) ante, 627.

Idaho. — *Stoneburner v. Stoneburner* (1905) 11 Idaho, 603, 83 Pac. 938.

Illinois. — *Kerby v. Kerby* (1910) 157 Ill. App. 564 (apparently taking a like view).

Iowa. — *Tipton v. Tipton* (1915) 169 Iowa, 182, 151 N. W. 90, Ann. Cas. 1916C, 360.

Kentucky. — *Fishli v. Fishli* (1822) 2 Litt. 342 (apparently obiter).

New Jersey. — See *Gordon v. Gordon* (1918) 89 N. J. Eq. 535, 105 Atl. 242, *infra*.

Oregon. — *Luper v. Luper* (1908) 61 Or. 418, 96 Pac. 1099 (apparently approving the rule).

Washington. — See *Egbers v. Egbers* (1914) 79 Wash. 72, 139 Pac. 767.

The same rule was held where the right had accrued to the wife to a judicial separation on the ground of desertion without cause for two years and upwards. *Cargill v. Cargill* (1858) 1 Swabey & T. (Ir.) 235, 4 Jur. N. S. 764, 6 Week. Rep. 870, 27 L. J. Prob. N. S. 69. See also *Mallinson v. Mallinson* (1866) L. R. 1 Prob. & Div. (Eng.) 93, 14 Week. Rep. 353; *Basing v. Basing* (1864) 3 Swabey & T. (Ir.) 516, 10 Jur. N. S. 806, 33 L. J. Prob. N. S. 150, 10 L. T. N. S. 756.

It will be seen that the rule is sustained by the reported case (*WRIGHT v. WRIGHT*, ante, 627).

So, in case of a constructive desertion, the offer of the guilty spouse to

become reconciled is too late if made after the other party's right of action accrues. *Lundy v. Lundy* (1922) — *Ariz.* —, 202 Pac. 809.

The rule is suggested by a statute which provides that "if one party deserts the other, and, before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfil the marriage contract and solicits condonation, the desertion is cured." *Walker v. Walker* (1910) 14 Cal. App. 487, 112 Pac. 479.

When the statute provides that, after the lapse of four years and the adoption of certain prescribed procedure, the party deserted shall have a right to obtain a divorce, the deserter cannot, after four years and the prerequisite procedure, defeat the divorce action, by an offer to return made after the beginning of such action. *M'Lauchlan v. M'Lauchlan* (1838) 1 Sc. Sess. Cas. 2d series, 294.

In *Tutwiler v. Tutwiler* (1916) 118 Va. 724, 88 S. E. 86, where after a decree of divorce a mensa et thoro had been granted to a wife against her husband, at least for desertion, he asked her to return to him, the court said: "With reference to the appellant's overtures made after the decree was rendered against him, we have no difficulty in holding that they were too late to have any effect upon the correctness of that decree. The cause is still pending, however, the decree for alimony is temporary only, there has been no divorce a vinculo, and the provisions of § 2266 of the Code will enable the lower court to afford the parties any relief to which they may hereafter show themselves entitled."

In New Jersey, while in *Hall v. Hall* (1902) — N. J. Eq. —, 53 Atl. 455, affirmed in (1903) 65 N. J. Eq. 709, 55 Atl. 300, the opinion of Vice Chancellor Pitney seems to indicate a view in accordance with the general

rule, the court of errors and appeals in *Myles v. Myles* (1910) 77 N. J. Eq. 265, 76 Atl. 1037, laid down the rule that "the two-years' duration contemplated by the statute are, of course, those immediately preceding the filing of the petition;" and this rule of law was held binding on the court of chancery in its decision in *Gordon v. Gordon* (1917) 88 N. J. Eq. 436, 103 Atl. 31, wherein it was accordingly held that where, after the two-years' desertion period had expired, the deserting party had become insane, the offended party could not obtain a divorce on the ground of desertion. But the court of errors and appeals, while affirming the judgment in (1918) 89 N. J. Eq. 535, 105 Atl. 242, did so on the ground that the wilful desertion period of two years had not been completed when the insanity began, and said, *inter alia*, referring to the *Myles Case*, supra: "What we intended to express was that, no matter how long the period of desertion had existed beyond the statutory two years preceding the filing of the petition, unless the desertion had continued up to the time of such filing, the injured spouse could take no benefit from the statute. But, in our view, when the two-years' period has once elapsed the desertion becomes permanently established, and its character continues until the filing of the petition, unless it is sooner brought to an end by the act of the injured husband or wife. During the whole of the two years immediately following the act of desertion the offending spouse is offered an opportunity of repenting of his or her

sin, and may put an end to the running of the statute by exhibiting such repentance to his or her wife or husband, and offering in good faith to return to the deserted home and to renew cohabitation. But if he or she declines to take advantage of the opportunity to repent afforded by the statute, and persists in the desertion for the full period of two years, the right to return has gone, the hour of repentance has passed, the benefit given by the statute to the spouse offended against has become vested, and he or she can never thereafter be deprived of that benefit—of his or her right to a divorce—except by his or her own act. Repentance by the sinner, offers of return by him or her, are then of no avail. Not even the fact that the offending spouse, after the termination of the two-years' period, has ceased to be a free agent by reason of mental aberration, or from any other cause, can deprive the injured spouse of that vested right. It is absolute and unassailable."

In Massachusetts, where the statute made a ground for divorce "utter desertion continued for three consecutive years next prior to the filing of the libel," the court, in *LaFlamme v. LaFlamme* (1911) 210 Mass. 156, 39 L.R.A. (N.S.) 1133, 96 N. E. 62, said, *arguendo*: "It is true, as was argued in behalf of the libellant, that in December, 1909, he had become entitled to a divorce from his wife on the ground of her desertion. *Cargill v. Cargill* (1858) 1 Swabey & T. (Ir.) 235, 4 Jur. N. S. 764, 6 Week. Rep. 870, 27 L. J. Prob. N. S. 69." B. B. B.

RE ESTATE OF MARGARET GRAHAM, Deceased.

R. B. TAPPAN, Exr., etc., of Margaret Graham, Deceased, Appt.,
v.

ANNA FORTMAN, Respt.

California Supreme Court (In Banc)—October 18, 1921.

(— Cal. —, 201 Pac. 456.)

Executor and administrator — right of lawyer administrator to employ attorney to probate the estate.

That an administrator is a practising attorney does not, under a statute

providing that he shall be allowed all necessary expenses in the care and settlement of the estate, prevent his receiving an allowance for the expenses of an attorney to perform the usual and ordinary legal services incident to a probate proceeding, where the legislature has provided compensation for both the administrator and the attorney in such proceeding.

[See note on this question beginning on page 635.]

APPEAL by the executor from an order of the Superior Court for Alameda County (Robinson, J.), denying an allowance in his final account of fees to an attorney employed by him in the administration of the estate of his decedent. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Nusbaumer & Bingaman for appellant.

Mr. Allen G. Wright, amicus curiæ:

An administrator has the right to retain counsel to aid him in the settlement of the estate, and to pay him reasonable compensation therefor out of the assets of the estate.

Re Gasq, 42 Cal. 288; Re Page, 57 Cal. 238; Re Simmons, 43 Cal. 543; Re Ogier, 101 Cal. 381, 40 Am. St. Rep. 61, 35 Pac. 900; Re Kasson, 119 Cal. 489, 51 Pac. 706; Collier v. Munn, 41 N. Y. 143; Re Runyon, 125 Cal. 197, 57 Pac. 783; Re Hite, 155 Cal. 448, 101 Pac. 448; Re Murphy, 171 Cal. 697, 154 Pac. 839; Willard v. Bassett, 27 Ill. 38, 79 Am. Dec. 393; 1 Perry, Trusts, § 432; Re Brignole, 133 Cal. 162, 65 Pac. 294.

Mr. L. R. Weinmann for respondent.

Sloane, J., delivered the opinion of the court:

This is an appeal by R. B. Tappan, executor of the last will of Margaret Graham, deceased, from an order of court denying an allowance in the final account of the executor of fees to an attorney employed by said executor in the administration of the estate of said decedent.

The executor, Tappan, is himself a practising lawyer, and it was the ruling of the probate court that his employment of an attorney for the usual and ordinary legal proceedings of the administration was not a necessary expense of the administration. An allowance of attorneys' fees was made for certain extraordinary services rendered by the attorney employed in the course of the administration. So the only question presented is whether an executor or administrator, who is him-

self a practising lawyer, is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding.

The Code of Civil Procedure, as in force at the time this estate was in process of administration, contained the following provisions:

"Sec. 1616. Compensation of the executor and administrator. . . . He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter."

"Sec. 1618. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him."

Then follows a graded scale of commissions, varying with the valuation of the estate. Section 1619 provides that attorneys for executors and administrators shall be allowed out of the estate, as fees "for conducting the ordinary probate proceedings, the same amounts as are allowed by the last section as compensation for executors and administrators for their own services."

The reasonable necessity for the employment of an attorney to prepare legal papers and conduct the ordinary court proceedings by the average layman administrator is not disputed. Such employment is a matter of universal practice, the compensation is provided for by

statute, and made equal to that of the executor or administrator, and such allowance is not made an issue in this case further than to claim an exception where such executor or administrator is himself a lawyer, and competent to perform the legal services required.

We may, therefore, confine ourselves to a consideration of the question whether a duty rests upon the executor who is a lawyer to render this professional legal service to the estate without additional compensation, rather than to employ another attorney for such service.

Counsel in this case are disposed to agree that, if the executor does perform these legal services, he may not receive extra compensation therefor.

The issue presented here is whether the performance of such professional legal duties is part of the service designated by the Code when it provides that the executor or administrator shall receive "for his services such fees as are provided in this chapter." It is clear that the services incumbent upon the executor in the exercise of his duty to the estate are the same, irrespective of his general vocation in life. The "care, management, and settlement of the estate" referred to in § 1616, *supra*, may call for the services of a plumber, a carpenter, an auctioneer, a real estate agent, or an expert accountant. Must the administrator render these services if they happen to be in the line of his general occupation? Clearly not. He would be entitled to hire such work done, and pay for it as part of the "necessary expense of the care, management, and settlement of the estate." If he did perform such services, which were not in the line of his duty as administrator, he might not be permitted to receive compensation, but the reason would be one of public policy, forbidding him to be his own employer.

In many of the states and in California prior to 1873, attorneys' fees have been approved under the general provision that the adminis-

trator "shall be allowed all necessary expenses in the care, management, and settlement of the estate," and, as already pointed out, under such general provision an attorney administrator would be no more called upon to give his professional services to the estate than would the plumber, carpenter, or accountant administrator to render services that might be required in his special line of business, when the care and management of the estate should call for such employment.

It is true that such services as just referred to are of a more exceptional and casual nature than that of handling the legal business of an administration, but that is an additional reason why the latter should not be gratuitously added to the responsibilities of the lawyer administrator, while all others are allowed to avail themselves of outside legal assistance.

The legal end of the probate of an estate has come to be recognized as a distinct branch of employment. Hence we have had various amendments to the Code, recognizing and providing for such legal services. In 1873 there was added to the general provision hereinbefore quoted, providing for an allowance to the administrator of all necessary expenses," etc., the words, "including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in the probate or other courts." In 1905 the legislature advanced the position of an attorney in probate matters, so far as relates to compensation, to an equality with the administrator, upon a commission basis, graduated according to the value of the estate, and in 1909 the law as it now stands was enacted, which gives the same compensation to the attorney for the ordinary legal services of a probate proceeding as are allowed to the administrator for the ordinary business administration of the estate.

We are bound to assume that the legislature, in its deliberations, has determined that the services rendered by the administrator and by

the attorney in such probate proceedings are of equal value, and that the compensation to each is a reasonable compensation for the service rendered. It certainly would be an unjust interpretation of the law which would require of the lawyer administrator twice the service for the same pay that is required of the merchant or mechanic or physician in the same position.

Although the employment of an attorney for the probate of an estate is not required by law, such employment is recognized by our legislation as the usual and customary practice, and it is doubtless conducive to system and accuracy in the administration of the probate law. The probate procedure in California may be considered by many as unduly intricate and expensive, but it cannot be disputed that it is effective in the settlement of estates and the transmission of property and titles in a way to protect the rights of creditors and of heirs and devisees.

The whole matter of the disposition of the estates of deceased persons is within the legislative control. Our legislature has seen fit to recognize the services and compensation of the administrator, and the services and compensation of an attorney, as relating to distinct employments in probate administration.

There are, and have been, to the knowledge of all legislators, hundreds of practising lawyers serving as executors and administrators, but there has been no intimation in any law upon the subject that a different rule should apply to a lawyer in such position, in the matter of employing legal assistance, than to an administrator of any other business calling.

And in all of the innumerable instances in this and in other states where lawyer administrators have employed and paid attorneys, there seems to be but one case in the courts where the right of such employment has been called in question.

There are decisions cited where,

on grounds of public policy, it has been held that an administrator rendering legal services cannot receive additional compensation therefor. *Taylor v. Wright*, 93 Ind. 121; *Hough v. Harvey*, 71 Ill. 72; *Collier v. Munn*, 41 N. Y. 143; *Bushby v. Berkeley*, 153 App. Div. 742, 138 N. Y. Supp. 831; *Doss v. Stevens*, 13 Colo. App. 535, 59 Pac. 67.

Other courts have upheld allowances to the administrator for legal services rendered by him as an attorney in the interests of the estate. *Harris v. Martin*, 9 Ala. 895; *Morgan v. Nelson*, 43 Ala. 586; *Wisner v. Mabley*, 74 Mich. 143, 41 N. W. 835; *Chatfield v. Swing*, 6 Ohio Dec. Reprint, 666; *Fulton v. Davidson*, 3 Heisk. 614.

The only decision which the diligence of the counsel in this action and of amicus curiæ filing briefs in behalf of this matter has been able to find, bearing upon the right of such administrator to employ an attorney, is that of *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451. This decision was under a statute similar to the provisions of the California law prior to 1873, which merely allowed to the administrator "all necessary expenses in the care, management, and settlement of the estate." It was there held that the administrator, who was a practising lawyer, was not under the necessity of employing additional legal assistance, and was not entitled to an allowance therefor. It is said in the course of the opinion: "In this case the record shows that the administrator was a lawyer. He had control of the estate as agent and attorney for the deceased during her lifetime. He was allowed a claim of \$200 for services and advice to Mrs. Whitten prior to her death. Mr. Whitten, the principal heir, desired to retain him as attorney to represent 'my interest and that of my children, if any, and continue to manage the property, so far, at least, as our interests are concerned;' and, upon this request, Mr. Noble voluntarily offered to serve as administrator. Because of these

facts, no doubt, Mr. Whitten consented to his appointment as administrator, and because of his ability and fitness to conduct the administration of the estate the court appointed him."

To what extent the court was influenced in the decision cited by the circumstances referred to as to the choice of this administrator with a view to his legal services does not appear. In the application of the limitation as a general rule, especially in view of the more specific recognition of the functions of an employed attorney under our Code, its authority is not controlling and its reasoning is not convincing.

Conceding that it is still within the discretion of the probate court

in this state to pass upon the necessity for the employment of an attorney in the administration of an estate, the same as upon other matters of necessary expenditure, we are satisfied that denial of such necessity cannot be made to rest upon the mere fact that the required services are in the line of the administrator's profession or business.

Executor and administrator—right of lawyer administrator to employ attorney to probate the estate.

The order appealed from is reversed.

We concur: Angellotti, Ch. J.; Wilbur, J.; Lennon, J.; Lawlor, J.

Petition for rehearing denied November 10, 1921.

ANNOTATION.

Right of executor, administrator, or testamentary trustee, who is himself an attorney, to employ another attorney at the expense of the estate.

General rule.

An executor, administrator, or testamentary trustee who is himself an attorney may properly employ another attorney to render the necessary legal services for the estate, and the court may make an allowance out of the estate for the value of such legal services. RE GRAHAM (reported herewith) ante, 631; Doss v. Stevens (1899) 13 Colo. App. 535, 59 Pac. 67; Re Van Buren (1897) 19 Misc. 373, 44 N. Y. Supp. 857; Re Wick (1907) 53 Misc. 211, 104 N. Y. Supp. 717; Re Lester (1916) 172 App. Div. 509, 158 N. Y. Supp. 763; Burge v. Bruttin (1843) 2 Hare, 373, 67 Eng. Reprint, 153, 12 L. J. Ch. N. S. 368, 7 Jur. 988; Stanes v. Parker (1846) 9 Beav. 385, 50 Eng. Reprint, 392, 10 Jur. 603 (arguendo); Re Corsellis (1887) L. R. 34 Ch. Div. (Eng.) 675, 56 L. J. Ch. N. S. 294, 56 L. T. N. S. 411, 35 Week. Rep. 309, 51 J. P. 597 (arguendo); Broughton v. Broughton (1855) 5 De G. M. & G. 160, 43 Eng. Reprint, 831, 26 L. J. Ch. N. S. 250, 1 Jur. N. S. 365, 3 Week. Rep. 602 (arguendo). Contra in part, Noble v. Whitten (1905) 38 Wash. 262, 85 Pac. 451.

It is held in the reported case (RE

GRAHAM, ante, 631) that an executor who is himself a practising lawyer is entitled to employ another attorney to render the usual and ordinary legal services incident to the administration of the estate, at the expense of the estate.

In Doss v. Stevens (1899) 13 Colo. App. 535, 59 Pac. 67, supra, the court, while denying to an administrator who was a lawyer, his claim for legal services rendered by himself, allowed him for the services of counsel employed by him in and about the hearings on his final report, where the statute provided: "Executors and administrators shall be allowed as a compensation for their trouble a sum not exceeding 6 per cent on the whole amount of personal estate and not exceeding 3 per cent on the money arising from the sale or letting of land; with such additional allowances for costs and charges in collecting and defending the claims of the estate and disposing of the same as shall be reasonable, to be allowed and paid as other expenses of administration."

In Burge v. Brutton (1843) 2 Hare, 373, 67 Eng. Reprint, 153, 12 L. J. Ch. N. S. 368, 7 Jur. 988, supra, it was

held that where an executor who is a solicitor, practising in the country, acts as solicitor in a case in which he is a party in his representative character, though he is only allowed personally as against the estate such costs as he actually pays, he is entitled to be allowed as against the estate that proportion of the whole costs which his town agent in the cause was entitled to receive.

In *Stanes v. Parker* (1846) 9 Beav. 385, 50 Eng. Reprint, 392, supra, the court observed, arguendo: "The safety of the public has been justly thought to require the rule now clearly established, that, although a trustee, being a solicitor, may appoint another solicitor to execute the professional business relating to the trust, yet, if he does it himself, he shall not be allowed to charge for his professional services."

In *Re Corsellis* (1887) L. R. 34 Ch. Div. (Eng.) 675, supra, a case of a testamentary trustee, Cotton, L. J., said, arguendo: "A trustee who is a solicitor cannot, as a rule, make any profits as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. . . . If there is business which a layman cannot properly perform, he may employ a solicitor to do that legal business."

A part of the amount paid by an executor who was a lawyer, to other attorneys, for services, was allowed in *Re Wick* (1907) 53 Misc. 211, 104 N. Y. Supp. 717, supra.

In the contra case of *Noble v. Whitten* (1905) 38 Wash. 262, 85 Pac. 451, supra, quoted from in the reported case (*RE GRAHAM*, ante, 631), the court said also: "Where the administrator is a lawyer, and competent to prepare his own ordinary papers in the conduct of the estate, he should be required to do so without extra compensation. Where there is litigation concerning the estate, and the administrator is a party, under such circumstances, the services of a legal assistant would no doubt be necessary and proper. This is not such a case. The only time in the course of the

administration of the estate when an attorney or assistant to the administrator was necessary was in the trial of the questions now presented here. These questions were caused by the administrator attempting to obtain an allowance to which he was not entitled. He should not be authorized to employ an attorney for that purpose."

It may be here noted that in *Re Van Buren* (1896) 19 Misc. 373, 44 N. Y. Supp. 857, supra, where, upon the accounting of an administrator who was a lawyer, the court allowed part of the moneys paid out by him for services by other attorneys, one of whom was his law partner, the court said, in refusing to allow payments to lawyers and others for collecting testimony: "It is difficult to see on what legal principle this expense can be allowed, or how it can be construed as necessary. . . . This administrator is a lawyer, and accustomed to collecting and weighing testimony himself. He has already been allowed \$185 for one attorney, \$565 for another, and in the *Lovel-Quitman Case* his attorney was allowed \$93 more, which would seem to be a sufficient allowance for attorneys, even in this estate, for litigations prior to the final accounting, without \$80 additional for legal services of the kind herein disclosed. This is not the case of an executor brought into the care of an estate without his knowledge or consent, nor of an administrator endeavoring to make as good settlement as possible for a near relative, but a lawyer not of any kin to deceased, appointed apparently of his own volition, and necessarily bound to use his best ability and legal training to properly discharge the duties of the trust he had voluntarily assumed."

Of course, an executor, administrator, or testamentary trustee will not be allowed for the expense of services of an attorney when the services are such as a layman executor, etc., could perform as well. Thus, an executor and trustee who is an attorney and an experienced business man cannot pay other lawyers for

business judgment, at the expense of the estate. In *Re Lester* (1916) 172 App. Div. 509, 158 N. Y. Supp. 763, supra, the court made an allowance for part of the payments made by an executor and trustee, who was a lawyer, to his firm, for legal services rendered both in court proceedings and otherwise, it having been agreed before such services were rendered that he was not to share in the moneys received therefor. In this case, the court said as to one item: "An examination of the evidence and findings above referred to, and the bills presented for legal services on account of the Hotel Brunswick property of approximately \$12,500, show that a considerable portion of such services was rendered in the discharge of duties which the respondent himself was fully competent to discharge, and which he was under legal obligation to perform. The respondent had been admitted to practise in the courts of the state of New York prior to 1880, and had been actively engaged in general law practice, and was a member of the real estate firm of Lester Brothers, and was undoubtedly well qualified to pass upon many of the matters requiring simply the exercise of good business judgment in connection with handling the Hotel Brunswick property."

There are some jurisdictions in which an executor, administrator, or testamentary trustee who is a lawyer may be allowed for his own legal services to the estate, and it has been held in such jurisdictions that he may employ his partner or other attorneys.

In *Bendall v. Bendall* (1854) 24 Ala. 295, 60 Am. Dec. 469, in allowing an administrator for payment for services to his law partner, the court said: "The mere fact that the administrator and B. T. Moore were law partners at the time, which is so prominently set out in the bill of exceptions, and in the argument of the attorney for the plaintiff in error, is wholly without weight in considering the propriety of this allowance. We have already decided, upon full consideration, that allowances of this character may well be made to the

administrator himself, if he be an attorney, and, as such, renders necessary legal services to the estate; the judge of the probate court deciding upon the propriety and reasonableness of the charges. *Harris v. Martin* (1846) 9 Ala. 895. It would seem to follow from this, that there would be no impropriety whatever in the employment of the law partner of the administrator to render legal services for the estate, and in paying him a just and reasonable compensation for such services when rendered."

"It is the opinion of a majority of the members of the court that where an administrator, being an attorney at law, finding it necessary to institute a suit in behalf of the estate, associates another attorney with him, and they—himself and such other attorney—jointly render professional services to the estate in the institution and prosecution of such suit, the administrator is entitled to a credit on the settlement of the administration in the probate court to the extent of the reasonable value of such services." *John v. Sharp* (1906) 41 So. 635, also briefly reported in 148 Ala. 665.

Where the executor was an attorney, the court said that the statute authorizes the probate judge to allow "for services extraordinary in their character and out of the common course of the duty of the administrator. While it would have been within the course of plaintiff's duty to have secured the services of an attorney, it was not within that duty for him to perform those services himself, and, in the discretion of the court, he may be allowed therefor." *Re Wilson* (1909) 83 Neb. 252, 119 N. W. 522.

In *Fulton v. Davidson* (1871) 3 Heisk. (Tenn.) 614, the court said: "Nor does the fact that John M. Bright was executor as well as solicitor for the estate interfere with his right to compensation as a solicitor or counselor. Every executor or administrator has a right to procure the necessary legal counsel in administering his trust, and to pay reasonable compensation therefor out of the assets of the estate. If the executor or administrator is himself an attorney at law,

he may either employ other counsel, or he may give to the business his own professional services. In the latter case, he is entitled to the same compensation which he would have paid to another attorney in the former case. There is no incompatibility in the two offices of executor and solicitor."

In *Re Mumma* (1855) 1 Pearson (Pa.) 394, the court said (*arguendo*): "In England and New York an attorney administrator is justifiable in engaging another attorney to attend to the interests of the estate; and if such attorney happens to be an executor or guardian, he may, in turn, employ his employer in relation to his trust. Why not permit each to attend to the business of his own estate, which he best understands, and not drive the two to an exchange of labor?"

Employment of one's law firm or partner.

The cases in the English books holding that if an executor, administrator, or testamentary trustee who is a solicitor, employs his law firm or law partner in matters of the trust, the employer will be allowed only his costs out of pocket, go upon the theory that the employer would share in the fees to his firm or partner. See *Collins v. Carey* (1839) 2 Beav. 128, 48 Eng. Reprint, 1128; *Christophers v. White* (1847) 10 Beav. 523, 50 Eng. Reprint, 683; *Lyon v. Baker* (1852) 5 DeG. & S. 622, 64 Eng. Reprint, 1271. See also cases beyond the scope of this annotation: *Clark v. Carlon* (1861) 7 Jur. N. S. (Eng.) 441, 39 L. J. Ch. N. S. 639, 4 L. T. N. S. 361, 9 Week. Rep. 568; *Re Doody* [1893] 1 Ch. (Eng.) 129, 62 L. J. Ch. N. S. 14, 2 Reports, 166, note, 67 L. T. N. S. 650, 41 Week. Rep. 49.

Upon the same theory it has been held in this country that an executor who is a lawyer will not be allowed for services rendered by his law firm. *Liles's Succession* (1872) 24 La. Ann. 490.

An executor and trustee may not, out of trust funds with which he is chargeable, pay for legal services rendered the estate by a law firm of which he is a member, sharing him-

self in the amount paid, where the statute provided that the court should allow an executor or administrator reasonable attorney's fees, where he employed an attorney in the management of the estate, but that such attorney's fees should not be included in the allowance to said executor or administrator for his personal services. *Taylor v. Wright* (1883) 93 Ind. 121.

A lawyer who is suing his law partner for an accounting cannot claim to share in fees paid by an estate, whereof he was one of the executors, to the defendant personally for professional services rendered it as an attorney. *Bushby v. Berkeley* (1912) 153 App. Div. 742, 138 N. Y. Supp. 831.

But he may employ his law firm if it is understood that he is not to share in the fees. *Re Lester* (1916) 172 App. Div. 509, 158 N. Y. Supp. 763. Probably it was on this theory that an allowance was made for payment to the administrator's law partner in *Re Van Buren* (1896) 19 Misc. 373, 44 N. Y. Supp. 357.

In jurisdictions where the executor, administrator, or testamentary trustee, who is a lawyer, is allowed for his own legal services to the estate, he may employ his law partner (*Bendall v. Bendall* (1854) 24 Ala. 295, 60 Am. Dec. 469, *supra*), or law firm (see next case).

In *Re Leckie* (1900) 36 Can. L. J. 136, the court allowed the solicitor's bill of the executor's firm as part of the remuneration, under the statute providing that "the judge of the surrogate court may allow the executor, trustee, or administrator, acting under a will or letters of administration, a fair and reasonable allowance for his care, pains, and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee, or ad-

ministrator, in passing his accounts"—the court considering that the statute had changed the old rule.

Miscellaneous.

While not directly within the scope of this annotation, reference should be made to the observations of Cranworth, L. C., in *Broughton v. Broughton* (1855) 5 DeG. M. & G. 160, 43 Eng. Reprint, 831, where he said: "The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no im-

proper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust; namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee."

It may be noted that in New York, since the Statute of 1914 (Code Civ. Proc. § 2753, Surrogate's Court Act 1920, § 285), the surrogate may, upon an accounting, allow an executor, administrator, guardian, or testamentary trustee who is an attorney and counselor at law of that state, and has rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable. See *Re Bell* (1916) 94 Misc. 552, 16 Mills, 337, 158 N. Y. Supp. 142; *Re Plimpton* (1921) 186 N. Y. Supp. 257. B. B. B.

L. DUNNE

v.

INDEPENDENT ORDER OF FORESTERS.

California Supreme Court (In Banc)—February 25, 1921.

(— Cal. —, 196 Pac. 41.)

Corporation — ultra vires — effect of decision of officers.

A corporation having charter authority to invest in mortgages which do not exceed 60 per cent of the value of the land mortgaged is bound by the valuation placed upon the property by its investment board, so that it cannot repudiate a contract for purchase of a mortgage as ultra vires from one acting in good faith, although the mortgage exceeded 60 per cent of the value of the land, if its board in good faith determined that the value was sufficient.

[See note on this question beginning on page 645.]

CROSS APPEALS from a judgment of the Superior Court for the City and County of San Francisco (Sturtevant, J.) in an action brought to recover the balance alleged to be due on a contract for the sale of a promissory note and mortgage; plaintiff appealing from so much of the judgment as denied her relief, and defendant appealing from so much as denied it relief upon its cross complaint, and from an order denying its motion for vacation of the judgment, and for entry of judgment in its favor on the cross complaint. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Gavin McNab, R. P. Hen-
shall, and Nat. Schmulowitz, for plain-
tiff:

A plea of ultra vires as to the purchase of the note and mortgage cannot be sustained for the reason that the charter of the corporation expressly authorized the investment of its funds in notes and mortgages, and if the value of the real property did not exceed the required percentage fixed in the charter, that was a matter of which the state alone could complain, and is not a good ultra vires plea as against a third person, who could not be aware of the internal economy of the defendant.

J. S. Potts Drug Co. v. Benedict, 156 Cal. 322, 25 L.R.A. (N.S.) 609, 104 Pac. 432; Lewin v. Hanford, 35 Cal. App. 36, 169 Pac. 242; Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926; Hughes Mfg. & Lumber Co. v. Elliott, 178 Cal. 181, 172 Pac. 584; Blochman Commercial & Sav. Bank v. F. G. Investment Co. 177 Cal. 762, 171 Pac. 943; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 59, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; Natomia Water & Min. Co. v. Clarkin, 14 Cal. 544; Union Water Co. v. Murphy's Flat Fluming Co. 22 Cal. 620, 3 Mor. Min. Rep. 487; Cowell v. Colorado Springs, 100 U. S. 55, 25 L. ed. 547; Union Trust Co. v. Hendrickson, — Okla. —, 172 Pac. 440; McCann v. Children's Home Soc. 176 Cal. 359, 168 Pac. 355; San Diego County Sav. Bank v. Barrett, 126 Cal. 413, 58 Pac. 914; Bates v. Coronado Beach Co. 109 Cal. 160, 41 Pac. 815; McKee v. Title Ins. & Trust Co. 159 Cal. 206, 113 Pac. 140; Goodland v. Bank of Darlington, 74 Mo. App. 373.

The contract, even if ultra vires in its most extreme sense, and especially if ultra vires in any of the modified senses used in the decisions, is enforceable here because it was fully

executed so far as the plaintiff was concerned, and was partly performed by the defendant; and such part performance estops the corporation from pleading ultra vires.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 59, 35 L. ed. 68, 11 Sup. Ct. Rep. 478; Goodland v. Bank of Darlington, 74 Mo. App. 373; Fletcher, Corp. § 1543; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; Re Mutual Guaranty F. Ins. Co. 70 Am. St. Rep. 156, and note, 107 Iowa, 143, 77 N. W. 868; Citizens' Bank v. Weakley, 11 L.R.A. (N.S.) 598, and note, 126 Ky. 169, 128 Am. St. Rep. 282, 103 S. W. 249; Bay City Bldg. & L. Asso. v. Broad, 136 Cal. 525, 69 Pac. 225; Pixley v. Western P. R. Co. 33 Cal. 183, 91 Am. Dec. 623; Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; Cemp v. Land, 122 Cal. 167, 54 Pac. 839; Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238; McQuaide v. Enterprise Brewing Co. 14 Cal. App. 315, 111 Pac. 927; 10 Cyc. 1163; Sargent v. Palace Cafe Co. 175 Cal. 737, 167 Pac. 146.

Messrs. Corbett & Selby, for defendant:

Ultra vires contracts are void while executory.

San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Coleman v. San Rafael Turnp. Road Co. 49 Cal. 521; 29 Am. & Eng. Enc. Law, 49; Clark & M. Corp. § 211 (E); Coppin v. Greenlees & R. Co. 38 Ohio St. 275, 43 Am. Rep. 425; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Thomp. Corp. 2d ed. § 2786; Morawetz, Priv. Corp. §§ 685, 689; Machen, Corp. § 1055.

Full performance by the other party will not estop a corporation as defendant from pleading the defense of ultra vires unless the performance by the other party has benefited the corporation, as where goods have been received by the corporation itself.

First Nat. Bank v. Alexander, 152

(— Cal. —, 196 Pac. 41.)

Ala. 585, 44 So. 866; Nebraska Shirt Co. v. Horton, 3 Neb. (Unof.) 888, 93 N. W. 225; Stone-Ordean-Wells Co. v. New England Pie Co. 201 Mich. 407, 167 N. W. 943; Sturdevant Bros. v. Farmers' & M. Bank, 62 Neb. 472, 87 N. W. 156; Marcy v. Guanajuato Development Co. 228 Fed. 150; 29 Am. & Eng. Enc. Law, 59; Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; Visalia Gas & E. L. Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

A mere part performance by the plaintiff will not render the contract enforceable as against the plea of ultra vires.

Day v. Spiral Springs Buggy Co. 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; Bowman Dairy Co. v. Mooney, 41 Mo. App. 665; Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co. 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879; McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; Keokuk v. Ft. Wayne Electric Co. 90 Iowa, 67, 57 N. W. 689; Fletcher, Cyc. Corp. § 1585; Clark & M. Corp. § 211 (E); Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409.

Part performance by defendant does not estop it from pleading ultra vires.

28 Am. L. Rev. 376; 9 Harvard L. Rev. 255; Morawetz, Priv. Corp. § 689; 10 Cyc. 1162; Parish v. Wheeler, 22 N. Y. 494; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Mitchell v. Hydraulic Bldg. Stone Co. 61 Tex. Civ. App. 131, 129 S. W. 148; Day v. Spiral Springs Buggy Co. 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781.

Shaw, J., delivered the opinion of the court:

In this case three appeals are presented. By reason of the fact that the transcripts were filed at different times they received two numbers. Number 9005 is an appeal by the plaintiff from the part of the judgment denying her the relief asked in her complaint. Number 9155 presents appeals by the defendant from the part of the judgment which denied it relief upon its cross

complaint, and from an order denying its motion that the judgment entered be vacated, and for the entry judgment in its favor on the cross complaint. It is stipulated that the record filed in appeal No. 9005 may be used on all the appeals.

The complaint alleges that on April 6, 1916, the plaintiff and defendant executed an agreement whereby plaintiff agreed to sell and defendant agreed to buy a certain note and mortgage executed by Newark Realty & Development Company to said plaintiff, and dated February 15, 1916, covering 2,186 acres of land in Alameda county, and the defendant agreed that on February 15, 1917, it would pay for said note and mortgage the sum of \$225,000 and all interest accrued thereon from February 15, 1916, to February 15, 1917; the note and mortgage to be transferred to the defendant upon payment by it to the plaintiff of said sum of money and interest. The agreement is awkwardly expressed, but we have stated its legal effect. It is alleged that on March 1, 1917, defendant paid \$20,000 on the agreement, and that on October 3, 1917, plaintiff tendered the note and mortgage to the defendant, together with an assignment conveying to it all plaintiff's title thereto, and demanded payment of the balance of the principal and interest under said agreement, which the defendant then refused to pay. The prayer was for judgment for \$205,000 with interest.

The defendant answered, setting up several defenses. Its first defense was that it had not executed the agreement sued on. The second defense alleged that the defendant had paid \$42,500 on the agreement set forth in the complaint, and that it was induced to execute the same by reason of certain false and fraudulent representations made by plaintiff to defendant. The third defense was that the defendant is a Canadian corporation, and that, under its articles and the laws of Canada governing it, it was without author-

ity to purchase the said mortgage described in said agreement, and that any agreement executed by it purporting to agree to purchase the same was void for that reason. It also filed a cross complaint wherein it alleged the same facts as are set forth in the answer, and in reliance thereon asked for a recovery of the \$42,500 alleged to have been paid upon said agreement, and for the cancelation thereof.

The court found that all the allegations relating to fraud were untrue. With regard to the execution of the agreement of April 6, 1916, it found that Stevenson, who was the president and attorney in fact of the defendant, on the one part, and the plaintiff, on the other part, "went through the form of making, delivering, and executing, as and for the contract of the" defendant, the said agreement. As to the power of the defendant to make the agreement, it found that it never at any time was authorized or empowered by law to enter into such contract; that it was not authorized by law to invest any of its funds in the purchase of mortgages where the amount paid therefor exceeded 60 per cent of the value of the land covered by such mortgage; and that on April 6, 1916, the value of the land covered by the mortgage to be purchased under said agreement did not exceed \$231,803.55. It also found that the defendant had, by mistake, paid \$42,500 upon the agreement; that the agreement was void; that the defendant was not guilty of laches, and had done nothing whereby it was estopped to contend that the agreement was beyond its powers.

The judgment was that the plaintiff take nothing by her action, that the defendant take nothing by its cross complaint, and that defendant recover of plaintiff its costs.

To authorize the defendant to invest \$225,000 on a real-estate mortgage, the real estate should have been worth \$375,000. If the theory of the court below, that it could inquire into and revise the decision

of the corporate authorities of the defendant as to the value of that land, is correct, its conclusion that the defendant was not empowered to purchase said mortgage at that price is sustained by the facts; otherwise not, as we shall presently see.

Upon the trial it appeared that the denial of the alleged execution of the agreement of April 6, 1916, was based entirely on the theory that the execution of such a contract was not within the corporate powers of the defendant. The formal execution of the agreement was fully proven and found. The defense of the nonexecution of the contract, therefore, need not be considered, except as it may be connected with the defense that it was ultra vires.

The defendant is a corporation organized in Canada, under the laws of Canada. Those laws confer upon it power (a) "of loaning and of investment prescribed by the Insurance Act of 1910;" (b) to "constitute an investment board . . . to have charge of the loaning and investment of the funds of the society, . . . and to exercise such powers and under such regulations, . . . applicable thereto, as the society, or the executive council thereof, may from time to time determine;" (c) under the "Insurance Act of 1910," to "invest its funds, or any portion thereof, in the purchase of . . . mortgages . . . on real estate in Canada, or elsewhere where the company is carrying on its business, provided that the amount paid for any such mortgage . . . shall in no case exceed 60 per cent of the value of the real estate covered thereby;" and (d), under said act, to "loan its funds or any portion thereof on the security" of such mortgages, "provided, however, that no such loan shall exceed 60 per cent of the value of the real estate or interest therein which forms the security for such loan."

The defendant corporation was, at all times here involved, doing business in California. Consequent-

ly, its power to invest its money on the security of mortgages on real estate extended to this state, and included authority to buy mortgages on California real estate in order to invest its money on such security. The only limitation upon this power is found in the proviso "that the amount paid for any such mortgage shall in no case exceed 60 per cent of the value of the real estate covered thereby."

It appears from the uncontradicted evidence that Elliott G. Stevenson was the president, chief executive officer, and general manager of the defendant at the time the transactions involved in the action occurred; also, that prior to the making of the agreement sued on the "investment board" of the defendant, by resolution duly adopted, had authorized Stevenson, as its "president and general manager," "to undertake to purchase for" the defendant the mortgage described in the agreement sued on, "for such sum and upon such terms as to payment as he may deem expedient," and to execute as such president, in the name and on behalf of the defendant, a contract by which the defendant should "undertake to purchase said mortgage and to pay for the same the face value, plus accrued interest from the date of transfer, upon such terms as to time of payment as aforesaid as he shall deem expedient."

The decision of the court below that the defendant did not have power to make the contract for the purchase of the mortgage is based entirely on the theory that defendant's power depended on the conclusion of the court as to the value of the land covered by the mortgage at the time the agreement was made, and that the belief and decision of the investment board of the defendant that the land then had the necessary value to empower the defendant to invest the proposed sum in the mortgage was immaterial. There is no finding that Stevenson did not believe that the sum to be paid for the mortgage exceeded 60

per cent of the value of the land, nor any finding of any kind on the subject of the belief, opinion, or knowledge of Stevenson, or of the investment board, as to the value of the land. No question with respect to the effect of fraud of any sort, or of any breach of trust, is involved in the case.

We are of the opinion that the court below was in error. The purposes of the defendant are those of a life insurance company or mutual benefit association. It has a large fund which it invests both in Canada and other countries for the purpose of obtaining money to pay to the beneficiaries of its policies or certificates. It is authorized to invest these funds in real-estate mortgages to the extent of 60 per cent of the value of the real estate mortgaged. Its "investment board" invests these funds, and it is charged with the duty, before making an investment thereof upon a real-estate mortgage, of ascertaining and determining that the sum invested does not exceed 60 per cent of the value of the property, and, consequently, of determining to its own satisfaction the value of that property. It is not required to obtain the sanction of any court or tribunal before making the investment. Therefore, when it has, in good faith, determined that the value is sufficient, it has the power to

invest the money upon that security. In the absence of any allegation and proof to the contrary, the law presumes that legal duty has been performed. The board authorized Stevenson to enter into an agreement on its behalf to buy this mortgage at its face value. He did so, and the evidence shows that it received the agreement and paid part of the price stipulated therein. These facts raise the presumption that the board satisfied itself by due inquiry that the sum to be paid did not exceed 60 per cent of the value of the mortgaged land, and that the members of the board then believed

Corporation—
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effect of decision
of officers.

that the land was worth at least \$375,000. We think that with respect to third persons dealing with the corporation, in the absence of fraud, the decision of the board on the question of that value is conclusive as to the power to make the contract. We need not go so far as to say that it is conclusive in any action against the unfaithful officers of the defendant, or against third persons chargeable with participation in a fraudulent valuation, or with notice that the officer or officers acting for the company did not believe that the value of the mortgaged property was sufficient to authorize the taking of the mortgage in accordance with the defendant's articles.

Any other rule would make it practically impossible for the corporation to carry on its business successfully in such matters. The validity of its contracts relating thereto would remain undecided until some attempt was made to enforce them in the courts, and until the court had finally determined that the value was sufficient to give the corporation power to enter into the particular contract. In effect, the investment of the funds would be committed to the courts instead of the board. It is apparent that with this condition it would not be able to obtain such contracts. The value of property rests on opinion. There is no subject of inquiry in the courts upon which opinions are more widely variant or more positive. If such contracts could be set aside whenever a court should find that the investment board had, even to a slight extent, overestimated the value of the property, no one could safely deal with the defendant in such matters, however cautious the board might be in coming to a decision.

The language of Chief Justice Field in *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 552, is pertinent here. Speaking of a corporation with power to buy and hold "such real and personal estate, as the purposes of the corporation shall re-

quire," and referring to a proposal to have the court determine whether certain property was so "required," he said: "Whether or not the premises in controversy are necessary for those purposes, it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defendants. It would lead to infinite inconveniences and embarrassments if, in suits by corporations, to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity."

In *Bates v. Coronado Beach Co.* 109 Cal. 163, 41 Pac. 856, where a corporation having similar powers sought to avoid its contract as ultra vires, the court said: "Whether a contract is 'essential' to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by . . . those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted . . . to question its effect."

And in *San Diego County Sav. Bank v. Barrett*, 126 Cal. 417, 58 Pac. 915, the court said: "Whether the purchase of the mortgage in question was 'such as the purposes of the corporation required' was to be determined by its board of directors (Civ. Code, § 305), and is not open to investigation at the instance of the defendant."

The provisions considered in these cases were limitations upon the power of the corporation, and the principle enunciated is applicable to any limitation of a similar nature where the action of the corporation is to be taken according to the discretion or judgment of the officers in charge of its affairs, as is the case here. Such limitations are for

(— Cal. —, 196 Pac. 41.)

the benefit and protection of the corporation and its beneficiaries or creditors, or the state. The corporation, or its beneficiaries or creditors suing in its name or on its behalf in equity, on the ground that its officers had acted fraudulently or in bad faith, or that it had been defrauded by third parties, might perhaps impeach the finding as to value. But where there is no fraud or bad faith charged, the contract in such cases cannot be shown to be ultra vires by proof that the property was not of sufficient value to justify the investment made.

It follows from what has been said that the judgment in favor of the defendant is not supported ei-

ther by the pleadings or the findings, and that it cannot stand. This renders it unnecessary to consider the appeals of the defendant further than to state that the allegations of the answer and cross complaint, so far as they were found to be true, do not, upon the principles we have stated, constitute grounds for any relief to the defendant against the plaintiff. The entire judgment should be set at large for a new trial.

The judgment is reversed.

We concur: Angellotti, Ch. J.; Olney, J.; Lennon, J.; Sloane, J.; Wilbur, J.; Lawlor, J.

Petition for rehearing denied March 24, 1921.

ANNOTATION.

Conclusiveness of decision of corporate officers or directors that property is of sufficient value to warrant a loan under the powers of the corporation.

An extensive search has disclosed no case other than the reported case (DUNNE v. INDEPENDENT ORDER OF FORESTERS, ante, 639) in which the conclusiveness of the decision of the corporate officers or directors that property on which the corporation is about to make a loan is of sufficient value to warrant the loan under the corporate powers has been considered. The cases of *Bates v. Coronado Beach Co.* (1895) 109 Cal. 163, 41 Pac. 856, and *San Diego County Sav. Bank v. Barrett* (1899) 126 Cal. 417, 58 Pac. 915, referred to and sufficiently set out in the reported case, are of interest in this connection in so far as they deal with the conclusiveness of a determination by corporate officers or di-

rectors of facts which are conditions precedent to the validity of a contract by the corporation.

The question passed upon in the reported case is very similar to the question passed upon in a large number of cases involving the acts of corporations in excess of corporate powers, where the court has denied the right to question the corporate powers on the theory that only the state can thus question acts of corporations in excess of authority. The reported case, in dealing with the facts before the court, as will be observed, treats this question as one of conclusiveness of corporate determination.

W. A. E.

A. H. JONES et al.

v.

JOHN C. DAY et al.

Mississippi Supreme Court (Division B)—November 23, 1921.

(— Miss. —, 89 So. 906.)

Schools — adoption of uniforms — validity.

Where the trustees of an agricultural high school adopted a rule that

Headnote by SYKES, P. J.

the pupils of the school should wear a uniform of khaki when in attendance upon the school and when visiting public places within 5 miles of the school, even on Saturdays and Sundays, this rule is not *ultra vires*, unreasonable, and void, and applies to all students boarding in the dormitory of the school and until their return to the custody of their parents. It applies to those students who live with their parents when they are in the custody of the school authorities; that is to say, after they leave the home of their parents to attend school and until they return to the home after the school is over. It does not apply to those children on holidays, when they are within the care, custody, and control of their parents.

[See note on this question beginning on page 649.]

CROSS APPEALS from a decree of the Chancery Court for Wilkinson County (Cutrer, Ch.) dismissing a bill filed to enjoin the enforcement and to have declared void certain rules adopted by defendants, requiring pupils to wear uniforms; complainants appealing from the decree dismissing the bill, and defendants appealing from the amount allowed for attorney's fee. *Affirmed*.

The facts are stated in the opinion of the court.

Mr. A. H. Jones, in propria persona:
The entire rule or regulation is utterly void, *ultra vires* the power of the board of trustees, and is in conflict with the Constitutions of the state and of the United States.

Young v. Com. 101 Va. 853, 45 S. E. 327; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Wilby v. State, 93 Miss. 767, 23 L.R.A. (N.S.) 677, 47 So. 465.

The regulation is unreasonable, and is an invasion of parental rights.

Hobbs v. Germany, 94 Miss. 469, 22 L.R.A. (N.S.) 983, 49 So. 515; Dritv v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; J. T. Thompson & Co. v. Lamar County Agri. High School, 117 Miss. 621, 78 So. 547.

The decree is erroneous in that it allows an attorney's fee to the defendants.

Curphy v. Terrell, 89 Miss. 632, 42 So. 235; Jamison v. Dulaney, 74 Miss. 890, 21 So. 972; Mims v. Swindle, 124 Miss. 686, 87 So. 151; 16 Am. & Eng. Enc. Law, 469.

Mr. David Clay Bramlette, Jr., for defendants:

Defendants had the right to prescribe and enforce regulations for the wearing of uniforms by students.

Waugh v. University of Mississippi, 237 U. S. 589, 59 L. ed. 1131, 35 Sup. Ct. Rep. 720; 11 C. J. 998; Connell v. Gray, 42 L.R.A. (N.S.) 336, and note,

33 Okla. 591, 127 Pac. 417, Ann. Cas. 1914B, 399; Kinzer v. Independent School Dist. (Kinzer v. Toms) 129 Iowa, 441, 3 L.R.A. (N.S.) 496, 105 N. W. 686, 6 Ann. Cas. 996; 24 R. C. L. 575, ¶ 24; 27 R. C. L. 140, ¶ 9; Mechem, Pub. Off. § 730; Turner v. Hattiesburg, 98 Miss. 337, 53 So. 681.

Defendants are entitled to recover attorneys' fees necessarily incurred in defending the case.

Jamison v. Dulaney, 74 Miss. 890, 21 So. 972; Thomas v. McDanel, 77 Iowa, 302, 42 N. W. 301; 2 High, Inj. § 1686; 1 Beach, Inj. § 203, note 4; Bolling v. Tate, 65 Ala. 428, 39 Am. Rep. 5; New Orleans, M. & C. R. Co. v. Martin, 105 Miss. 230, 62 So. 228; Leflore County v. Allen, 80 Miss. 298, 31 So. 815; Thornton-Claney Lumber Co. v. J. M. O'Quin & Sons, 115 Miss. 857, 76 So. 732; Rubon v. Stephan, 25 Miss. 253.

Sykes, P. J., delivered the opinion of the court:

The appellant A. H. Jones, on behalf of himself, and as father and next friend of Ben Shaifer Jones, minor, in this proceeding against the county superintendent and the trustees of the Wilkinson County Agricultural High School, seeks to perpetually enjoin the enforcement and to have declared null and void certain rules and regulations adopted by the board of trustees of this high school, which are as follows:

A rule passed on September 10, 1918, as follows: "It was carried that a uniform of khaki, as per sample selected, be adopted for high school boys, and that all of same be required to wear them, which shall consist of one coat, two pairs of pants, one pair of leggings, two shirts, one cap, two black ties, as a minimum, and two coats, three pairs pants, two pairs leggings, three shirts, one cap and three ties as a maximum."

And also the following rule, adopted on the 25th day of October, 1920, as follows: "It was ordered that the principal be instructed to enforce the uniform regulations on all students when visiting public places within 5 miles of the school, even on Saturdays and Sundays."

The bill alleges that under these rules all students and pupils of the high school are required to wear at all times and at all places—at home, at school, and elsewhere—this uniform; that these rules are illegal, unauthorized, and ultra vires, because by them it is attempted to govern and manage the said students and pupils at times and places when the authority of the board of trustees is at an end, and when the students have left the school, and are under the control and supervision of their parents. The answer denies the material allegations of the bill, and alleges that, because of existing conditions, in the judgment of the board of trustees it was necessary, for the welfare of the school and in order to maintain proper discipline, to pass these rules. A temporary injunction was issued, which was dissolved on final hearing, when decree was entered dismissing the bill, and assessing as damage an attorney's fee for \$25. The complainant, appellant here, prosecutes an appeal from this decree, and the defendants in the court below, appellees here, prosecute a cross appeal, presenting solely the question of the inadequacy of the fee allowed in the court below.

In his decree the chancellor held

that the orders passed by the board of trustees, requiring the students to wear the uniform not only while in attendance in the school, but when they appear in public places and on the streets, is not such an unreasonable regulation that the court should interfere when the testimony shows that it aids in the discipline of the school. But further held that, if it is the purpose to invade the home, and undertake to say what the children should wear at home, that would be unreasonable.

The authority principally relied upon by the appellant is *Hobbs v. Germany*, 94 Miss. 469, 22 L.R.A. (N.S.) 983, 49 So. 515. The rule adopted by the teachers of the public school in that case was one requiring the pupils to remain in their homes and study from 7 to 9 in the evening. In the very exhaustive opinion in that case the court quotes with approval from the opinion of *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343, as follows: "The directors of a school district are invested with the power and authority to make and execute all needful rules and regulations for the government, management, and control of such school as they may think proper, not inconsistent with the laws of the land. Under the power thus conferred, the directors are not authorized to prescribe a rule which undertakes to regulate the conduct of the children within the district, who have a right to attend the school, after they are dismissed from it and remitted to the custody and care of the parent or guardian. They have the unquestioned right to make needful rules for the control of the pupils while at school, and under the charge of the person or persons who teach it, and it would be the duty of the teacher to enforce such rules, when made. While in the teacher's charge, the parent would have no right to invade the school room and interfere with him in its management. On the other hand, when the pupil is released and sent back to his home, neither the

teacher nor directors have the authority to follow him thither, and govern his conduct while under the parental eye. It certainly could not have been the design of the legislature to take from the parent the control of his child while not at school, and invest it in a board of directors or teacher of a school. If they can prescribe a rule which denies to the parent the right to allow his child to attend a social gathering, except upon pain of expulsion from a school which the law gives him the right to attend, may they not prescribe a rule which would forbid the parent from allowing the child to attend a particular church, or any church at all, and thus step in loco parentis and supersede entirely parental authority? For offenses committed by the scholar while at school he is amenable to the laws of the school; when not at school, but under the charge of the parent or guardian, he is answerable alone to him."

Chapter 186, Laws of 1914 (Hemingway's Code, § 3421), which deals with the appointment and the powers of the trustees, among other things, provides that they "shall have full power to do all things necessary to the successful operation of said school."

It will be noted from an examination of these laws relating to agricultural high schools that the power is given them to have dormitories where students may board during the school term. The students of these agricultural high schools who board in the dormitories are under the care and custody of the school authorities during the entire scholastic session, and until they have returned to the care and custody of their parents. For the proper maintenance, the board of trustees of this school had a right to pass these orders, which would apply to all students boarding in the dormitory during the time that they remained as students of the school. These rules will continue to apply to them until they cease to be under the care and

control of the school management, and return to the parental charge.

With reference to the students who are merely day pupils of this school, and who each afternoon return to the parental charge, the order would not apply to them while under the control of their parents. That is to say, after they return home from school in the afternoon they would be under the control of their parents until they again start for school. This order would not control what apparel these children should wear after school hours, and while under parental control.

Children are under parental control until their parents start them to the school during the day. They are under the parental control during the school holidays, which, I assume from this record, are Saturdays and Sundays. Consequently the orders here in question would apply to those students boarding in the dormitory, if there be one, during the scholastic term, but would not apply to those students living with their parents except while going to, at the school, and returning to the parental roof. We understand the decree of the chancellor to be to this effect.

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uniforms—
validity.

A temporary injunction was issued, which was not dissolved until the final hearing of the cause on its merits. The end and aim, however, of this litigation, was injunctive relief sought, viz., to perpetually enjoin the enforcement of these rules and to declare them null and void. It was therefore proper to allow the appellees a reasonable attorney's fee. *Mims v. Swindle*, 124 Miss. 686, 87 So. 151; *Curphy v. Terrell*, 89 Miss. 624, 42 So. 235.

In fixing the amount of a reasonable attorney's fee for the dissolution of the injunction, necessarily the Chancellor is vested with discretionary powers. In this case we cannot say that the fee fixed by the Chancellor is an inadequate one. The decree is affirmed, both on direct and cross appeal.

ANNOTATION.

Validity of regulation by school authorities as to clothes of pupils.

There have been but few cases which have considered the reasonableness or validity of regulations as to the dress of students.

The reported case (*JONES v. DAY*, ante, 645) is in accord with the general rule that school authorities may make reasonable rules and regulations governing the conduct of pupils while under their control. It is to be observed that the extent of the decision in *JONES v. DAY* is that the rule requiring the students to wear certain uniforms was reasonable and valid so long as it applied to the time when the students were under the control of the school authorities, and that, if it were intended to apply when the student had come again under the control of his parents, it would, to that extent, be unreasonable and void.

A case upholding the right of school authorities to prescribe the kind of dress to be worn by students is *Connell v. Gray* (1912) 33 Okla. 591, 42 L.R.A.(N.S.) 336, 127 Pac. 417, Ann. Cas. 1914B, 399, which held that the board of regents of a state college has power to prescribe the kind of uniform or gymnasium suit, and to require the same to be worn by the students, and may require the students, at the time of entrance, to provide themselves with such uniform or suit, or make a reasonable deposit to cover the cost of the same.

But an order of a school board, depriving a pupil of his diploma for refusal to wear cap and gown at graduation, is unreasonable and ultra vires. *Valentine v. Independent School Dist.* (1919) 187 Iowa, 555, 6 A.L.R. 1525, 174 N. W. 334, same case,

later appeal, in (1921) — Iowa, —, 183 N. W. 434. The court, in the opinion on the later appeal, said: "Conceding appellant's contention that there was a rule formerly adopted and effective at the time in question, we hold that such rule is unreasonable and a nullity as a condition precedent to receiving the honors of graduation and a diploma. The wearing of a cap and gown on commencement night has no relation to educational values, the discipline of the school, scholastic grades, or intellectual advancement. Such a rule may be justified in some instances from the viewpoint of economy, but from a legal viewpoint the board might as well attempt to direct the wearing of overalls by the boys and calico dresses by the girls. The enforcement of such a rule is purely arbitrary, and especially so when the offending pupil has been passed for graduation after the performance on her part of all prescribed educational requirements. . . .

This plaintiff, having accepted the benefits of education tendered by the public school system established in the independent school district of Casey, and having complied with all the rules and regulations precedent to graduation, may not be denied her diploma by the arbitrary action of the school board subsequent to her being made the recipient of the honors of graduation."

The court in the opinion last cited, however, said that school authorities may deny the right of a graduate to participate in public ceremonies of graduation unless cap and gown are worn.

J. H. B.

LEO G. GOSTINA and Wife, Respts.,

v.

A. L. RYLAND and Wife, Appts.

Washington Supreme Court (Dept. No. 1) — July 1, 1921.

(— Wash. —, 199 Pac. 298.)

Adjoining owners — right to clip branches of trees.

1. A property owner may without notice, if he has not encouraged the maintenance of the nuisance, and after notice if he has, clip the branches of trees standing on adjoining property, which overhang his premises.

[See note on this question beginning on page 655.]

Estoppel — to abate nuisance.

2. Acquiescence for a few months by a landowner in a nuisance consisting of branches overhanging his boundary line does not estop him from maintaining an action to abate it.

Nuisance — overhanging branches.

3. Branches of a tree overhanging a boundary line may be abated as a nuisance, under a statute providing for abatement of whatever is an obstruction to the free use of property,

where the falling leaves litter the lawn, stop gutters on the house, and blow into the house to the annoyance of the occupants.

[See 1 R. C. L. 401; 20 R. C. L. 433, 434; 1 R. C. L. Supp. 130.]

— abatement — laches.

4. Mere delay for a few months does not deprive one of equitable relief for abatement of branches of trees overhanging his boundary line.

(Mackintosh and Bridges, JJ., dissent.)

APPEAL by defendants from a judgment of the Superior Court for King County (Gilliam, J.) in favor of plaintiffs in an action brought for the abatement of an alleged nuisance. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Walter B. Allen, for appellants:

In order to be a nuisance a thing must work a hurt, inconvenience, or damage.

Everett v. Paschall, 61 Wash. 47, 31 L.R.A.(N.S.) 827, 111 Pac. 879, Ann. Cas. 1912B, 1128; Thornton v. Dow, 60 Wash. 633, 32 L.R.A.(N.S.) 968, 111 Pac. 899; Veazie v. Dwinel, 50 Me. 479; Grandona v. Lovdal, 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366; Countryman v. Lighthill, 24 Hun, 405.

One who has slept upon his rights for a considerable time, by acquiescing in an alleged nuisance, will be denied equitable relief, and left to his remedy at law.

20 Cyc. 1231; Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192; Bassett v. Salisbury Mfg. Co. 47 N. H. 426; Washington Lodge v. Frelinghuysen, 138 Mich. 350, 101 N. W. 569; Madison v. Ducktown Sulphur, Copper & I. Co. 113 Tenn. 331, 83 S. W. 658; Crolin v. Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605.

Mr. Warren Hardy, for respondents:

Where actual damage is shown, overhanging branches are nuisances to the extent to which they overlap the land of the injured party.

Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Grandona v. Lovdal, 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366; 1 C. J. 1232, § 92; Henry v. Shepherd, 52 Miss. 125; Cooley, Torts, 1st ed. p. 567.

Plaintiffs' right of action is for the abatement of a nuisance.

Doran v. Seattle, 24 Wash. 182, 54 L.R.A. 532, 85 Am. St. Rep. 948, 64 Pac. 230; Thornton v. Dow, 60 Wash. 622, 32 L.R.A.(N.S.) 968, 111 Pac. 899.

Overhanging branches are nuisances per se.

Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 183; Ackerman v. Ellis, 81 N. J. L. 1, 79 Atl. 883.

Holcomb, J., delivered the opinion of the court:

These adversaries own and reside upon adjoining lots in the city of Seattle. Appellants have owned

and resided upon their lot for many years. Respondents bought their lot in August, 1918. There is growing upon appellant's lot a Lombardy poplar tree, situated about 2 feet from the division line fence separating the properties; also, a fir tree in the rear of appellant's premises, situated within 2 feet of the division fence. It is alleged that some branches of the trees overhang the premises of respondents. Appellants also maintain a creeping vine, growing in a rustic box on top of a large stump, a few feet from the division fence, which is trained downward from the stump, and it is alleged that parts of the creeping plant go through and under the division fence, and onto the lawn on respondent's premises. There are also some raspberry bushes and a rosebush at the rear of appellants' premises, growing near the line, which the respondents allege are permitted to hang over the division fence.

On July 28, 1919, respondents caused their attorney to give notice in writing to the appellants that the branches of the fir tree (then mentioned as a pine tree) standing upon appellants' premises extended over the lot of respondents, and that the needles therefrom fell upon the lawn of respondents, injuring the same, and that the ivy planted in the yard of appellants ran under the fence and onto the lawn of respondents. Demand was made that appellants, within ten days, cut off the branches of the fir tree at the point where they crossed the boundary line, and remove the ivy from respondents' property, and keep the tree and ivy from further encroaching upon their property.

This demand not having been complied with, about fifteen days thereafter respondents began their action under the statute (Rem. Code, §§ 943, 944, and 945) for the abatement of a nuisance, and for such other and further relief as might seem equitable and just. Issue was joined as to the overhanging branches and encroaching ivy

constituting a nuisance. Findings of fact and conclusions of law, and judgment ordering abatement of the nuisances by appellants within sixty days, and, in case of failure by them, ordering the sheriff to do so, were entered in favor of respondents by the trial court, and this appeal resulted.

Appellants desired to defend on the theory that the action by respondents was merely for spite and vexation, and first complain because the court excluded evidence offered by them to the effect that, when respondents purchased their property adjoining that of appellants, they knew of the existence and condition of the trees and shrubs, and expressed their admiration therefor, and had no objection to their maintenance, as they were, upon the property of appellants, until after they had had some sort of personal disagreement, which caused their action in regard to the trees and shrubs. The court rejected all such evidence and offered proof, on the ground that it was immaterial, because, where branches of trees overlap adjoining property, the owner of the adjoining property has an absolute legal right to have the overhanging branches removed by a suit of this character.

Section 943, Rem. Code, provides: " . . . Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance, and the subject of an action for damages and other and further relief."

Section 944, *supra*, provides: "Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. . . ."

It cannot be said that acquiescence in the existence of the alleged nuisance for the period of a few months is such as to constitute estoppel or equitable

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abate nuisance.**

laches. Whatever may have been respondents' sentiments regarding the situation and character of the trees and shrubs at one time, when they entered upon the enjoyment of their own possessions, after occupancy for a few months they gave notice on July 28, 1919, that their permissive acquiescence in the existence of the alleged nuisances—at least, as to the fir tree and the ivy—had ceased, and that they required the encroachment to be stopped.

In *Lonsdale v. Nelson*, 2 Barn. & C. 311, 107 Eng. Reprint, 396, it is held by the English court: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but . . . nuisances from omission [may not be thus abated], except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting [of] these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence. . . . The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisance, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice."

"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are technical nuisances, and the person over whose land they extend may cut them off, or have his action for damages, if any have been sustained therefrom, and an abatement of the nuisance against the owner or occupant of the land on which

they grow; but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil." Wood, Nuisances, 3d ed. § 108.

"It may be understood that any erection upon one man's land that projects over the land of another, as well as any tree whose branches thus project, doing actual damage, or anything that interferes with the rights of an adjoining owner, is an actionable nuisance." Wood, Nuisances, § 106.

From ancient times it has been a principle of law that the landowner has the exclusive right to the space above the surface of his property. To whomsoever the soil belongs, he also owns the sky and to the depths. The owner of a piece of land owns everything above it and below it to an indefinite extent. 1 Co. Litt. 4.

"On the same principle it is held that the branches of trees extending over adjoining land constitute a nuisance; at least, in the sense that the owner of the land encroached on may himself cut off the offending growth." 20 R. C. L. 433-435, § 49, and cases cited.

"But whether a suit for an injunction and damages may be maintained without proof of actual damage is a point upon which the authorities are not very clear or satisfactory. According to some of the decisions, sensible, appreciable damage must be shown in order to give overhanging branches the character of nuisance; in other words, the fact that the branches extend over another's land does not constitute them a nuisance per se." 20 R. C. L. pp. 433-435, § 49.

Thus, in *Countryman v. Lighthill*, 24 Hun, 405 (not an ancient case, as respondents state, but decided in 1881), it was held that: "The overhanging branches of a tree, not poisonous or noxious in its nature, are not a nuisance per se, in such a sense as to sustain an action for damages. Some real, sensible damage must be shown to result therefrom"—and the complaint which does not de-

scribe the damages caused will not state a cause of action.

That is our view. It is generally the rule that "one adjoining owner cannot maintain an action against another for the intrusion of roots or branches of a tree which is not poisonous or noxious in its nature. His remedy in such case is to clip or lop off the branches, or cut the roots at the line." 1 C. J. 1233, § 94; Countryman v. Lighthill, *supra*; Crowhurst v. Burial Bd. L. R. 4 Exch. Div. 5, 48 L. J. Exch. N. S. 109, 39 L. T. N. S. 355, 27 Week. Rep 95; Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537; Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728; Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645; Harndon v. Stultz, 124 Iowa, 440, 100 N. W. 329; Tanner v. Wallbrunn, 77 Mo. App. 262.

It is, therefore, well settled that the powerful aid of a court of equity, by injunction, "can be successfully invoked only in a strong and mischievous case of pressing necessity," and "there must be satisfactory proof of real, substantial damage." Tanner v. Wallbrunn, *supra*. Hence, were it not for our Statute of Nuisances, the respondents herein would not be accorded any judicial relief. But our statutes accord a remedy to one "whose personal enjoyment is lessened," or for a very slight nuisance: "Whatever is an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property."

But in this case the respondent did describe some annoyance and damage—insignificant, it is true; so insignificant that respondents did not even claim them, or prove any amount in damages,—but simply proved that the leaves falling from the overhanging branches of the poplar tree caused them some additional work in caring for their lawn; and that the needles from the overhanging branches of the fir tree caused them some additional work in keeping their premises neat and

clean, and fell upon their roof, and caused some stoppage of gutters; and that sometimes, when the wind blew in the right direction, the needles blew into the house and annoyed the occupants. We cannot avoid holding, therefore, that these are actual, sensible damages, and not merely nominal, and, although insignificant, "the insignificance of the injury goes to the extent of recovery, and not to the right of action." Henry v. Shepherd, 52 Miss. 125.

The respondents in this case certainly had one remedy in their own hands, and under all the authorities could—without notice, if they had not encouraged the maintenance thereof; after notice, if they had (which they gave)—have clipped the branches that overhung their premises at the line.

Adjoining owners—right to clip branches of trees.

And although the right to trim encroaching branches must be conceded, it may be said that the watching to see when trimming of noxious branches would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner. But, if the trees are innocuous, it might well be held that the occupier of the land projected over would have no right of action from grounds of general convenience, but should be left to protect himself by clipping. Crowhurst v. Burial Bd. L. R. 4 Exch. Div. 5.

Since they had the statutory right to bring an action for abatement, and have shown some actual and sensible damages, although insignificant, we consider that we have no option but to sustain it. The remainder of the trees will doubtless shed their leaves and needles upon the respondents' premises; but this they must endure positively without remedy.

The appellants' contention that "one who has slept upon his rights for a considerable time by acquiesc-

ing in the alleged nuisance, will be denied equitable relief, and left to his remedy at law" (29 Cyc. 1231), cannot apply here. The cases cited by appellants under this head show delays, not of months, but of years. That principle is applied where one has encouraged the nuisance, and allowed the party to go on and make a heavy expenditure, under the reasonable belief that no objection would be made, or where the damages were small, and the injury not of a continuous and permanent nature. 2 Wood, Nuisances, 3d ed. § 785. The courts look beyond the injury to the consequence of their action, and if fair redress can be had at law they will not tie up important industries or operations by injunction, unless the equities of the case demand. *Varney v. Pope*, 60 Me. 192; *Sparhawk v. Union Pass R. Co.* 54 Pa. 401.

Here, respondents did not encourage an active nuisance, or nuisance by commission, but for a short time permitted an omission, when they gave notice of the cessation of their permission. No expenditure had been encouraged, and incurred on the part of appellants. It cannot be considered that respondents slept upon their rights for such a considerable time, by acquiescing in the alleged nuisance, so that they would be denied equitable relief; nor is this equitable relief, but legal and statutory relief. *Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 618, 43 Pac. 890. While it has some appearance of being merely a vexatious suit, appellants admit that the tree boughs do overhang respondents' lot to some extent. There is sufficient foundation in fact to sustain a case, and the authorities are clearly with respondents.

The judgment of the lower court is affirmed.

Parker, Ch. J., and Fullerton, J., concur.

Mackintosh, J., dissenting:

To have the acts complained of in this case constitute a nuisance under § 943, Rem. Code, they must be acts (1) injurious to health; or (2) indecent; or (3) offensive to the senses; or (4) an obstruction to the free use of the property, so as to essentially interfere with the comfortable enjoyment of the life and property. It is conceded that the acts do not come within classifications 1, 2, or 3; but it is held that such acts amount to an obstruction of the free use of the property, so as to essentially interfere with its comfortable enjoyment. I cannot agree with such a result; for the trivial encroachment of the branches of a tree, and the growth of a few vines under a fence, do not appear to me to amount to such an obstruction as to essentially interfere with the respondents' comfortable enjoyment of their property, and are not such circumstances as will entitle respondents, under § 944, Rem. Code, to institute an action, it being provided in that section that the action may be brought by a person whose property is injuriously affected or whose personal enjoyment is lessened.

I agree with the writer of the opinion in his characterization of this action as vexatious, and I think that the statutes on nuisances are hardly susceptible of the interpretation given them, which has rendered the action, not only vexatious, but successful.

I therefore dissent.

Bridges, J.:

I concur in the dissent of Judge Mackintosh.

Petition for rehearing denied.

ANNOTATION.

Rights and remedies in case of encroachment of trees, shrubbery, or other vegetation across boundary line.

- I. Ownership, 655.
- II. Right to remove, 658.
- III. Right to compel removal, 659.
- IV. Right to enjoin planting, 661.
- V. Right to damages, 662.
- VI. Right to fruit, 667.

I. Ownership.

When the base of a tree is wholly on the land of one owner, the whole tree is his without reference to its ramifications. *Lyman v. Hale* (1836) 11 Conn. 177, 27 Am. Dec. 728; *Robinson v. Clapp* (1895) 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939, later appeal in (1896) 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504; *Wideman v. Faivre* (1917) 100 Kan. 102, 163 Pac. 619, Ann. Cas. 1918B, 1168; *Hoffman v. Armstrong* (1872) 48 N. Y. 201, 8 Am. Rep. 537, affirming (1866) 46 Barb. 337; *Dubois v. Beaver* (1862) 25 N. Y. 123, 82 Am. Dec. 326, affirming (1861) 34 Barb. 547; *Cobb v. Western U. Teleg. Co.* (1916) 90 Vt. 342, 98 Atl. 758, Ann. Cas. 1918B, 1156. See also *Grandona v. Lovdal* (1889) 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366; *Holder v. Coates* (1827) *Moody & M. (Eng.)* 112, 31 Revised Rep. 724 (ownership in owner of soil where planted).

Thus, in *Hoffman v. Armstrong* (1866) 46 Barb. (N. Y.) 337, affirmed in (1872) 48 N. Y. 201, 8 Am. Rep. 537, the court said: "The strong current of authority shows that the mere fact of the boughs or limbs of a tree, planted upon the land of one man, extending to or overhanging the land of an adjoining owner, does not give the latter any right or title to any part of the tree, or to the overhanging branches, or the fruit growing thereon."

The fact that a tree stands in such proximity to a boundary line that its roots extend into the soil of the adjacent owner does not affect the sole ownership of the tree by the person on whose soil the tree is standing. *Lyman v. Hale* (Conn.) *supra*; *Robinson v. Clapp* (1895) 65 Conn. 365,

29 L.R.A. 582, 32 Atl. 939, later appeal in (1896) 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504; *Skinner v. Wilder* (1865) 38 Vt. 115, 88 Am. Dec. 645; *Masters v. Pollie* (1620) 2 Rolle, Rep. 141, 81 Eng. Reprint, 712; *Holder v. Coates* (1827) *Moody & M. (Eng.)* 112, 31 Revised Rep. 724. Compare *Waterman v. Soper* (1697) 1 Ld. Raym. 737, 91 Eng. Reprint, 1393.

Thus, in *Skinner v. Wilder* (Vt.) *supra*, it was said: "This principle of tenancy in common in a tree merely because some of its roots extend into the land of the adjoining proprietor, regardless of the location of the tree, would be attended with so much inconvenience, uncertainty, and embarrassment in its practical application that it furnishes a strong argument against the construction of these cases contended for by the defendant, as well as against recognizing such a principle unless the authorities lead to that result, or the purposes of justice imperiously demand it. There is, at first view, an apparent equity in the proposition that the proprietor from whose land a tree draws a portion of its support should have some benefit in return; but to allow him an equal right to the tree and its fruits, because a single root penetrates his soil; is quite as unjust as to deny him any right in the tree whatever. If he is tenant in common, what proportion does he own? If his interest is in proportion to the portion of nourishment the tree draws from his land, how is the fact to be ascertained? Suppose the division line runs through a grove, a fruit yard, a nursery of trees, or a forest, and this rule is adopted, there might be a belt of land, rods in width, on which the parties would be tenants in common of more or less of the trees. How is each to know or ascertain what he owns solely, and what in

common, and what in proportion, especially as the rights of the parties would be constantly changing by the growth, and consequent extension of roots across the division line. Principles of law and rules of property must be such as are capable of practical application to business affairs.

On the whole, we think the weight of authority, reason, and analogy, as well as convenience, is in favor of the principle that a tree and its product is the sole property of him on whose land it is situated; and that, considering the necessary uncertainty of evidence as to the location and extent of the roots of a tree, its location and property should be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or branches above it. But even if a tree standing with its trunk at the extreme limit of one's land, with the main roots extending immediately into the soil of the adjoining proprietor, should be regarded as so far substantially upon the line as to become common property, it cannot be so regarded in relation to the tree in question, situate 6 feet from the division line."

So, in *Lyman v. Hale* (1836) 11 Conn. 177, 27 Am. Dec. 728, it was said: "This writ of error is reserved for our advice; and the principal question raised and discussed is whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy. It is admitted that the tree stands upon the plaintiff's land, and about 4 feet from the line, dividing his land from that of the defendant. It is further admitted that a part of the branches overhang, and that a portion of the roots extend into, the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on in the argument that the mere fact that some of the branches overhang the defendant's land creates such a joint ownership. Indeed, such a claim could

not have been made with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. 'Thus,' it is said, 'if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance. 2 Rolle, Abr. 144, l. 30; *Rex v. Pappineau* (1726) 2 Strange, 688, 93 Eng. Reprint, 784; *Cooper v. Marshall* (1757) 1 Burr. 267, 97 Eng. Reprint, 303; *Welsh v. Nash* (1807) 8 East, 394, 103 Eng. Reprint, 394; *Dyson v. Collick* (1822) 5 Barn. & Ald. 600, 106 Eng. Reprint, 1310, 1 Dowl. & R. 225; Comyns's Dig. title, 'Action on the Case for a Nuisance,' D. 4. And in *Waterman v. Soper* (1697) 1 Ld. Raym. 737, 91 Eng. Reprint, 1393, the case principally relied on by the defendant's counsel, it is laid down: 'That if A. plants a tree upon the extremest limits of his land, and the tree, growing, extends its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A.' The claim of joint ownership, then, rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground the charge proceeded in the court below, and on this the case has been argued in this court. We are to inquire, then, whether this ground be tenable. The only cases relied upon in support of the principle are the cases already cited from Lord Raymond, and an anonymous case from Rolle's Reports. 2 Rolle, Rep. 255, 81 Eng. Reprint, 783. The principle is, indeed, laid down in several of our elementary treatises. 1 Sw. Dig. 104; 3 Starkie, Ev. 1457, note; Bull. N. P. 84. But the only authority cited is the case from Lord Raymond. And it may well deserve consideration whether that case is strictly applicable to the case at bar, and whether it carries the principle

so far as is necessary to sustain the present defense. That case supposes the tree to be planted on the 'extremest limit'—that is, on the utmost point or verge of A's land. Is it not, then, fairly inferable from the statement of the case that the tree, when grown, stood in the dividing line? And in the case cited from Rolle the tree stood in the hedge, dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases that whenever a tree growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they, therefore, become tenants in common of the tree? We think not; and, if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principles to practice; and, in the next place, we think the weight of authorities is clearly the other way. How, it may be asked, is the principle to be reduced to practice? And here it should be remembered that nothing depends on the question whether the branches do, or do not, overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry whether any portion of the roots extends into his land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained? Again, if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties? Again, suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced, in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know

whether he is the exclusive owner of trees growing, indeed, on his own land, but near the line, and whether he can safely cut them without subjecting himself to an action? And again,—on the principle claimed, a man may be the exclusive owner of a tree one year, and, the next, a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth. It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those which, in our opinion, establish a contrary doctrine. In the case of *Masters v. Pollie* (1620) 2 Rolle, Rep. 141, 81 Eng. Reprint, 712, it was adjudged that where a tree grows in A's close, though the roots grow in B's, yet, the body of the tree being in A's soil, the tree belongs to him. The authority of this case is recognized and approved by Littledale, J., in the case of *Holder v. Coates* (1827) Moody & M. (Eng.) 112. He says: 'I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so.' The same doctrine is also laid down in *Mitten v. Faudrye* (1625) Popham, 163, 79 Eng. Reprint, 1259; *Norris v. Baker* 3 Bulstr. 178 [proper citation (1612) 1 Rolle, Rep. 394, 81 Eng. Reprint, 559]. See also 20 Vin. Abr. 417; 1 Chitty, Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant were not joint owners of the tree; and that the charge to the jury in the court below was, on this point, erroneous."

In *Grandona v. Lovdal* (1889) 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366, discussing the title of the plain-

tiff as to trees which overhung his land, the court said: "The trees and the overhanging branches, in so far as they were on or over his land, belonged to the plaintiff, and he could have cut them off or trimmed them at his pleasure."

In *Reed v. Drake* (1874) 29 Mich. 222, the facts were stated by the court as follows: "Plaintiff sued defendant for removing certain peach trees from his freehold. It appeared on the trial, and the jury found, that some fourteen years before the suit defendant purchased of the common grantor of both parties a parcel of land 18 rods wide, and that they procured a surveyor to find the line; and they set a worm fence, and set out the trees in question on defendant's side of the fence. Defendant has ever since continued in possession up to that boundary. The plaintiff claims that the fence laps over a few feet on his land. The court instructed the jury, if they believed these facts, that defendant was entitled to a verdict." Affirming the judgment of the trial court, the appellate court said: "We think the charge was correct. Whether there was such action as would have conclusively fixed the boundary for all purposes was not decided, and is not important, in this controversy. The defendant, being in a possession which was taken by joint consent as his rightful possession under his deed, has merely removed what he placed there with the co-operation of his grantor, and for his own use and advantage. It would be difficult to find a plainer case. He has done nothing which was not within the direct intent of his grantor when he was put in possession. He has not removed what he found already there, but what was placed there after his purchase, with his grantor's aid as well as assent. The trees were planted by their joint help for the defendant's benefit as owner. His actual possession was measured by their joint action, and was notice to plaintiff of the extent of his claim. It would operate as a fraud upon defendant to deny his right to remove

the trees which were planted and retained under such circumstances; and plaintiff must be held estopped from complaining of such removal, which comes within the scope of the authority under which they were placed on the ground. We think there is no support for any principle which would not go far enough to sustain this defense for the removal of such improvements, whatever may be the case as to the title itself, which, as already stated, is not involved in the case, and needs no discussion."

II. Right to remove.

A landowner may cut or lop off the overhanging branches of a tree belonging to an adjoining landowner.

California. — *Grandona v. Lovdal* (1886) 70 Cal. 161, 11 Pac. 623; *Grandona v. Lovdal* (1889) 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366.

Connecticut. — *Lyman v. Hale* (1836) 11 Conn. 177, 27 Am. Dec. 728; *Robinson v. Clapp* (1895) 65 Conn. 365, 29 L.R.A. 582, 32 Atl. 939, later appeal in (1896) 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504.

Illinois. — *Simpson v. Gibson* (1911) 164 Ill. App. 147.

Iowa. — *Harndon v. Stultz* (1904) 124 Iowa, 440, 100 N. W. 329.

Louisiana. — *Tissot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261 (citing statute).

Michigan. — See *Hickey v. Michigan C. R. Co.* (1893) 96 Mich. 498, 21 L.R.A. 729, 35 Am. St. Rep. 621, 55 N. W. 989; *Newberry v. Bunda* (1904) 137 Mich. 69, 100 N. W. 277.

Mississippi. — *Buckingham v. Elliott* (1884) 62 Miss. 296, 52 Am. Rep. 188.

Missouri. — *Tanner v. Wallbrunn* (1898) 77 Mo. App. 262.

New York. — *Countryman v. Lighthill* (1881) 24 Hun, 405.

Vermont. — *Cobb v. Western U. Teleg. Co.* (1916) 90 Vt. 342, 98 Atl. 758, Ann. Cas. 1918B, 1156. See also *Skinner v. Wilder* (1865) 38 Vt. 116, 88 Am. Dec. 645.

Washington. — See the reported case (*GOSTINA v. RYLAND*, ante, 650).

England. — See *Lonsdale v. Nelson*

(1823) 2 Barn. & C. 302, 107 Eng. Reprint, 396; *Lemmon v. Webb* [1895] A. C. 1, 64 L. J. Ch. N. S. 205, 11 Reports, 116, 71 L. T. N. S. 647, 59 J. P. 564.

"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off." *Grandona v. Lovdal* (1886) 70 Cal. 161, 11 Pac. 623.

A landowner desiring to cut off overhanging branches of trees belonging to an adjacent landowner is not required to give notice. *Hickey v. Michigan C. R. Co.* (1893) 96 Mich. 498, 21 L.R.A. 729, 35 Am. St. Rep. 621, 55 N. W. 989; *Lemmon v. Webb* [1895] A. C. (Eng.) 1, 64 L. J. Ch. N. S. 205, 11 Reports, 116, 71 L. T. N. S. 647, 59 J. P. 564, affirming [1894] 3 Ch. 1; *Lonsdale v. Nelson* (1823) 2 Barn. & C. 302, 107 Eng. Reprint, 396 (dictum).

Thus, in *Lemmon v. Webb* (Eng.) supra, it was said: "I think it is clear that a man is not bound to permit a neighbor's tree to overhang the surface of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that if he can get rid of the interference or encroachment without committing a trespass, or entering upon the land of his neighbor, he may do so whenever he pleases, and that no notice or previous communication is required by law."

In *Simpson v. Gibson* (1911) 164 Ill. App. 147, discussing the right of a municipality in regard to a tree belonging to a private person, the branches of which overhung a street, the court said: "If the trees were so located that the branches which overhung a portion of the street and damaged the street, or were an inconvenience to the public in the use of the street, or if the body of the tree extended into the street so as to obstruct its use by the public, the city would have the right to remove such branches of the tree as extended into

the public street, without any compensation to the property owner."

A landowner cannot destroy or cut down an overhanging tree belonging to his neighbor, but has only the right to cut the overhanging branches back to the boundary line. *Grandona v. Lovdal* (1886) 70 Cal. 161, 11 Pac. 623; *Hickey v. Michigan C. R. Co.* (Mich.) supra; *Newberry v. Bunda* (1904) 137 Mich. 69, 100 N. W. 277. See also *Harndon v. Stultz* (1904) 124 Iowa, 440, 100 N. W. 329.

Thus, one who cuts branches overhanging his land is ordinarily liable for any subsequent damage, if he cuts off a part of the branches not over his land. *Newberry v. Bunda* (1904) 137 Mich. 69, 100 N. W. 277. And the owner of a tree may maintain an action to enjoin the adjacent landowner from destroying it. *Wide-man v. Faivre* (1917) 100 Kan. 102, 163 Pac. 619, Ann. Cas. 1918B, 1168.

A landowner has the same right to remove encroaching roots of trees belonging to an adjoining owner as he has to cut off the overhanging branches. *Robinson v. Clapp* (1895) 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 582, later appeal in (1896) 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504; *Tissot v. Great Southern Teleg. & Teleph. Co.* (1887) 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261 (citing statute). See also *Grandona v. Lovdal* (1886) 70 Cal. 161, 11 Pac. 623; *Skinner v. Wilder* (1865) 38 Vt. 116, 88 Am. Dec. 645; *Lemmon v. Webb* [1894] 3 Ch. (Eng.) 1, affirmed in [1895] A. C. 1, 64 L. J. Ch. N. S. 205, 11 Reports, 116, 71 L. T. N. S. 647, 59 J. P. 564.

While the landowner may cut off the overhanging branches of trees belonging to an adjacent landowner, he may not convert them to his own use. *Lyman v. Hale* (1836) 11 Conn. 177, 27 Am. Dec. 728. Compare *Grandona v. Lovdal* (1889) 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 366.

III. Right to compel removal.

There are a few decisions which recognize the right of a landowner, whose premises are invaded by the overhanging branches of a tree

standing on the land of another, to maintain an action to compel the latter to remove the branches. *Grandona v. Lovdal* (1886) 70 Cal. 161, 11 Pac. 623; *Tissot v. Great Southern Teleg. & Teleph. Co.* (1887) 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261; *Hoffman v. Armstrong* (1866) 46 Barb. (N. Y.) 337, affirmed in (1872) 48 N. Y. 201, 8 Am. Rep. 537. See also the reported case (*GOSTINA v. RYLAND*) ante, 650.

Thus, in the reported case (*GOSTINA v. RYLAND*), it is held that where the branches of trees growing on the land of one man overhang the land of another, and shed leaves and needles on the latter's lawn, affirmative equitable relief will be granted under the Washington statute as to nuisances. Two judges dissent, and in the opinion of the majority of the court it is pointed out that ordinarily the only remedy of the person on whose property the trees encroach would be to clip them; but that the rule in Washington is otherwise, on account of the statute relating to the abatement of nuisances.

Likewise, under a Louisiana statute, a landowner who suffers a damage from his neighbor's overhanging trees may compel the owner to have them torn up, or to have their branches cut off. *Tissot v. Great Southern Teleg. & Teleph. Co.* (1887) 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261.

In *Tanner v. Wallbrunn* (1898) 77 Mo. App. 262, holding that an injunction would not lie against a landowner to compel the removal of his trees because their roots extended into his neighbor's soil, the court said: "The extraordinary relief awarded in this case should not be granted, except where the right thereto is clear and the necessity therefor imperative. Such relief will not ordinarily be given, either, when other legal remedies are open to the complaining party. While it is true that my neighbor has no technical right to overhang my soil with the branches of his trees, yet, if he do so, I have no right to cut his tree down and destroy it entirely. I may, however,

clip off the overhanging branches, but only to the extent of such overhanging. . . . The judgment in the case at bar commands not only the destruction of the overhanging branches, but would destroy the tree itself. This clearly is erroneous. At most, the plaintiff could only have been entitled to cut away these branches, and to the extent only that they may have overhung his property. And this cutting away may have been done without calling in aid the extraordinary writ of injunction. Before this equity power can be successfully invoked, there should be 'a strong and mischievous case of pressing necessity.' Washb. Easements & Servitudes, 3d ed. 701; 1 High, Inj. 3d ed. § 740. From the evidence it appears that about the date of the institution of this suit (whether before or after is not clear), defendant did cut away the branches of the tree to the extent that they overhung plaintiff's building, and thereby plaintiff got all that he was entitled to. But, even had defendant refused to cut off such overreaching limbs, plaintiff had the undoubted legal right himself so to do. And, having this right, it was his duty to avail himself thereof before resorting to this extraordinary remedy. As to the extension of the roots from defendant's tree into the soil of plaintiff's lot, the evidence fails to show that any substantial damages were thereby committed. There is no basement under plaintiff's house; it rests on a stone foundation beginning down 3 feet below the surface, and the roots complained of have grown beneath this. It is difficult to understand how this did or could damage the foundation wall, or the building resting thereon; and, indeed, the evidence fails to show that any damage did result therefrom. Equity will not interfere where the injury from a private nuisance is merely nominal or uncertain; there must be satisfactory proof of real substantial damage."

In *Grandona v. Lovdal* (1889) 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. 866, the suit was brought for damages and to abate a nuisance

consisting of trees overhanging the boundary line of the plaintiff's land. Affirming a judgment in favor of the defendant, as against various objections raised by the plaintiff, the court said: "It is urged for appellant that the trees were a nuisance because they interfered with and prevented his enjoying the free and full use of his land for growing fruit trees. But we are unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened, because he cannot use it for a purpose which he has never attempted or wished to use it for. . . . It is specified that the evidence was insufficient to justify the decision, because it appeared that the trunks had crowded the division fence over and upon plaintiff's land, and thereby ousted him from a part of his land. But the plaintiff had never been called upon to repair that part of the fence, and had never been prevented from plowing and cultivating his land as near the line as he could if the trees had not been there. His property, therefore, was not injuriously affected, nor his personal enjoyment lessened by the crowding. Besides, the trees and the overhanging branches, in so far as they were on or over his land, belonged to the plaintiff, and he could have cut them off or trimmed them at his pleasure. This being so, we do not see how the fact that the trees had grown so that a small part of them was on plaintiff's land could give any cause of action. It is further specified that the decision was contrary to the evidence, for the reason that defendant maintained the trees for the purpose of supplying himself with fuel and hop poles, and thereby using the plaintiff's land for his own profit and advantage. But how can this maintain plaintiff's contention? The fuel and hop poles growing over plaintiff's land were his, and could have been claimed by him as against the defendant. And the fact that the balance of the limbs and branches were useful to defendant in no way harmed the plaintiff, or gave him cause for complaint.

We conclude that the judgment cannot be reversed on the ground that the decision was contrary to the evidence or the law."

It appears, also, from the reported case (*GOSTINA v. RYLAND*, ante, 650), that under the Washington statute relating to the abatement of nuisances, a mandatory injunction will lie for the removal of a vine which is planted on the land of one owner, and which creeps through a boundary fence and spreads on the lawn of another.

IV. *Right to enjoin planting.*

In *Brock v. Connecticut & Pass. R. Co.* (1862) 35 Vt. 378, a suit was brought against a railroad to enjoin the planting of willow trees within a few feet of the line between the plaintiff's line and the railroad right of way. It was alleged that the soil for a considerable distance from the boundary line would be injured by the willows. Holding that relief was properly granted, the court said: "From a consideration of all the testimony which has been introduced on both sides, we are of opinion that the orator has established the fact, by a fair balance of testimony, that the planting and continuance of the trees and their growth, as designed and contemplated by the defendants, would produce the injuries to the orator which he has alleged in his bill would result therefrom. The question then arises, Have the defendants a right to plant and cultivate a row of willow trees on each side of their road, through the orator's land, in the manner and for the purposes contemplated, notwithstanding the great injury that must inevitably ensue to the orator therefrom? The defendants surveyed their road across the orator's land, under and by virtue of their charter. Whether they obtained it all by proceedings in invitum, or whether a part was transferred to them by deed, would seem to be immaterial, so far as this question is concerned. They obtained it for the purpose of constructing and operating a railroad. By their charter the company was

bound to fence its road, and it was in view of this obligation that the price to be paid was fixed upon by the commissioners of the parties; but evidently neither party contemplated that the road was to be fenced in this unusual and extraordinary manner, in a way that should virtually destroy or render nearly worthless an amount of land along the sides of the road nearly, if not quite, equal to the amount taken, and that, too, by the introduction into the farms of the willow tree, which some of the witnesses represent as the common enemy of the farmer in that vicinity, and one with which they have been contending half their lives, a tree that most of the witnesses seem to consider as injurious to the surrounding land, to an extent beyond that of most other trees. Whether one or two adjoining landowners, holding their titles in fee, and for the ordinary purposes of cultivation, would have the right to construct a fence in this manner, on the line between them, to the manifest injury of the other, is a question we are not now called upon to decide."

In an action wherein the testimony was conflicting as to the character and effect of Johnson grass, and left in doubt the result of its introduction into agricultural lands, an injunction against its planting by an insolvent owner was denied to an adjoining owner, who claimed that it would overrun his lands, rendering them unfit for the production of crops usually produced in the country. *McCutchen v. Blanton* (1881) 59 Miss. 116.

V. Right to damages.

The owner of a tree the branches of which overhang the premises of an adjoining landowner is liable for damages caused by the overhanging branches. *Ackerman v. Ellis* (1911) 81 N. J. L. 1, 79 Atl. 883; *Crowhurst v. Amersham Burial Bd.* (1878) L. R. 4 Exch. Div. (Eng.) 5, 48 L. J. Exch. N. S. 109, 39 L. T. N. S. 355, 27 Week. Rep. 95; *Smith v. Giddy* [1904] 2 K. B. (Eng.) 448, 2 B. R. C. 897, 73 L. J. K. B. N. S. 894, 91 L. T. N. S. 296, 20

Times L. R. 596, 53 Week. Rep. 207. See also *Buckingham v. Elliott* (1884) 62 Miss. 296, 52 Am. Rep. 188; *Hoffman v. Armstrong* (1866) 46 Barb. (N. Y.) 337, affirmed in (1872) 48 N. Y. 201, 8 Am. Rep. 537; *Lemmon v. Webb* [1894] 3 Ch. (Eng.) 1. Compare *Countryman v. Lighthill* (1881) 24 Hun (N. Y.) 405; *Kank Realty Co. v. Brown* (1921) 114 Misc. 357, 187 N. Y. Supp. 556; *Gulf, C. & S. F. R. Co. v. Oakes* (1900) 94 Tex. 155, 52 L.R.A. 293, 86 Am. St. Rep. 835, 58 S. W. 999; *Reed v. Smith* (1914) 19 B. C. 139, 27 West. L. R. 190, 6 West. Week. Rep. 794, 17 D. L. R. 92; *Giles v. Walker* (1890) L. R. 24 Q. B. Div. 656, 59 L. J. Q. B. N. S. 416, 62 L. T. N. S. 933, 38 Week. Rep. 782, 54 J. P. 599, 1 Eng. Rul. Cas. 235.

In *Buckingham v. Elliott* (1884) 62 Miss. 296, 52 Am. Rep. 188, it was said: "Undoubtedly, if the branches of a noxious tree extend over the land of another and do injury, the owner of the tree may be held responsible for the damage done."

In *Crowhurst v. Amersham Burial Bd.* (1878) L. R. 4 Exch. Div. (Eng.) 5, 48 L. J. Exch. N. S. 109, 39 L. T. N. S. 355, 27 Week. Rep. 95, it appeared that the plaintiff's horse was poisoned by eating some of the overhanging branches of a yew tree belonging to the defendant. It was held that the plaintiff could recover damages.

In *Smith v. Giddy* [1904] 2 K. B. (Eng.) 448, the court said: "It is no doubt quite true that there is no case to be found in the books in which the action has been held to lie against an adjoining owner for allowing his trees to project over the boundary line, where the only damage resulting from the projection has been a damage to the plaintiff's crops. It was pointed out by Kelly, C. B., in *Crowhurst v. Amersham Burial Bd.* (Eng.) supra, that there was no precedent for such an action, and it was there suggested that there was much to be said on grounds of general convenience in favor of such an action not being maintainable. But I am of opinion that the principle upon which

that case was decided is enough to enable us to decide the present case in favor of the plaintiff. There the action was brought against the owners of a yew tree, which they or their predecessors in title had planted on their land, and which they allowed to overhang their boundary, whereby the plaintiff's horse in the adjoining meadow, feeding on the projecting branches, was poisoned; and it was held that the action lay. The court treated the case as an illustration of the rule in *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235, that a person who brings onto his land something that is likely to do damage if it escapes is responsible if that damage occurs. It seems to me that there is no distinction in principle between the damage occasioned in that case and the damage in the present. The injury to the plaintiff's fruit trees was the natural consequence of the defendant's trees being allowed to overhang. I have come to this conclusion with considerable reluctance, for I have a strong feeling that it is highly desirable not to establish new causes of action, if it can possibly be avoided; but I do not see how we can refuse to hold that this action lies, without departing from the principle of *Crowhurst's Case*. Moreover, we are fortified in this view by the dictum of Kay, L. J., in the case of *Lemmon v. Webb* [1894] 3 Ch. (Eng.) 1, where, although it was not necessary to the decision, he distinctly states it as his opinion that for any damage occasioned by overhanging boughs an action on the case would lie. It has been contended that the remedy which the plaintiff has of cutting the trees back himself is all-sufficient, and that under those circumstances it is unnecessary to invent a new cause of action. But that, in my opinion, is no answer to the action."

In *Ackerman v. Ellis* (1911) 81 N. J. L. 1, 79 Atl. 883, discussing the right of a landowner to bring an action against an adjoining landowner whose trees overhung the boundary line, the court said: "Trees which

overhang the premises of another are a nuisance to the extent that their branches extend over such premises, and the person over whose land they spread is entitled to his action for damages against the person who is responsible for their presence there. Wood, Nuisances, § 112; Cooley, Torts, 1st ed. 567. And this is so without regard to the extent of the damage resulting therefrom, the insignificance of the injury going to the extent of the recovery, and not to the right of action. Cooley, Torts, supra. The right of action in the present case, therefore, depends upon the fact that the trees overhang the plaintiff's premises, not upon the character of the trees, that being merely an element in determining the amount of the damage sustained by reason of the nuisance." In that case it was held that a landowner could maintain an action against a person in possession of an adjoining tract of land for planting spruce trees so close to the boundary line that the roots and branches of the trees extended into the plaintiff's premises. It was alleged that the trees were "poisonous or noxious," but that allegation was disregarded as surplusage, the character of the trees being considered only in determining the amount of the damage sustained. But it was held that a tenant in possession of the land on which the overhanging trees grew was not liable merely because he maintained the demised land in the condition in which it came to him.

However, in *Kank Realty Co. v. Brown* (1921) 114 Misc. 357, 187 N. Y. Supp. 556, affirmed on opinion below in (1921) 198 App. Div. 958, 189 N. Y. Supp. 946, it was held that where a violent windstorm had partially broken a limb of a tree standing on the defendant's land, so that the limb overhung the premises of the plaintiff and menaced his dwelling house, the defendant was not liable in trespass for damage to the plaintiff's house caused by the falling of the limb while an experienced workman, employed by the defendant, was in the act of removing it. It did not appear

that the workman performed his task in an improper or careless manner. The court said: "A careful examination of a number of the cases cited on both sides leads me to the conclusion that an actionable trespass, such as would carry the right to damages, must necessarily presuppose and involve a wrongful or unjustifiable entry upon the lands of another, or the performance of some improper, careless, wrongful, or unnecessary act thereon. An act done in good faith, in a careful and proper manner, and in the performance of a legal or moral duty, does not, in my opinion, constitute such a trespass.

. . . So far as this proof goes, the tree was not dangerous before the storm—it became a menace to plaintiff's property by reason of an act of God, and without the intervention or fault of defendant. Finding it thus a menace to his neighbor's home, the defendant, with reasonable diligence and prudence, and through the medium of an experienced agent exercising due care, attempted to remove it in the usual way, and in a careful manner. Its fall is not claimed to have been due to negligence or want of care. If I am correct in my conception of an actionable trespass, and unless it can be held that every entry upon another's lands, for purpose right or wrong, and with method good or bad, must impose liability for damages for any and all accidental occurrences, I think that there can be no basis for recovery in the case at bar. Had the plaintiff alleged and proven negligence of any kind, or in any respect, then, confessedly, the rule would be otherwise; but this is plainly and definitely an action for trespass, and nothing more."

And it has been held that no landowner has a cause of action from the mere fact that the branches of an innoxious tree, belonging to an adjoining landowner, overhang his premises, his right to cut off the overhanging branches being considered a sufficient remedy. *Countryman v. Lighthill* (1881) 24 Hun (N. Y.) 405, wherein the court said: "It would be intolerable to give an action in the

case of an innoxious tree, whenever its growing branches extend so far as to pass beyond the boundary line and overhang a neighbor's soil. The neighbor has a remedy in such case by clipping the overhanging branches, especially if the owner of the tree refuses to do it on being requested.

. . . The overhanging branches of a tree, not poisonous or noxious in its nature, are not a nuisance, *per se*, in such a sense as to sustain an action for damages. Some real, sensible damage must be shown to result therefrom. The complaint in this case alleged that in consequence of the overhanging limbs the plaintiff's garden was damaged. That was not a necessary result, and in what way it was produced was not alleged. The only proof on the subject was that plaintiff had berry bushes on his side of the line, and he thought there was a difference between those in the shade and those that were not. What the difference was—whether the shaded bushes were injured or benefited by the shade—does not appear. The action was misconceived, and the justice erred in rendering judgment for the plaintiff."

In *Reed v. Smith* (1914) 19 B. C. 139, 17 D. L. R. 92, it appeared that a decayed tree of native growth, standing on an unoccupied lot of the defendant, fell on the lot of the plaintiff and damaged his dwelling house. It also appeared that the plaintiff had, before the accident, given notice to the defendant of the dangerous situation created by the decay of the tree and requested the defendant to remove it. In holding that the defendant was not liable in trespass the court said: "We have been referred to no case, and I am unable to find one quite like this. In *Smith v. Giddy* [1904] 2 K. B. (Eng.) 448, 2 B. R. C. 897, 73 L. J. K. B. N. S. 894, 91 L. T. N. S. 296, 20 Times L. R. 596, 53 Week. Rep. 207, the plaintiff was awarded damages for injury caused by the branches of defendant's trees overhanging the plaintiff's land, thereby causing injury to his crops. On the other hand, it was de-

cided in *Giles v. Walker* (1890) L. R. 24 Q. B. Div. 656, 59 L. J. Q. B. N. S. 416, 62 L. T. N. S. 933, 38 Week. Rep. 782, 54 J. P. 599, 1 Eng. Rul. Cas. 235, that when an occupier of land allows it to become overgrown with thistles, and the seed is carried by the wind into his neighbor's fields to his great injury, no action will lie, because, as Lord Coleridge, Ch. J., and Lord Esher, M. R., said, the thistles were the natural growth of the soil. Now, it does not appear to have been regarded as wrongful to allow branches to overhang another's land, when no injury was occasioned thereby. It would seem that there must be something more than that. Kelly, C. B., in *Crowhurst v. Amersham Burial Bd.* (1878) L. R. 4 Exch. Div. (Eng.) 5, at pp. 9, 10, said: 'On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject-matter of an action, especially when an adjoining landowner over whose property it grew could, according to the authorities, have the remedy in his own hands by clipping.' And Kennedy, J., in *Smith v. Giddy* (Eng.) supra, at p. 451, said: 'If trees, although projecting over the boundary, are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions; but where they are actually doing damage, I think, there must be a right of action. In such a case I do not think that the owner of the offending trees can compel the plaintiff to seek his remedy in cutting them. He has no right to put the plaintiff to the trouble and expense which that remedy might involve.' This is not a case of nuisance. If the defendant is liable at all it is for trespass, and if any act of his had brought about the falling of the tree on the plaintiff's house, there would be no difficulty in the case. The doctrine of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235, supra,

is not one which must govern the decision of this case. There the defendant was liable because of his own acts, irrespective of negligence. Here, clearly he cannot be liable unless he has been guilty of negligence. My difficulty is to say, under the peculiar circumstances now arising for the first time, so far as any direct authority goes, that there was any duty on the defendant either to cut down the menacing tree, or to make good the damage, should it fall without any act of his. If the law does not reach such a case, then it stands thus; the owner of a lot in a city may maintain on that lot a primeval forest tree in such a condition of decay that it is a menace to a neighbor, and should it fall upon his neighbor without any inducing act of the owner of the tree, the neighbor must bear the loss. If it were the case of an ancient building falling into decay, although not erected by the then owner of the lot, but by a remote predecessor in title, the owner would undoubtedly be liable, but there would be privity of estate between the person who erected the artificial structure and his successor who diligently maintained it. I think there is no warrant for saying that, at common law, one who allows his land to remain in its natural state, neither he nor a predecessor in title having changed that state, is under any obligation to his neighbor in respect to what is standing or growing thereon. The neighbor must protect himself, if he can, or suffer the consequences."

In *Buckingham v. Elliott* (1884) 62 Miss. 296, 52 Am. Rep. 188, holding that a landowner could recover damages from an adjoining landowner for injuries caused by the noxious roots of a tree belonging to the latter, the court said: "We are not able to draw a distinction between the roots of a tree which extend into a neighbor's land, and overhanging branches. It seems to be settled law that overhanging branches are a nuisance, and it must follow that invading roots are. The person intruded on by branches may cut them off; it must be true that one may cut off

invading roots; it must be true that he who is injured by encroaching roots from his neighbor's tree can recover the damages sustained from them. The right of action seems clear. In determining how much the person injured shall recover, it may be proper to consider the means of protection in his own hands against the injury complained of. It is an admitted fact in this case that the roots of the mulberry trees destroyed the well. That proves the noxious character of the trees. The trees were planted by a former owner, but the appellee has no right to maintain and continue a nuisance after notice of its character and the injury done by it. True, he has as much right to shade and ornamental trees as his neighbor has to his well of unpolluted water; but if in the enjoyment of his right he invades his neighbor's he is answerable for it. The trees and their roots are his; he must so restrain his roots as not to work injury to his neighbor; he can enjoy the full advantage of his trees, as we suppose, without permitting them to damage his neighbor; he is not required to destroy them, but only to prevent them from encroaching injuriously upon others. This he is required to do upon the principle embodied in the fundamental maxim, 'so use your own as not to hurt another.'

In *Gulf, C. & S. F. R. Co. v. Oakes* (1900) 94 Tex. 155, 52 L.R.A. 293, 86 Am. St. Rep. 835, 58 S. W. 999, an action for damages by an adjoining owner against a railroad company, for planting Bermuda grass on its right of way which spread on to the land of plaintiff and injured his crops, it was held that the plaintiff, having failed to show that the planting of this grass to protect the right of way was unreasonable, could not recover. The court said: "While the ground of liability, if one can be shown, would be negligence or other culpable conduct on the part of appellant, nothing of the sort could be imputed to it if what it did was, under the principles stated, only a legitimate use of its property, and the facts stated fail to show that it was not such a use."

And in an action wherein it appeared that a farmer occupied land which was previously a forest, and after cultivating it thistles sprang up on it, and he neglected to remove them so as to prevent them from seeding, and thousands of thistles on his land produced seed which was blown on to the land of plaintiff and took root there, the question was left to the jury whether the defendant, in not cutting the thistles, had been guilty of negligence. The jury found that he was negligent, and judgment was entered for plaintiff. On appeal this was set aside. *Giles v. Walker* (1890) L. R. 24 Q. B. Div. 656, 1 Eng. Rul. Cas. 235; Coleridge, Ch. J., said: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed."

It seems that, if the owner of a tree cuts the overhanging boughs so that they fall on the land of another, an action of trespass may be maintained by the latter. *Mitten v. Fawdrye* (1625) Popham, 161, 79 Eng. Reprint, 1259 (reported as *Millen v. Fawdry, Latch*, 120, 82 Eng. Reprint, 304); *Lambert v. Bessey* (1715) T. Raym. 421, 467, 83 Eng. Reprint, 220, 244.

But in *Wilson v. Newberry* (1871) L. R. 7 Q. B. (Eng.) 31, the action was brought against the owner of yew trees to recover damages for injuries to the plaintiff's stock, which had eaten some of the clippings of the tree and were thereby poisoned. It was alleged that the defendant had allowed the clippings to escape from his land. Holding that no cause of action was shown, the court said: "It is not alleged that the defendant clipped the yew trees; it is not alleged that he knew the yew trees were clipped; and it is not alleged that he had anything to do with the escape of the yew clippings on to his neighbor's land. It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger without the defendant's knowledge. I cannot think that the duty charged can be deduced

from the facts stated; and therefore, in my opinion, the declaration is bad."

VI. Right to fruit.

The fruit of a tree overhanging a boundary line belongs to the owner of the tree. *Lyman v. Hale* (1836) 11 Conn. 177, 27 Am. Dec. 728; *Newkirk v. Sabler* (1850) 9 Barb. (N. Y.) 655; *Hoffman v. Armstrong* (1872) 48 N. Y. 201, 8 Am. Rep. 537, affirming (1866) 46 Barb. 337; *Skinner v. Wilder* (1865) 38 Vt. 115, 88 Am. Dec. 645. In the case last cited the court said: "In this case it appears that the plaintiff planted or set apple trees on his own land 6 feet from the division line between his land and the defendant's land; the trees grew until the roots extended into, and the branches overhung, the defendant's land. The question is whether the defendant is liable, either in trespass on the freehold or in trover, for picking, carrying away, and converting to his own use the apples growing on the branches overhanging his own land. Each party claims to be the sole owner of the fruit in question; the plaintiff upon the ground that he is the owner of the tree, and the defendant upon the ground that the branches and the fruit thereon overhung his land, and that in virtue of his ownership of his land he owns everything above it. . . . The defendant . . . cannot be regarded as the owner of the apples merely because the branches on which they grew were wrongfully encumbering his ground. Suppose the defendant's counsel is correct, as he probably is, in the proposition that the defendant had the right to cut the roots and branches of the tree to the

division line, so far as they penetrated or overhung his land, upon the ground that they were unlawfully encumbering his premises; this justification does not extend to the carrying away and converting the apples upon such branches to his own use, unless he was the owner of the apples, either solely, or in common with the plaintiff. The title to the apples depends upon the title to the tree, and the defendant was not the sole owner of any part of the tree. The defendant is liable in either count in the declaration unless he has some property in the tree."

Hence, if an owner of premises converts to his own use fruit on branches overhanging his premises, the owner of the tree may maintain trespass against him. *Lyman v. Hale* (1836) 11 Conn. 177, 27 Am. Dec. 728.

And if fruit on a overhanging tree falls to the ground in the neighboring close, the owner of the tree may enter to gather it. *Norris v. Baker* (1616) 1 Rolle, Rep. 394, 81 Eng. Reprint, 559, as cited in *Lemmon v. Webb* [1894] 3 Ch. (Eng.) 1. See also *Mitten v. Faudrye* (1625) Popham, 161, 79 Eng. Reprint, 1259, also cited as *Millen v. Fawdry, Latch*, 120, 82 Eng. Reprint, 304.

In *Hoffman v. Armstrong* (1866) 46 Barb. (N. Y.) 337, affirmed in (1872) 48 N. Y. 201, 8 Am. Rep. 537, it appeared that the plaintiff was forcibly prevented by the defendant from picking fruit from a tree overhanging the defendant's land. The plaintiff was not the owner of the tree, but was authorized by its owner to pick the fruit. The court held that the defendant was liable for assault and battery.

W. S. R.

EDWARD J. CUNNIEN
v.

SUPERIOR IRON WORKS COMPANY et al.

Wisconsin Supreme Court—October 13, 1921.

(— Wis. —, 184 N. W. 767.)

Damages — personal injury — deduction of allowance for lost time because of award from government.

1. The amount awarded one enlisted in the United States Navy for loss

of time because of injury negligently inflicted upon him by a third person should not be deducted from the total amount awarded him as damages for the injury, although he continued for a time to draw his pay from the government and received an allowance for vocational rehabilitation under the Federal statutes.

[See note on this question beginning on page 678.]

Automobile — duty to keep lookout.

2. An automobilist must keep a reasonably careful lookout so that he may be able to avoid collision with persons upon the highway.

[See 2 R. C. L. 1184; 2 R. C. L. Supp. 722.]

Trial — jury — negligence in hitting one alighting from vehicle.

3. The jury must determine the question of the negligence of an automobilist who in daylight, with the machine under full control, hits one attempting to alight from a standing vehicle which the automobile passes without sounding a warning.

— negligence in operating automobile.

4. Questions of negligence arising out of automobile accidents are peculiarly for the jury, and will not be decided as matter of law except under the clearest circumstances.

[See 2 R. C. L. Supp. 725.]

Highway — negligence in alighting from standing vehicle.

5. One cannot be said to be negligent as matter of law in alighting backwards from a vehicle standing in a street with ample passing room and little traffic, without looking to the rear to ascertain whether or not other vehicles are approaching.

Trial — jury — negligence in alighting from vehicle.

6. The jury must determine whether or not one is negligent in alighting backwards from a vehicle standing in a highway with ample passing space and little traffic, without looking to the rear to see if other vehicles are approaching, where he is hit by a passing automobile before both feet reached the ground.

[See 13 R. C. L. 297.]

CROSS APPEALS from a judgment of the Circuit Court for Douglas County (Foley, J.) in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence, defendants appealing from the judgment in favor of plaintiff, and plaintiff appealing from so much of the judgment as denied recovery of the amount found as damages for loss of earnings. *Modified and affirmed.*

Statement by Doerfler, J.:

Ogden avenue is a paved street in the city of Superior, extending north and south, and at the point of the accident is 40 feet wide from curb to curb, and it is intersected by Belknap street at right angles, there being on said last-named street a line of street cars.

The plaintiff at the time of the trial, in September, 1920, was twenty-two years of age, and had been a railroad car seat upholsterer from the time he was seventeen years of age until he arrived at the age of twenty years, when he enlisted in the United States Navy, in the month of April, 1917. On July 19, 1919, while on a furlough, he came

to Superior and aided in assisting a drayman by the name of Young in the moving of his mother's furniture from her former home in the city of Superior to the freight depot. Immediately prior to the happening of the injury, the dray on which the plaintiff and the driver, Young, were seated, was returning from the freight yards empty, the dray being driven south on the west side of Ogden avenue, the horse going at a slow trot or walking, up to the point where it stopped, about 10 feet north of the north crossing at the intersection of Belknap street, in order to permit the plaintiff to alight from the wagon. The dray box had sides to it, about 2 feet high,

(— Wts. —, 184 N. W. 787.)

and the seat was elevated about 5½ feet from the street. The driver sat on the right-hand side of the seat, while the plaintiff sat on the left-hand side.

There is very little dispute in the evidence as to the actual facts in the case. The defendant Hayes, who was the president of the defendant company, immediately preceding the accident, was driving a single-seated six-cylinder Saxon car, used in the business of the defendant Superior Iron Works Company, south on Ogden avenue, from the Y. M. C. A. building, and when he caught up with the dray, which had stopped, as stated, within a distance of about 10 feet from the north crossing of Ogden avenue and Belknap street, turned to the left in order to pass the dray, and thereafter proceeded on his course. Immediately after the dray had been stopped, the plaintiff started to alight therefrom, and in doing so faced the west, and stepped down backwards, first stepping on the tongue of the wagon with one foot, then with the other foot on the hub, and then down onto the pavement. He still clung with his hands to the dray at the time of the accident, and it appears from the evidence that he had alighted on the pavement with only one foot, such foot being a distance of about a foot east of the wagon wheel, the other foot being still on the hub of wheel. While the plaintiff was so alighting, the defendant Hayes was passing around the dray towards the east, and in proceeding along the highway came so close to the dray that his automobile struck the plaintiff, causing him to be thrown upon the pavement, and to sustain the injuries complained of.

It also appears quite conclusively that immediately prior to the happening of the accident the automobile was driven at a rate of speed between 7 and 8 miles an hour, and that no horn or signal was blown or sounded to attract the attention of the plaintiff, or to warn him of the approach of the machine.

The testimony also shows that the

plaintiff, prior to the time he attempted to alight from the dray, did not look towards the north in order to discover the approach of an automobile.

After the collision, the automobile of the defendant Hayes swerved off to the left, across Ogden avenue, and stopped close to the east curb. There were no automobiles, excepting the one in question, going along either side of Belknap street, and the evidence shows that there was little traffic at the time in question on either of the streets.

The case was submitted to the jury on a special verdict, and the jury found in its answer to question No. 2 that the defendant Hayes failed to exercise ordinary care in the operation of the automobile as it approached and collided with the plaintiff; and, in answer to question No. 3 found that such failure to exercise ordinary care was the proximate cause of plaintiff's injury, and also found that no want of ordinary care on the part of the plaintiff proximately contributed to produce the injury.

The defendants contend: First, that there was no evidence in the case under which they could be found guilty of negligence; and, second, that the evidence in the case conclusively shows that the plaintiff, at the time of the happening of the accident, was guilty of contributory negligence, and that, therefore, defendants' motion for nonsuit or for a direction of a verdict should have been granted, and that after verdict the answer to the question in which it was found that the defendant Hayes was guilty of negligence should have been set aside, and that such answer should have been changed from "Yes" to "No," and that the answer by which the plaintiff was held to be free from contributory negligence should have been changed from "No" to "Yes;" and that judgment should have been entered in favor of the defendants and against the plaintiff, dismissing plaintiff's complaint, etc.

Messrs. Pickering & Rieser, for appellants:

Defendant was not guilty of negligence.

Feyerer v. Durbrow, 172 Wis. 71, 178 N. W. 306; Becker v. West Side Dye Works, 172 Wis. 1, 177 N. W. 907; Sheldon v. James, 175 Cal. 474, 2 A.L.R. 1493, 166 Pac. 8, 15 N. C. C. A. 880; Depons v. Ariss, 182 Cal. 485, 188 Pac. 797.

Even where one party violates the law of the road, the injured party is not absolved from the duty to exercise ordinary care.

Becker v. West Side Dye Works, 172 Wis. 1, 177 N. W. 907; Zimmerman v. Mednikoff, 165 Wis. 333, 162 N. W. 349; Lloyd v. Pugh, 158 Wis. 441, 149 N. W. 150; Goldberg v. Berkowitz, — Wis. —, 181 N. W. 216; Weber v. Swallow, 136 Wis. 46, 116 N. W. 844; Larner v. New York Transp. Co. 149 App. Div. 193, 133 N. Y. Supp. 743.

One who steps into a known zone of danger without looking is guilty of contributory negligence as a matter of law.

Moss v. Boynton Co. — Cal. App. —, 186 Pac. 631; Livingstone v. Dole, 184 Iowa, 1340, 167 N. W. 639; Hill v. Lappley, 199 Mich. 369, 165 N. W. 657; Mills v. Powers, 216 Mass. 36, 102 N. E. 912; Fulton v. Mohr, 200 Mich. 538, 166 N. W. 851; Gleason v. Smith, 180 Mass. 6, 55 L.R.A. 622, 91 Am. St. Rep. 261, 61 N. E. 220, 10 Am. Neg. Rep. 599; Young v. Small, 188 Mass. 4, 108 Am. St. Rep. 457, 73 N. E. 1019; Fuller v. Dederick, 35 App. Div. 93, 54 N. Y. Supp. 593; Lieberman v. Stanley, 88 N. Y. Supp. 360; Harder v. Mathews, 67 Wash. 487, 121 Pac. 983.

It was improper to admit evidence of plaintiff's former earnings, or earnings in some other occupation, because, by all the evidence submitted, the period of his disability would not have extended beyond the period for which he enlisted, and which he was bound to serve by a more binding and exacting obligation than an ordinary contract.

Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. 837; West Chicago Street R. Co. v. Maday, 188 Ill. 308, 58 N. E. 933; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 880; Bonnet v. Galveston, H. & S. A. R. Co. 89 Tex. 72, 33 S. W. 384;

Legendre v. Consumers' Seltzer & Mineral Water Mfg. Co. 147 La. 120, 84 So. 517.

Where wages have been paid as before the injury during the period of disability, the plaintiff cannot recover for loss of time, because he has suffered no loss.

17 C. J. 782; Travis v. Louisville & N. R. Co. 183 Ala. 415, 62 So. 851; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 So. 363; Chielinsky v. Hoopes & T. Co. 1 Marv. (Del.) 273, 40 Atl. 1127; Drinkwater v. Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624; Quigley v. Pennsylvania R. Co. 210 Pa. 162, 59 Atl. 958; Goodhart v. Pennsylvania R. Co. 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191.

Messrs. Dietrich & Dietrich, for respondent:

The finding of negligence on the part of defendants is supported by the evidence.

Lipsky v. C. Reiss Coal Co. 136 Wis. 307, 117 N. W. 803.

Plaintiff was not guilty of contributory negligence as a matter of law.

Deitchler v. Ball, 99 Wash. 483, 170 Pac. 123; Undhejem v. Hastings, 38 Minn. 485, 38 N. W. 488; Kathmeyer v. Mehl, — N. J. L. —, 60 Atl. 40, 17 Am. Neg. Rep. 688; Zimmerman v. Mednikoff, 165 Wis. 333, 162 N. W. 349.

Defendants cannot escape payment of loss of earnings by plaintiff from March 8, 1920, to March 8, 1921, by showing that plaintiff's government vocational allowance during same period, plus apprentice wage, equaled such loss.

Nashville, C. & St. L. R. Co. v. Miller, 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 Ann. Cas. 210; Western & A. R. Co. v. Sellers, 15 Ga. App. 369, 83 S. E. 445; St. Louis & S. F. R. Co. v. Clifford, — Tex. Civ. App. —, 148 S. W. 1163; Pittsburgh, C. C. & St. L. R. Co. v. Bir, 56 Ind. App. 598, 105 N. E. 921, 7 N. C. C. A. 114; Williams v. St. Louis & S. F. R. Co. 123 Mo. 573, 27 S. W. 387; Gulf, W. T. & P. R. Co. v. Wittnebert, — Tex. Civ. App. —, 104 S. W. 424; Houston Belt & T. R. Co. v. Johansen, — Tex. Civ. App. —, 143 S. W. 1186, affirmed in 107 Tex. 836, 179 S. W. 853, 13 N. C. C. A. 829; International & G. N. R. Co. v. Haddox, 36 Tex. Civ. App. 387, 81 S. W. 1036.

Doerfler, J., delivered the opinion of the court:

Did the evidence warrant submission of the question involving defendants' negligence to the jury? The accident happened at about noontime, on a clear day in the month of July. The defendant Hayes, with his automobile, was coming along the west side of Ogden avenue, and from the time that he approached the dray, up to the time of the happening of the accident, the dray and the occupants thereof were fully within his view. The machine was driven at a rate of speed of between 7 and 8 miles per hour, and, assuming that the appliances on the machine were in proper order, the machine was at all times within the easy control of the driver, so that he could readily pursue any course, by either swerving his machine to the left a sufficient distance away from the dray or by stopping it, and thus avoid the accident. It is the duty of a driver of a machine to keep a reasonably careful lookout so that he may be able to avoid a collision, and whether a driver has fulfilled his duty in regard to watching for pedestrians and other persons is generally a question for the jury. Huddy, *Automobiles*, § 332.

Automobile—
duty to keep
lookout.

Section 1636-52 of the Statutes, among other things, provides: "Every automobile . . . while being used upon any public highway of this state, shall be provided with efficient brakes and an adequate bell, horn or other signal device."

The legislature evidently realized the necessity for enacting a provision requiring the presence of a suitable horn or signal device upon every automobile propelled along the streets in this state, and the only object and purpose which that body could have had in mind in the enactment of such a precaution was to enable the driver of a machine to give a proper warning of his approach under any circumstances where such warning would be liable to prevent an accident.

It is true that this court has held that there is no rule of law which requires an automobilist to sound his horn in approaching a street intersection. However, that was not intended to convey the idea that the horn or signal device was a useless appliance, but that a warning or signal by use of such horn or device would be necessary in the exercise of reasonable care, wherever there was anticipated danger which could be averted by the giving of a proper, timely signal.

Therefore, the matter of the negligence of the defendant presented a proper question for the jury, both upon the theory that the defendant Hayes did not keep a proper lookout, and that he

Trial—negli-
gence in operat-
ing automobile.

did not seasonably, by means of his automobile horn, sound a warning of danger. Furthermore, while going at the rate of 7 or 8 miles an hour, and under circumstances from which it must be assumed that he had full control of his machine, it is very questionable indeed whether he could not be deemed guilty of negligence, under the circumstances, in driving his machine so close to the dray while passing it, as to leave a space of but 1 foot between his machine and the wheels of the dray. As stated, there was no other vehicle or pedestrian on Ogden avenue; the street was 40 feet wide; the dray stood between 1 and 3 feet from the west curb of Ogden avenue, and there was ample space, even on the west side of the street, for the defendant Hayes to pass the dray, without in any way endangering the plaintiff under the circumstances detailed herein. This, also, was a proper matter to submit to the jury, under all the facts and circumstances in the case, in order to determine the question of negligence. The question of the negligence of the defendant Hayes, if any, was therefore properly submitted to the jury.

Questions of negligence arising

out of automobile accidents are peculiarly for the jury, and will not be decided as a matter of law, except

—Jury—negligence in hitting one alighting from vehicle.

under the clearest circumstances. *Groeschner v. John Gund Brewing Co.* 173 Wis. 366, 181 N. W. 212.

What was said in the case of *Shortle v. Sheill*, 172 Wis. 53, 178 N. W. 304, is strictly applicable to the instant case: "There is no yardstick by which it may be determined whether any given action amounts to ordinary care. The decision must, of necessity, be a matter of human judgment. This is signally true in automobile accident cases. Whether the conduct of one charged with responsibility for an automobile accident amounts to negligence is, in the vast majority of cases, a question calling for the exercise of human judgment, and one upon which men are very likely to differ. In these days, when automobiles are in well-nigh universal use, who is better qualified to pass final judgment upon such matter than a jury, who can apply to the facts of the case a collective and varied experience? The daring, the reckless, the moderate, the careful, and the timid driver, as well as the pedestrian and he who still clings to 'old Dobbin,' all find their way to the jury box, and the decision of the jury upon these questions reflects a judgment founded upon varied views, sympathies, and experiences, which a court can disregard only when palpably unsupported by evidence or inconsistent with law."

We come now to the question submitted to the jury in the special verdict, involving the contributory negligence of the plaintiff. In this connection it must be borne in mind that the plaintiff did not look towards the north before climbing down from the wagon, and that he proceeded to climb down backwards in the manner heretofore stated. To hold that the plaintiff would be guilty of contributory negligence as a matter of law, under the facts and

circumstances detailed in the evidence, would appear to establish a very harsh rule indeed.

Highway—negligence in alighting from standing vehicle.

In determining the question of negligence, the traffic on the street must be taken into consideration, the width of the street, and all the surrounding facts and circumstances. It is true, had the plaintiff, after alighting, with one foot on the pavement, proceeded, without looking, to cross the highway, and then had been struck, it would be quite clear that under the decisions there would be little difficulty in finding that he was guilty of contributory negligence, as a matter of law. However, in the instant case, he had only partially alighted from the vehicle. There is sufficient evidence to warrant the conclusion that the foot which had settled on the pavement was not to exceed 1 foot distant from the dray. The injury would have resulted even though it had been the intention of the plaintiff to pass forward towards the south around the wagon, and to gain access to the west sidewalk in that manner; or it would have happened if he had merely stepped down from the dray and had stood within 1 foot of the dray, intending to discuss some matter with the driver; or if he had alighted from the dray for the purpose of either examining some portion of the dray on the traffic side, or of attending to some slight repair upon the wagon. It would seem that whether or not the plaintiff was guilty of contributory negligence in doing what he did at the time of the happening of the collision presented a situation which, like the negligence of the defendant Hayes, constituted a proper jury question. At least, it has been so held by courts of last resort of eminent respectability. *Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123; *Undhejem v. Hastings*, 38 Minn. 485, 38 N. W. 488; *Kathmeyer v. Mehl*, — N. J. L. —, 60 Atl. 40, 17 Am. Neg. Rep. 688.

While other courts of eminent standing have held to the contrary doctrine in cases somewhat similar to the instant case, the very fact that there should be a dispute among learned judges upon the question involved in this case on contributory negligence would make it appear clear that, under the rulings of this court, the matter of contributory negligence is a proper subject to be submitted to and decided by a jury; and what has been quoted and said in the case of *Shortle v. Sheill*, *supra*, is equally applicable to the question of the plaintiff's contributory negligence, as it is with respect to the negligence of the defendant Hayes. We have arrived at this conclusion not without considerable difficulty, but after mature consideration. In view of our former holdings and what has been heretofore said and referred to, we hold that the contributory negligence of the plaintiff is a proper matter to be submitted to the jury.

Trial-jury—
negligence in
alighting from
vehicle.

In answer to the fifth question of the special verdict, namely, "What sum will fairly compensate plaintiff for the damages he has sustained?" the jury answered, "\$3,250." The jury further answered that, of said amount, the sum of \$1,500 is allowed as damages for loss of earnings since March 8, 1920, and judgment was rendered in favor of the plaintiff and against the defendants for the sum of \$1,725 and costs, etc. The plaintiff in his cross appeal contends that it was error for the trial court to deduct the sum of \$1,500 from the total amount of the damages, namely, \$3,250, and to render judgment as aforesaid.

The plaintiff's injury consisted of a simple fracture of the tibia of the right limb, about an inch below the knee joint. Dr. Ground testified that the bone at the point of the injury, in hardening, ossifies separately from the shaft and the part which involves the new joint. The injury twisted and bent the bone at the

joint, and the ligaments lifted the epiphylum cap off the shaft of the bone. That is what is called an epiphysial fracture. It is a weak point naturally, and the two pieces of the bone do not become ossified or thoroughly fastened together until the person becomes twenty-four or twenty-five years of age, and then they become very firm; and the injury was such as to bend the bone and lift the shaft right off of the tibia. The doctor treated the plaintiff about two months in St. Mary's Hospital, at Superior, and thereafter, when the plaintiff went to St. Paul, he still had some retentive dressing on his limb. The injury will naturally constitute a weak place for a few years. The fact that the bone has been immobilized for so long a time makes the joint stiff, and the tissues around the joint have become thickened, and that thickening has to be absorbed before the joint can be used normally, and that always takes a considerable time. The doctor further testified that he would expect it to take a year, or possibly a year and a half, before conditions would become reasonably normal.

The plaintiff testified that since his injury he was able to work, with great difficulty, inconvenience, and pain, at his regular employment, for a period of about one week, for which he earned the sum of \$34, but that the condition of his limb was such as to prevent him from continuing in his employment, and that such disability continued up to the time of the trial.

In December, 1918, the plaintiff filed his application for a discharge from the Navy, and his four-year term was changed automatically to one which continued during the duration of the war. He received his discharge from the Navy on October 29, 1919. From the time of the happening of the injury, up to the time of his discharge from the Navy, the plaintiff received his usual compensation from the government, amounting to \$45 a month.

The plaintiff thereafter presented

an application for vocational training, under an act of Congress (Comp. Stat. §§ 3078½a-3078½gg, 3078½h, 3078½i, Fed. Stat. Anno. Supp. 1918, pp. 875-879), and for a period of one year thereafter, under the provisions of said act, he was afforded an opportunity to improve himself in the business of general upholsterer, so as to enable him to pursue a gainful occupation. The work required under the Vocational Rehabilitation Act was not so strenuous, nor did it require the person to kneel or to stand to any considerable degree while so employed. Under this Vocational Rehabilitation Act, the plaintiff received from March 8, 1920, the sum of \$120 per month, and for a portion of the time his employer paid him the sum of \$6 per week, which was subsequently raised to \$10 per week.

The lower court instructed the jury that, inasmuch as the government paid plaintiff's salary of \$45 a month to him until the time of his discharge on October 29, 1919, nothing was to be allowed to him prior to said date for loss of earnings. The jury was further instructed that in arriving at plaintiff's loss of earnings they were to leave out of consideration the \$120 per month which the plaintiff received from the government under the Vocational Rehabilitation Act, and find his loss of earnings, if any, just the same as if he did not receive any money from the government.

Plaintiff testified that since his injury and up to the time of the trial he would have been able to earn 72½ cents per hour in his former occupation, had he been able to resume it, and that, since plaintiff was injured, the compensation for railway car upholsterers has materially increased.

The jury was instructed also by the lower court to answer separately the amount awarded to the plaintiff for damages since March 8, 1920, and the jury fixed said sum at \$1,500, and this amount was subsequently, in the judgment, deducted from the total amount of the plaintiff's damages, as aforesaid.

The plaintiff in his cross appeal now raises the question that in making such deduction the court committed error, and that the total damages should be, by the judgment, fixed at \$3,250, instead of \$1,725.

The Vocational Rehabilitation Act, which was enacted on June 27, 1918, and which is known as §§ 10,349,-10,359 of the Federal statutes, and as set forth in Barnes's Federal Code of 1919, among other things, provides as follows:

Sec. 10,350. "Every person who is disabled under circumstances entitling him, after discharge from the military or naval forces of the United States, for compensation under article 3 of the act entitled 'An Act to Amend an Act Entitled "An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department,"' approved October sixth, nineteen hundred and seventeen, hereinafter referred to as 'said act,' and who, after his discharge, in the opinion of the board, is unable to carry on a gainful occupation, . . . shall be furnished by the said board, where vocational rehabilitation is feasible, such course of vocational rehabilitation as the board shall prescribe and provide.

"The board shall have power, and it shall be its duty, to furnish the persons included in this section suitable courses of vocational rehabilitation to be prescribed and provided by the board, and every person electing to follow such a course of vocational rehabilitation shall, while following the same, receive monthly compensation equal to the amount of his monthly pay for the last month of his active service, or equal to the amount to which he would be entitled under article 3 of said act, whichever amount is the greater. If such person was an enlisted man at the time of his discharge, for the period during which he is so afforded a course of rehabilitation, his family shall receive compulsory allotment and family allowance according to the terms of article 2 of said act in the same manner as if he were an enlisted man, and for

the purpose of computing and paying compulsory allotment and family allowance his compensation shall be treated as his monthly pay: Provided, that if such person wilfully fails or refuses to follow the prescribed course of vocational rehabilitation which he has elected to follow, in a manner satisfactory to the board, the said board in its discretion may certify to that effect to the bureau and the said bureau shall, during such period of failure or refusal, withhold any part or all of the monthly compensation due such person and not subject to compulsory allotment which the said board may have determined should be withheld.

"No compensation under article 3 of said act shall be paid for the period during which any such person is furnished by said board a course of vocational rehabilitation except as is hereinbefore provided." Comp. Stat. § 3078½b, Fed. Stat. Anno. Supp. 1918, p. 876.

Article 3 (Comp. Stat. §§ 514qqq-514tttt, 9 Fed. Stat. Anno. 2d ed. pp. 1317-1324), above referred to, provides for compensation to be paid on account of the death of one serving in the Army or the Navy, or for partial or total or temporary or permanent disability.

Article 2 of the Act entitled "War Risk Insurance" (Comp. Stat. §§ 514nnnn-514qqq½, 9 Fed. Stat. Anno. 2d ed. pp. 1312-1316, provides for compulsory and voluntary allotments for the benefit of the wives and families, which allotments are deducted and paid directly by the government to the dependents.

Section 10,304 of the Federal statutes pertaining to war risk insurance provides as follows: "(1) Assignment to United States or Prosecution of Right of Action for Death or Injury; Credit of Recovery on Compensation; Mortality Table Applicable.—If an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a

condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made." Comp. Stat. § 514tttt, 9 Fed. Stat. Anno. 2d ed. p. 1323.

In the next paragraph this section provides that if a recovery has been had as the result of the suit brought or of a settlement, the amount so obtained shall be credited upon any compensation payable, or which may become payable, to such beneficiary. Said section further provides: "(2) If an injury or death for which compensation may be payable under this article is caused under circumstances creating a legal liability upon some person, other than the United States or the enemy, to pay damages therefor, then, in order to preserve the right of action, the director may require the conditional beneficiary at any time after the injury or death, to assign such right of action to the United

States, or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury or death."

On June 5, 1920 (Barnes's Fed. Code Supp. 1921) § 10,356a was enacted by Congress, which, among other things, provides as follows: "That the board may, after June 30, 1920, pay, subject to the conditions and limitations prescribed by § 2 of the Vocational Rehabilitation Act as amended, to all trainees undergoing training under said section residing where maintenance and support is above the average and comparatively high, in lieu of the monthly payments for maintenance and support prescribed by § 2, as amended, such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons dependent upon him, if any: Provided, however, That in no event shall the sum so paid such person while pursuing such course be more than \$100 per month for a single man without dependents, or for a man with dependents \$120 per month, plus the several sums prescribed as family allowances under § 204 of article 2 of the War Risk Insurance Act."

The Federal statutes above quoted and referred to make it clear that Congress first intended to provide

for those engaged in the military and naval service, and who had sustained injury, compensation for disability, which compensation matured after the discharge of the soldier or sailor, and which compensation was subject to compulsory allotment for the benefit of dependents, in the same manner as the compensation received in the form of monthly pay was subject to while such soldier or sailor was in service.

Article 3, above referred to, is a separate and independent article, and has no connection with article 4 (Comp. Stat. §§ 514u-514bbb, 9 Fed. Stat. Anno. 2d ed. pp. 1325-1328), which provides for soldiers' and sailors' insurance. It is very clear that Congress had in mind, at the time of the enactment of the foregoing statutes, not only to relieve in a measure those who had served the government during the period of the war, but also to afford them some compensation by way of appreciation and gratitude of the great sacrifices made. And it cannot logically be maintained that these enactments were brought about, or had in view any thought of relieving those who were guilty of wrongdoing towards anyone engaged in the military or naval service of the United States.

The plaintiff, after his discharge, from March 8, 1920, took advantage of the statutes pertaining to vocational rehabilitation, and received the maximum provided for under said statute, and, in addition thereto, received from his direct employer, up to the month of July, 1920, the sum of \$6 per week by way of additional compensation, and thereafter the sum of \$10 per week.

Section 10,350, referred to above, provides that no compensation under article 3 of said act shall be paid for the period during which any such person is furnished by said board a course of vocational rehabilitation, showing that the amount allowed by way of compensation during the vocational rehabilitation period is substituted for the amount of the compensation provided for in

(— Wis. —, 184 N. W. 767.)

article 3; and said last-named section also provides that, in order to enable one to take advantage of the Vocational Rehabilitation Act, he must have been disabled under circumstances entitling him, after discharge from the military or naval forces, to compensation under said article 3. So that the Vocational Rehabilitation Statutes really act for the time being as a substitute for and a supplement to the provisions of said article 3, and under said article 3 all causes of action and all amounts recovered belong to the United States, and must be ultimately credited to the military and naval compensation appropriations; so that, in any event, it appears that whatever is ultimately realized out of this suit goes to the credit of the United States, and does not constitute or give to the plaintiff double compensation for the damages sustained for loss of time.

It has been held by this court in *Gatzweiler v. Milwaukee Electric R. & Light Co.* 186 Wis. 34, 18 L.R.A. (N.S.) 211, 128 Am. St. Rep. 1057, 116 N. W. 633, 16 Ann. Cas. 633, that the amount received by an injured party under an accident policy for which he has paid the premiums cannot be considered by way of partial or total satisfaction of damages claimed by such injured person from a tort-feasor.

In *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304, which was an action for an injury caused by a defect in a highway, defendant claimed to have the amount received by plaintiff on an accident insurance policy deducted from the recovery, but the court said: "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tort-feasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the de-

fendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff, and at his expense, and to the procurement of which the defendant was in no way contributory."

In answer to the objection that plaintiff was not entitled to more than one recovery, the court said: "Defendant was not in a position to raise that question, since it was primarily liable for the injury."

See also *Regan v. New York & N. E. R. Co.* 60 Conn. 134, 25 Am. St. Rep. 306, 22 Atl. 503; *Missouri, K. & T. R. Co. v. Rains*, — Tex. Civ. App. —, 40 S. W. 635; *Louisville & N. R. Co. v. Carothers*, 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385; *Pittsburgh, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138.

It also seems to be the prevailing doctrine in this country that, where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury. *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 573, 27 S. W. 387; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317; *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299; *Missouri P. R. Co. v. Jarrard*, 65 Tex. 560. New York and Alabama courts seem to hold the contrary view.

From the foregoing statutes we hold that the lower court, in reducing the amount of the plaintiff's damages for loss of earnings since March 8, 1920, in the sum of \$1,500, committed error, and that the judgment should be for the full amount of the damages as found by the jury, namely, \$3,250.

The judgment of the lower court is, therefore, modified accordingly, and, as so modified, affirmed.

It is so ordered.

Damages—personal injury—deduction of allowance for lost time because of award from government.

ANNOTATION.

Compensation from other source as precluding or reducing recovery against one responsible for personal injury or death.

I. Scope, 678.

II. Recovery for personal injury:

a. Receipt of salary or wages:

1. View that amount of recovery is not affected, 678.
2. View that recovery for loss of time is barred, 680.
3. View that recovery for loss of time depends on whether payment is gratuitous, 681.

b. Receipt of money on insurance policy, 683.

c. Receipt of charitable fund, 686.

III. Recovery for death by wrongful act:

a. Receipt of money on insurance policy, 686.

b. Receipt of pension, 689.

I. Scope.

With the exceptions hereinafter noted, there are reviewed in this annotation the cases wherein the courts have considered to what extent, if any, compensation from other sources affects a recovery against a defendant who is responsible for a personal injury or death. Cases governed by workmen's compensation statutes are not considered, nor are cases discussing the effect of compensation from a joint tort-feasor, or from a benevolent association to the support of which the defendant has contributed. Likewise, cases involving the effect of gratuitous medical, nursing, or similar services are excluded.

II. Recovery for personal injury.

a. Receipt of salary or wages.

1. View that amount of recovery is not affected.

Although the courts of different jurisdictions are not in entire agreement on the question, the amount of a recovery from a third person who is responsible for a personal injury is, in most jurisdictions, held not to be affected by the receipt by the plaintiff, from his employer, of wages or salary for the period during which he has suffered from the injury. Nash-

ville, C. & St. L. R. Co. v. Miller (1904) 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 Ann. Cas. 210; Western & A. R. Co. v. Sellers (1914) 15 Ga. App. 369, 83 S. E. 445; Ohio & M. R. Co. v. Dickerson (1877) 59 Ind. 317; Pittsburgh, C. C. & St. L. R. Co. v. Bir (1914) 56 Ind. App. 598, 105 N. E. 921, 7 N. C. C. A. 114; Illinois C. R. Co. v. Porter (1906) 117 Tenn. 13, 94 S. W. 666, 10 Ann. Cas. 789; Missouri P. R. Co. v. Jarrard (1886) 65 Tex. 560; Houston Belt & Terminal R. Co. v. Johansen (1915) 107 Tex. 336, 179 S. W. 853, 13 N. C. C. A. 829; International & G. N. R. Co. v. Haddox (1904) 36 Tex. Civ. App. 385, 81 S. W. 1036; Gulf, W. T. & P. R. Co. v. Wittnebert (1907) — Tex. Civ. App. —, 104 S. W. 424, reversed on other grounds in (1908) 101 Tex. 368, 14 L.R.A.(N.S.) 1227, 130 Am. St. Rep. 858, 108 S. W. 150, 16 Ann. Cas. 1153; St. Louis & S. F. R. Co. v. Clifford (1912) — Tex. Civ. App. —, 148 S. W. 1163. See also the reported case (CUNNIEN v. SUPERIOR IRON WORKS Co. ante, 667).

In Ohio & M. R. Co. v. Dickerson (1877) 59 Ind. 317, the court said: "It is insisted that the damages are excessive; and the principal argument in support of this alleged error is that the salary of the appellee, as the agent of a sewing-machine company, went on during the time he was disabled by the alleged injury, without abatement. This forms no ground for the reduction of the damages. In such cases, damages are assessed according to uniform principles, and are not to be affected by the mere accidental business relations of the party injured. The liberality of his employer forms no reason why the appellee should not be compensated for the injury he sustained." That case was cited and followed in Pittsburgh, C. C. & St. L. R. Co. v. Bir (1914) 56 Ind. App. 598, 105 N. E. 921, 7 N. C. C. A. 114.

In Texas it has been held that a tort-feasor who has caused an injury

to an employee of another person is not entitled to a reduction of damages because of the payment of salary or wages during the period of disability, whether the payment was in discharge of a legal obligation, or was a mere gratuity. *Missouri P. R. Co. v. Jarrard* (1886) 65 Tex. 560, wherein the court said: "The defendant in error testified that the injury he sustained caused him to lose a few days' time in Cincinnati, but that his employers made no deduction on this account from his wages. He lost time as a result of the injury, and was entitled to be compensated for this loss. If the continuance of his wages was a provision of his contract, or a grace of his employers, the defendant was not entitled to the benefit of either. The time was lost by him, and what it was worth, he was properly authorized to recover."

In *Houston Belt & Terminal R. Co. v. Johansen* (1915) 107 Tex. 336, 179 S. W. 853, 13 N. C. C. A. 829, the court said: "If, on account of his injury, any time was actually lost by Johansen during this period, a finding favorable to him upon the other issues submitted in the charge would have entitled him to damages in the amount of its reasonable value; and if during such period he was paid by the city, as a gratuity or bounty, the same or a greater salary than he was receiving when injured, the railway company was not entitled to the benefit of such payment. *Missouri P. R. Co. v. Jarrard* (1886) 65 Tex. 560. There was a conflict in the evidence as to whether the amount paid by the city in that interval was a gratuity; and there was evidence that he actually suffered the loss of such time. This fully warranted the submission of the issue of lost time as a part of the recoverable damages."

In *Nashville, C. & St. L. R. Co. v. Miller* (1904) 120 Ga. 453, 67 L.R.A. 87, 47 S. E. 959, 1 Ann. Cas. 210, it was held that the payment to a government postal clerk of his salary during the time that he was disabled did not preclude a recovery for loss of time from the defendant who caused his injury. The court stated that

there was no evidence that the government was under a legal obligation to pay the clerk's salary while he was unable to perform his duties, and it declined to pass on the effect of such an obligation, had it existed. See to the same effect, *Western & A. R. Co. v. Sellers* (1914) 15 Ga. App. 369, 83 S. E. 445; *Illinois C. R. Co. v. Porter* (1906) 117 Tenn. 13, 94 S. W. 666, 10 Ann. Cas. 789. In *St. Louis & S. F. R. Co. v. Clifford* (1912) — Tex. Civ. App. —, 148 S. W. 1163, the court said: "Appellant by its third assignment of error complains of that portion of the court's charge wherein appellee is permitted to recover damages for loss of time. The proposition is asserted that the undisputed testimony shows that appellee received his salary from the government from the time of his injury to the time of his trial, and hence lost no time, and as a consequence cannot recover therefor. Loss of time, as the result of an injury, is a damage for which the injured person is entitled to be compensated, and if the injured person is a wage earner, and his wages continue during the time he is incapacitated, the defendant is not entitled to the benefit thereof. *Missouri P. R. Co. v. Jarrard* (1886) 65 Tex. 560; *International & G. N. R. Co. v. Haddox* (1904) 36 Tex. Civ. App. 387, 81 S. W. 1036. The supreme court of Georgia, in our opinion, correctly states the rule and the reason therefor in these words: 'The wrongdoer may show, in defense to a claim for lost time, that no time has been lost; and this, of course, is right and just, because, if no time has been lost, no compensation is due from anybody on account of lost time. But, if time has been lost as the result of a tort, sound sense, common justice, and, it may be, public policy, would demand that the tort-feasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong,—it may be a grievous and outrageous wrong,—but that some third person . . . not in sympathy with the wrongdoer . . . has, from some worthy motive, paid to the injured person an amount which, if it

had come from the wrongdoer, would have equaled the damages which would have been assessed against him.' Nashville, C. & St. L. R. Co. v. Miller (1904) 120 Ga. 456, 67 L.R.A. 87, 47 S. E. 960, 1 Ann. Cas. 210. While the authorities are not unanimous on this question, we are persuaded, not only that it is now the adopted rule in this state, but the fairest and safest."

In *International & G. N. R. Co. v. Haddox* (1904) 36 Tex. Civ. App. 385, 81 S. W. 1036, the court stated the material facts on the question herein considered, and its conclusion thereon, as follows: "The first proposition urged under this assignment is that the diminished capacity of the plaintiff to earn money was not a proper matter to be submitted, because it appears from the evidence that the plaintiff was a salaried officer of the city of Austin, and there had been no stoppage of his salary on account of his injury. In determining the amount of damages that the plaintiff was entitled to recover by reason of his diminished capacity to earn money, the appellant is not entitled to any credit in the amount of the salary received by the plaintiff during that time. The plaintiff was entitled to full compensation for the injuries sustained, notwithstanding he may have received an income in the nature of a salary during the time he was incapacitated from work. *Missouri P. R. Co. v. Jarrard* (1886) 65 Tex. 566."

In *Gulf, W. T. & P. R. Co. v. Wittnebert* (1907) — Tex. Civ. App. —, 104 S. W. 424, reversed on other grounds in (1908) 101 Tex. 368, 14 L.R.A. (N.S.) 1227, 130 Am. St. Rep. 858, 108 S. W. 150, 16 Ann. Cas. 1153, it was held that the refusal to give an instruction that nothing should be allowed to the plaintiff for lost time was not error, where it appeared that the plaintiff was an old and valued employee, and was paid his regular salary by his employer during the time he was unable to work on account of the injury sued for.

In the reported case (*CUNNIEN v. SUPERIOR IRON WORKS Co.* ante, 667) it is held that the amount of salary

paid to a soldier under the Vocational Rehabilitation Act is not to be considered, in computing the damages to which he is entitled for an injury inflicted on him by a person other than the United States or "the enemy." The decision is apparently governed by the Federal statute (9 Fed. Stat. Anno. 2d ed. p. 1323) which provides, as a condition for compensation by the Federal government to a soldier injured by a person other than the United States or the enemy, that the United States may require the soldier to assign to that government any right of action he may have against the person causing the injury, or may require the soldier to prosecute his cause of action in his own name within a reasonable time, and also provides that any money realized on a cause of action so assigned shall be paid to the beneficiary, and be credited on any future compensation which may become payable to such beneficiary by the United States on account of the injury. The statute clearly contemplates that compensation paid to an injured soldier by the United States is not to have the effect of barring or reducing the damages recoverable from the person who caused the injury. The court, however, in support of its decision, also refers to cases in which the receipt of money on accident insurance policies is held not to bar or reduce a recovery from the person causing the injury, and to cases discussing the effect of the payment of salary by an employer to an employee during the time the latter has suffered from an injury caused by a third person.

2. View that recovery for loss of time is barred.

In two jurisdictions, however, the payment of wages or salary by an employer to an employee, for the period during which he is suffering from an injury, is held to bar a recovery by the employee for loss of time from a third person responsible for his injury. *Montgomery & E. R. Co. v. Mallette* (1890) 92 Ala. 209, 9 So. 363; *Travis v. Louisville & N. R. Co.* (1913) 183 Ala. 415, 62 So. 851;

Drinkwater v. Dinsmore (1880) 80 N. Y. 390, 36 Am. Rep. 624, reversing (1878) 16 Hun, 250. Compare *Bachelder v. Morgan* (1912) 179 Ala. 339, 60 So. 815, Ann. Cas. 1916C, 888.

In *Drinkwater v. Dinsmore* (1880) 80 N. Y. 390, 36 Am. Rep. 624, reversing (1878) 16 Hun, 250, an action for a personal injury, the plaintiff was asked, on cross-examination, whether his wages were not paid by his employer during the time he was suffering from the injury. In holding that it was error to sustain an objection to the question, the court said: "Here the proof was offered, not in mitigation or satisfaction of any damages actually done the plaintiff, but to show that he did not suffer the damages claimed; to wit, the loss of wages. Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that he lost no wages, or that they were not as much as claimed. He had the right to show, if he could, that for some particular reason the plaintiff would not have earned any wages if he had not been injured, or that he was under such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damages."

In *Montgomery & E. R. Co. v. Mallette* (Ala.) *supra*, it appeared that for a month or two the plaintiff was prevented, by an injury, from performing the services incident to his position as general manager of a corporation. The evidence did not show, however, that his salary was not paid, or that it was diminished during that period. An instruction was held to be erroneous which assumed that he was personally damaged by this loss of time, and which authorized the jury to include in their verdict damages therefor.

Similarly, in *Travis v. Louisville*

& N. R. Co. (1913) 183 Ala. 415, 62 So. 851, an action to recover for sickness due to the serving of spoiled oysters, it was held to be proper to give an instruction that the plaintiff could not recover for loss of time, if he received his wages during the time that he was sick.

A donation, however, by an employer, to an injured employee whose salary had been suspended, has been held in Alabama not to lessen the amount of damages recoverable by the employee from a third person who was responsible for his injury. *Bachelder v. Morgan* (1912) 179 Ala. 339, 60 So. 815, Ann. Cas. 1916C, 888.

3. *View that recovery for loss of time depends on whether payment is gratuitous.*

In Missouri and Pennsylvania the courts appear to attach importance to whether the payment of a salary or wages by an employer to an employee, while the latter is suffering from an injury, is gratuitous or in discharge of a legal obligation. The rule enforced in those states, it seems, entitles an employee to recover compensation for loss of time from the third person who caused the injury, in case, and only in case, the payment of the wages or salary is gratuitous. *Moon v. St. Louis Transit Co.* (1912) 247 Mo. 227, 152 S. W. 303; *Quigley v. Pennsylvania R. Co.* (1904) 210 Pa. 162, 59 Atl. 958; *Rundle v. State Belt Electric Street R. Co.* (1907) 33 Pa. Super. Ct. 233. See also *Ephland v. Missouri P. R. Co.* (1894) 57 Mo. App. 147, 4 Am. Neg. Cas. 440. Compare *Williams v. St. Louis & S. F. R. Co.* (1894) 123 Mo. 573, 27 S. W. 387.

In *Moon v. St. Louis Transit Co.* (Mo.) *supra*, it appeared that the plaintiff, the president of a corporation, after sustaining an injury, was unable to attend to business duties daily, but did go to the office of the corporation once or twice each week and attended a few directors' meetings. His salary continued to be paid to him regularly, without any deduction. It was held that, in the absence of evidence showing that the plaintiff

did not perform the services incumbent on him as president, it was to be presumed that his salary was not illegally paid to him; that, therefore, the salary payments were not to be treated as gratuities, and that the plaintiff could not recover for loss of time from the person responsible for his injury. The court distinguished as follows cases in which salary payments, so-called, were really gratuities: "It is quite true appellant can have no greater right to a reduction of damages on account of a gratuity or gift to respondent from the J. W. Moon Buggy Company than from a stranger, and no more right to such reduction on account of a gift after injury, than one before injury. It may also be conceded that in case one is employed for wages, or in a subordinate capacity on a salary, and his right to the agreed compensation depends upon his rendition of specific services, and his failure to render such services ends his right to compensation, then, in case of his injury and consequent inability and failure to work, he has no legal claim to compensation, and if money is paid him it is, on its face, a mere gratuity, and falls within the rule. Before the rule as to gratuities can apply in a particular case, however, the evidence must show the payment was a gratuity. The burden is on respondent to show loss of time and its value. If the buggy company was not entitled to his whole time, the value, if any, of the excess, might be recovered; but there is no evidence in this record justifying a recovery on such theory. The only evidence in connection with loss of time relates to time lost from respondent's duties as president of the buggy company, and there having been no evidence he owed any duty he did not perform, and the respondent's own testimony showing he received during the whole time the amount agreed to be paid him as salary, and that he drew it, and the company paid it and charged it to him, as salary, the rule as to gratuities, on the record before us, has nothing to do with the case. There was no evidence justifying the instruction

authorizing recovery for loss of time. The authorities cited in the briefs of counsel, while in conflict in other respects, in so far as they are pertinent, accord with the conclusion reached. It was error, on this evidence, to permit the jury to consider loss of time as ground of recovery."

In *Ephland v. Missouri P. R. Co.* (1894) 57 Mo. App. 147, 4 Am. Neg. Cas. 440, it was held that a person who received from his employers his regular wages or salary, without deduction or diminution, during the time he suffered from an injury, was not entitled to recover from a third person who caused the injury, for loss of time, since under the facts of the case he was entitled to compensatory damages only, and, if the payment of his wages or salary was not suspended, there was no damage due to loss of time for which he could be compensated.

However, in *Williams v. St. Louis & S. F. R. Co.* (1894) 123 Mo. 573, 27 S. W. 387, the court took a different view, saying: "Most clearly it was no defense to this action to show that plaintiff's employer, the Adams Express Company, had continued his salary while he was disabled by an injury caused by defendant. There can be no abatement of damages on the ground of partial compensation, when it comes from a collateral source, independent of defendant."

In *Quigley v. Pennsylvania R. Co.* (1904) 210 Pa. 162, 59 Atl. 958, it was held that where the injured plaintiff, after the injury, performed services for his employer similar in character to, though perhaps less efficient than, those performed before the injury, the payment of his salary by his employer was not a gratuity, and he could not recover from a third person, who caused the injury, for loss of earning power during that time.

On the other hand, it has been held in Pennsylvania that where a payment of salary to an employee during a period of disability is a donation or gift, rather than a payment for services, the employee is entitled to recover for loss of time from a third

person who has caused his injury. *Rundle v. State Belt Electric Street R. Co.* (1907) 33 Pa. Super. Ct. 233.

b. Receipt of money on insurance policy.

There appears to be no dissent among the courts from the view that the receipt of money on an accident insurance policy, by one who has suffered a personal injury, does not preclude a recovery, or lessen the amount recoverable, from the person who is responsible for the injury.

United States. — *Dempsey v. Baltimore & O. R. Co.* (1915) 219 Fed. 619.

Illinois. — *Pittsburg, C. & St. L. R. Co. v. Thompson* (1870) 56 Ill. 138.

Kentucky. — *Louisville & N. R. Co. v. Carothers* (1901) 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385.

Massachusetts. — *Gray v. Boston Elevated R. Co.* (1913) 215 Mass. 143, 102 N. E. 71, 8 N. C. C. A. 602.

Minnesota. — *Evans v. Chicago, M. & St. P. R. Co.* (1916) 133 Minn. 293, 158 N. W. 335.

New Jersey. — *Cornish v. North Jersey Street R. Co.* (1906) 73 N. J. L. 273, 62 Atl. 1004.

New York. — *Chernick v. Independent American Ice Cream Co.* (1910) 66 Misc. 177, 121 N. Y. Supp. 352.

Texas. — *Missouri, K. & T. R. Co. v. Rains* (1897) — Tex. Civ. App. —, 40 S. W. 635; *Missouri, K. & T. R. Co. v. Flood* (1904) 35 Tex. Civ. App. 197, 79 S. W. 1106; *Texas C. R. Co. v. Cameron* (1912) — Tex. Civ. App. —, 149 S. W. 709.

Vermont. — *Harding v. Townshend* (1871) 43 Vt. 536, 5 Am. Rep. 304. Compare *Congdon v. Howe Scale Co.* (1894) 66 Vt. 255, 29 Atl. 253.

Wisconsin. — *Gatzweiler v. Milwaukee Electric R. & Light Co.* (1908) 136 Wis. 34, 18 L.R.A.(N.S.) 211, 128 Am. St. Rep. 1057, 116 N. W. 633, 16 Ann. Cas. 633.

England. — *Bradburn v. Great Western R. Co.* (1874) L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, 8 Eng. Rul. Cas. 439.

Canada. — *Misner v. Toronto & Y. Radial R. Co.* (1908) 11 Ont. Week. Rep. 1064.

In the opinion by Bramwell, B., in

Bradburn v. Great Western R. Co. (Eng.) supra, the material facts, and the conclusion of the court thereon, were stated as follows: "The jury have found that the plaintiff has sustained damages through the defendants' negligence to the amount of £217, but it is said that, because the plaintiff has received £31 from the office in which he insured himself against accidents, therefore, the damages do not amount to £217. One is dismayed at this proposition. In *Dalby v. India & L. Life Assur. Co.* (1854) 15 C. B. 365, 139 Eng. Reprint, 465, 3 C. L. R. 61, 24 L. J. C. P. N. S. 2, 18 Jur. 1024, 3 Week. Rep. 116, 13 Eng. Rul. Cas. 383, it was decided that one who pays premiums for the purpose of insuring himself pays on the footing that his right to be compensated, when the event insured against happens, is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shows that the plaintiff is entitled to retain the benefit which he has paid for, in addition to the damages which he recovers on account of the defendants' negligence."

In *Pittsburg, C. & St. L. R. Co. v. Thompson* (Ill.) supra, it was held to be proper to refuse an instruction that any sum paid to the injured plaintiff by an accident insurance company should be deducted from the amount of the plaintiff's damage.

With respect to an instruction that the net proceeds received by the plaintiff on an accident insurance policy should be deducted from the damages sustained by him on account of an injury for which the defendant was responsible, the court said, in *Harding v. Townshend* (1871) 43 Vt. 536, 5 Am. Rep. 304: "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tort-feasors or joint

debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties, or by contract, or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit."

In *Gatzweiler v. Milwaukee Electric R. & Light Co.* (1908) 136 Wis. 34, 18 L.R.A.(N.S.) 211, 128 Am. St. Rep. 1057, 116 N. W. 633, 16 Ann. Cas. 633, the defendant filed an answer, stating that the plaintiff held an accident insurance policy on which he had received \$2,500 on account of his injury. It was held that a demurrer to the answer was properly sustained. The defendant contended that the receipt of the money on the insurance policy operated as a pro tanto equitable assignment to the insurance company of the plaintiff's claim against the defendant, and that the insurance company was, therefore, a necessary party to the action. The court, however, refused to recognize the validity of the contention, and based its decision affirming the order of the trial judge on the ground that the accident insurance policy was an investment contract, not an indemnity contract. On this point, Marshall, J., said: "We are not inclined to adopt counsel's view, but rather to hold that such a policy is an investment contract, giving to the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy; that, if such a company desires protection

against loss caused by the wrongs of third persons who would ordinarily be liable, they must do so by the contracts they make; that, in the absence of a feature expressly making the policy of insurance an indemnity contract, it should not be regarded as such, but held to be an investment contract, in which the only parties concerned are the insurer and the assured, or the beneficiary. It follows that the order sustaining the demurrer must be affirmed."

In *Evans v. Chicago, M. & St. P. R. Co.* (1916) 133 Minn. 293, 158 N. W. 335, the court stated the material facts, and its conclusion on the question herein considered, as follows: "The plaintiff was a passenger on a night train of the defendant from Minneapolis to Owatonna. He claims that as he was on the platform passing from the smoker to another coach, just as the train was leaving Minnehaha Falls, he slipped and fell down the steps, and, in trying to save himself, was thrown under the coach. His hand was crushed. Afterwards it was amputated at the wrist. The evidence was such as to sustain a verdict in his favor. On the cross-examination of the plaintiff, the defendant was permitted to show, over his objection, that he had received \$5,000 on policies of accident insurance covering his injury. The purpose was to reduce or defeat his recovery, upon the theory that, the larger the amount he received from insurance, the less was the loss for which he could recover of the defendant. The receipt by one injured through the negligence of another, of the proceeds of accident policies, does not defeat or diminish his recovery of the tort-feasor."

In *Missouri, K. & T. R. Co. v. Rains* (1897) — Tex. Civ. App. —, 40 S. W. 635, the court said: "It appears from the facts that, as a result of his injuries, the plaintiff will receive on an accident policy the sum of \$430. It is contended by appellant that the court erred in refusing to instruct the jury to the effect that they could consider this sum in mitigation of the damages which the plaintiff may be entitled to. There was no error in

this ruling. The rule upon this subject, which is sustained by the weight of authority in this country and in England, is to the effect that a payment upon a policy of insurance can neither be considered as a defense, nor in mitigation of an action for damages against a wrongdoer."

In *Missouri, K. & T. R. Co. v. Flood* (1904) 35 Tex. Civ. App. 197, 79 S. W. 1106, it was said: "The fact that the appellee, at the time of the injury, held a policy of accident insurance which was then in full force, and which he has since collected, was not admissible in evidence, and the court did not err in so holding. This fact could not have the effect of reducing the compensation to which the appellee was entitled for his injury, if the same was the result of negligence on the part of appellant, and was not contributed to by his own negligence. Nor was the evidence admissible on the issue of contributory negligence of appellee. It was proven that the appellee had accident insurance, and the amount thereof, and appellant sought to prove that he had collected the same, the contention being that the same was admissible on the issue of contributory negligence. We fail to appreciate upon what theory the evidence was admissible as tending to prove contributory negligence on the part of appellee."

In *Texas C. R. Co. v. Cameron* (1912) — Tex. Civ. App. —, 149 S. W. 709, the court said: "There was no error in refusing to permit the defendant to prove by plaintiff on cross-examination that he held an accident insurance policy at the time of the injury complained of, and collected from that company a sum of money to compensate him for the time lost on account of the injury. It is well settled by the authorities in this state that a tortfeasor, through whose negligence an injury is sustained, cannot be accorded any benefits of such a policy, for which it has paid nothing, in mitigation of the damages allowed by law for tort."

Moreover, it has been held not to be error, in an action to recover for a negligent injury, to exclude testimony

that the plaintiff had made a claim against an insurance company for \$2,000 under an accident insurance policy, and had settled the claim for \$300. *Dempsey v. Baltimore & O. R. Co.* (1915) 219 Fed. 619, wherein it was said, in holding that it was a proper exercise of discretion to refuse to allow cross-examination as to the settlement: "The real question before the jury was the extent of plaintiff's injuries. Upon this the jury had direct evidence. The fact excluded could have borne upon it only inferentially and more or less remotely. If the case were to be retried, and the question required to be answered, and the answer elicited no fact which had a proper bearing upon the amount of damages or the integrity of the claim, but elicited only the fact that the plaintiff had received compensation for these injuries from the insurance company, the consequence of which was a verdict for the defendant or the assessment of inadequate damages in favor of the plaintiff, we would then feel constrained to direct a third trial of the case. Our conclusion, therefore, is that, in any view of the question, the discretion of the trial judge was properly exercised. Questions of discretion may well be subjected to the test of results. Tested by the result in this case, we would not feel justified in granting a new trial unless a legal right of the defendant had been denied to it. The case properly called for a verdict for plaintiff. The assessment of damages was not excessive. This brings us to the final question of whether there was appellate error in the ruling. We have considered with care the very able and forceful presentation of the views of counsel for the defendant, but remain unconvinced of error. We think the offer of evidence was properly overruled, because not shown to be relevant, and the restriction of cross-examination properly applied, for the same reason, and within the discretion of the trial judge."

On the other hand, in an action for personal injuries, it has been held not to be error to admit evidence of an accident insurance policy under which

the plaintiff was paid certain benefits, for the purpose of proving that the plaintiff's injuries were feigned. *Congdon v. Howe Scale Co.* (1894) 66 Vt. 255, 29 Atl. 253.

Payment made to an injured policeman out of a pension fund, into which each policeman pays a percentage of his monthly salary as a consideration for participation in its benefits, is, in its essence, a payment of municipal insurance for which compensation is made, and does not reduce the damages which the policeman may recover for personal injuries negligently inflicted on him. *Heath v. Seattle Taxicab Co.* (1913) 73 Wash. 177, 131 Pac. 843.

Sick benefits received by an injured person from a source other than a person who caused the injury, it has been held, should not be considered in determining the amount of damages recoverable from the latter. *Baltimore City Pass. R. Co. v. Baer* (1899) 90 Md. 97, 44 Atl. 992.

c. Receipt of charitable fund.

In *Norristown v. Moyer* (1871) 67 Pa. 355, an action against a city for a personal injury, the following instruction was held to be a correct statement of law: "You will make no deduction because the plaintiff was aided by charity; individual benevolence cannot be made a set-off by the municipality."

III. Recovery for death by wrongful act.

a. Receipt of money on insurance policy.

In United States.

In the United States the rule appears to be well settled that a recovery for death by wrongful act is not barred, or the amount of the recovery diminished, by the receipt by any of the beneficiaries of the suit, of money paid by an insurance company on a life or casualty insurance policy.

United States.—*Clune v. Ristine* (1899) 36 C. C. A. 450, 94 Fed. 745, 6 Am. Neg. Rep. 416. Compare *Ladd v. Foster* (1887) 31 Fed. 827.

Georgia.—*Western & A. R. Co. v. Meigs* (1885) 74 Ga. 857.

Illinois.—*Illinois C. R. Co. v. Prickett* (1904) 210 Ill. 140, 71 N. E. 435,

affirming (1903) 109 Ill. App. 468; *Deel v. Heiligenstein* (1910) 244 Ill. 239, 91 N. E. 429.

Indiana.—*Sherlock v. Alling* (1873) 44 Ind. 184, affirmed in (1876) 93 U. S. 99, 23 L. ed. 819.

Missouri.—*Carroll v. Missouri P. R. Co.* (1885) 88 Mo. 239, 57 Am. Rep. 382; *Bright v. Thacher* (1919) 202 Mo. App. 301, 215 S. W. 788.

New York.—*Althorf v. Wolfe* (1859) 2 Hilt. 344, affirmed in (1860) 22 N. Y. 355. See also *Kellogg v. New York C. & H. R. R. Co.* (1879) 79 N. Y. 72.

Pennsylvania.—*Coulter v. Pine Twp.* (1894) 164 Pa. 543, 30 Atl. 490. See also *North Pennsylvania R. Co. v. Kirk* (1879) 90 Pa. 15.

Texas.—*Lipscomb v. Houston & T. C. R. Co.* (1901) 95 Tex. 5, 55 L.R.A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; *Tyler S. E. R. Co. v. Raspberry* (1896) 13 Tex. Civ. App. 185, 34 S. W. 794; *Houston & T. C. R. Co. v. Weaver* (1897) — Tex. Civ. App. —, 41 S. W. 846; *Galveston, H. & S. A. R. Co. v. Cody* (1899) 20 Tex. Civ. App. 520, 50 S. W. 135; *Houston & T. C. R. Co. v. Lemair* (1909) 55 Tex. Civ. App. 237, 119 S. W. 1162.

Virginia.—*Baltimore & O. R. Co. v. Wightman* (1877) 29 Gratt. 431, 26 Am. Rep. 384, reversed on other grounds in (1881) 104 U. S. 5, 26 L. ed. 643.

In *Sherlock v. Alling* (Ind.) *supra*, the court discussed as follows the right of the defendant to a reduction of damages because of the receipt of money paid on a policy insuring the life of the plaintiff's intestate: "The sixth paragraph of the answer raises the question whether the receipt of a sum of money by the persons for whose benefit the action is prosecuted, on account of a policy of insurance on the life of the deceased, can be shown to reduce the amount of the recovery. The argument urged in support of the position is that the damages are recoverable for the death, and when that death brings money, which might not otherwise come to the party, a pecuniary benefit, to the extent of the amount received, has accrued to the party from the death; that if the wrongful act causing the death has been the occasion of pecuniary benefit, the pecuni-

any damage cannot be ascertained without deducting from the whole damage the pecuniary benefit. If the argument is sound, it would apply to a case where the pecuniary benefit resulted by descent or devise. It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants had not contributed, and not resulting from, or connected with, the act causing the death—benefits which, it is fair to presume, would have been realized at a future day, without the aid of their wrongful act. To allow such a defense would defeat actions, under the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrongdoer would thus be enabled to protect himself against the consequences of his own wrongful act."

In *Baltimore & O. R. Co. v. Wightman* (Va.) *supra*, the court said: "The defendant's sixth bill of exceptions is to the refusal of the court to receive the evidence offered by the defendant to show that the deceased, at the time of his death, held policies of insurance on his life to the amount of \$5,000, for the benefit of his wife and children, and that since his death the amount called for by said policies had been collected and paid over to the widow and children. We think the court did not err in refusing to admit this evidence. It was clearly calculated to mislead the jury as to the issues they were to try. The mere fact that the family of the deceased received money from some other source would not justly influence the measure of compensation to be made by the defendant, for injuries attributable to the misconduct of its employees and agents. The party effecting the insurance paid the full value for it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration."

In *Illinois C. R. Co. v. Prickett* (1904) 210 Ill. 140, 71 N. E. 435, affirming (1903) 109 Ill. App. 468, it

was said: "It is immaterial whether the widow and next of kin of the deceased engineer had been paid, or were entitled to receive, any sum of money as beneficiaries in a policy of insurance on the life of the husband and father. Any such mortuary benefit would accrue from a collateral source wholly independent of the appellant company, and would present no ground for an abatement of the pecuniary loss occasioned by the death of the appellee's intestate, to his widow and next of kin."

Likewise, in *Clune v. Ristine* (1899) 36 C. C. A. 450, 94 Fed. 745, 6 Am. Neg. Rep. 416, an action for the negligent killing of the plaintiff's son, it was held to be error to admit evidence of an amount of money recovered by the plaintiff from an insurance company, since a wrongdoer is not entitled to a reduction of damages by proving that the plaintiff has received compensation from a collateral source.

In *Ladd v. Foster* (1887) 31 Fed. 827, the defendant sought to have the amount of a recovery for the negligent killing of a person reduced by the amount which his estate had received on a life insurance policy. The action was based on a statute which made the amount recovered for death by wrongful act a part of the estate of the deceased. The claim of set-off for the amount of the life insurance was apparently abandoned and disallowed on that ground, but the court discussed the legal effect of the receipt of life insurance money, stating that the English courts had permitted a deduction therefor, but that the American courts had not. The court doubted, however, whether the rule adopted by the American courts was applicable where the recovery was sought by, and the set-off claimed against, the estate of the injured person.

In an action by a widow for the death of her husband under a Dramshop Act, evidence of the receipt by her of money on an insurance policy on her husband's life is not admissible to bar her recovery or diminish the amount of her damages. *Deel v. Heiligenstein* (1910) 244 Ill. 239, 91 N. E.

429. In the case last cited the material facts on the question herein considered, and the conclusion of the court thereon, were stated as follows: "The instruction given on behalf of the appellee which is particularly complained of stated that this was a suit brought by plaintiff for damages to her means of support, and that the fact that she had received money upon a policy of insurance on her husband's life was not to be considered; but if the jury found she had been deprived of her means of support, she might recover, without reference to what money or property she had of her own,—whether derived from insurance policies, or from any other source. This instruction contained a correct statement of the law. It was proven that the deceased earned from \$80 to \$100 per month as a railway switchman, and that he gave his earnings each month to his wife; that he supported her and kept her in comfortable circumstances. He was under a legal obligation to support his wife, and this obligation was not limited to supplying the bare necessities of life, but included supplying such comforts as were suitable to his condition in life. The fact that a wife may have means of her own, or an income from a source other than her husband, will not affect her right to recover damages under the Dramshop Act, for an injury to her means of support on account of the death of her husband. She still has the right to recover for the loss of the support she was entitled to receive from her husband. . . . Though the deceased, at the time of his death, had in force a policy of insurance on his life payable to his wife, that fact would in no wise affect her right to recover for the injury to her means of support, occasioned by reason of his death."

On the other hand, it has been held that the amount of insurance money received by the estate of a deceased person is not a part of his earnings, and that, therefore, evidence of such sum is not admissible to show the earning power of the deceased, and thus enhance the damages recoverable for his death. *Nevers Lumber Co. v. Fields* (1907) 151 Ala. 367, 44 So. 81.

In England and Canada.

The opposite view to that adopted in the United States has been taken in England and in Canada. See *Hicks v. Newport, A. & H. R. Co.* (1857) 4 Best & S. 403, note, 122 Eng. Reprint, 510, note; *Grand Trunk R. Co. v. Jennings* (1888) L. R. 13 App. Cas. 800, 58 L. J. P. C. N. S. 1, 59 L. T. N. S. 679, 37 Week. Rep. 403, 8 Eng. Rul. Cas. 439; *Saindon v. Rex* (1914) 15 Can. Exch. 305 (obiter); *Jacob v. Rex* (1917) 16 Can. Exch. 349, 33 D. L. R. 203; *Royal Trust Co. v. Canadian P. R. Co.* (1921) 16 Alberta L. Rep. 523; *Millard v. Toronto R. Co.* (1914) 31 Ont. L. Rep. 526, 9 B. R. C. 539, 6 Ont. Week. N. 519 (obiter). The law has, however, been changed in England by the Fatal Accidents (Damages) Act of 1908, 8 Edw. VII. chap. 7.

The reason given for this view is that, in an action under Lord Campbell's Act, the action is for pecuniary loss caused by the death to the survivors, and that therefore the receipt of insurance money is a circumstance to be taken into consideration in determining whether any loss has been incurred.

This doctrine goes back to the case of *Hicks v. Newport, A. & H. R. Co.* supra, wherein Lord Campbell, in charging the jury, said: "Gentlemen, the case is entirely in your hands, and the only direction I can give you in point of law is that you ought to consider the amount of the pecuniary loss which the family have sustained by the death of the father. You are not to look to the wants of the family, but to the loss they have sustained by the father's death; and I would say, in the words of a very learned brother judge, 'Take a reasonable view of the case, and give a fair compensation.' I think you should first consider what would be the sum if there were no insurances. What sum should you say? That is entirely for you to consider. If there were no insurances, what would be the amount? Well, then, if there be an insurance for £1,000 by some company that insured him against accidents by railways, and they being entitled to receive £1,000 upon that policy, it is quite clear that there ought to be a deduction from the

aggregate amount in respect of that £1,000. Then, with regard to the policies upon his life independently of accident, if you allow any deduction (and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself, if this fatal accident had not happened. I leave that, however, entirely in your hands. You will first make a calculation, and say what you think would be a reasonable sum that ought to be allowed as a compensation for the pecuniary loss his family would sustain, had there been no insurance. You will then deduct from that the £1,000 insured against accidents, and then any reasonable sum that you think should be further deducted in respect of the life insurance. You will then have the balance which is to be distributed among the family; and then it will be your duty to allot it among the different members of the family according to your judgment." See to the same effect, *Royal Trust Co. v. Canadian P. R. Co.* (1921) 16 *Alberta L. R.* 523.

And in *Grand Trunk R. Co. v. Jennings* (1888) *L. R.* 13 App. Cas. 800, 58 *L. J. C. P. N. S.* 1, 59 *L. T. N. S.* 679, 37 *Week. Rep.* 403, 8 *Eng. Rul. Cas.* 439, that in an action brought by a widow under Lord Campbell's Act, for the pecuniary loss sustained through the death of her husband by wrongful act, the benefit received by her must be deducted from the amount of damages assessed, which, in the case of life insurance in her favor, is that accruing from the acceleration of payment of the amount of the policy; and that the benefit which she derived from acceleration might be compensated by deducting from the estimate of the future earnings of the deceased the amount of the premiums, which, if he had lived, he would have had to pay out for the maintenance of the policy.

However, in *Grand Trunk R. Co. v. Beckett* (1886) 16 *Can. S. C.* 713, the court affirmed a judgment of a divided court in (1886) 13 *Ont. App. Rep.* 174, holding that insurance on the life of the plaintiff's intestate should not be

deducted from the damages awarded. In the lower court, Hagarty, Ch. J., argued that the statute said that if death is caused by wrongful act, the one responsible therefor must pay the widow and children the pecuniary damages sustained by them, and that if the benefit exceeds the damages there is nothing to recover. But Burton, J., said that, if that view was correct, then the insurance had in fact been effective for the benefit of the one to whose negligence the death is attributable, and the family would lose the payments and interest which had been expended to procure that result.

b. Receipt of pension.

In *Geary v. Metropolitan Street R. Co.* (1902) 73 App. Div. 441, 77 *N. Y. Supp.* 54, a pension received by the widow of a fireman from the city of New York was held not to be a proper deduction in computing the damages recoverable from a street car company, which negligently caused his death. The court said: "It appeared that under the pension law provisions of the Greater New York Charter (Laws 1897, chap. 378, §§ 789 et seq.) the decedent's widow was receiving \$700 per annum. The court instructed the jury that in assessing the damages they should not take into consideration this pension which the widow was receiving, and the defendant excepted. We think the instruction was proper. The duty of the jury under the statute was to ascertain the pecuniary loss which the widow and children sustained by the death of the husband and father, and any benefits which they received by way of insurance or pension are not to be offset or deducted."

In *St. Louis, I. M. & S. R. Co. v. Maddy* (1893) 57 *Ark.* 306, 21 *S. W.* 472, 11 *Am. Neg. Cas.* 133, it was held that, although a pension received by the plaintiff's intestate was to be considered in determining the damage sustained by reason of his death, evidence that his wife and younger children were entitled to a pension on his death did not have the effect of lessening the amount of damages recoverable.

W. S. R.

GREEK CATHOLIC CHURCH OF ST. MICHAELS, Plff. in Err.,
v.
ARCHBISHOP PLATON ROIZDESTVENSKY et al.

Colorado Supreme Court (Dept. No. 2)—July 7, 1919.

(67 Colo. 217, 184 Pac. 295.)

Religious society — delay in suing for recovery of property — laches.

1. Delay in instituting proceedings to recover church property transferred by the controlling majority of a religious society to a denomination other than that in which the church was organized until after its debts had been paid and valuable improvements placed upon the property will prevent a recovery.

[See note on this question beginning on page 692.]

Laches — delay in proceedings to cancel void deed — disadvantage.

2. The doctrine that laches does not apply to a suit to cancel a void deed

is inapplicable where the party pleading the laches has been put to a disadvantage by the delay.

ERROR to the District Court for Pueblo County (Rizer, J.) to review a judgment in favor of defendant in a suit brought to cancel changes of name of the plaintiff church, and a deed to the defendant Archbishop, and to quiet title to certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. M. J. Galligan, for plaintiff in error:

There was not, and could not have been, any valid or legal change made, so far as plaintiff was concerned; and the alleged attempts to change name of plaintiff, etc., were illegal and void.

State v. Warner Valley Stock Co. 56 Or. 283, 106 Pac. 780, 108 Pac. 861; Harrison v. Miller, 87 Kan. 48, 123 Pac. 854; Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19.

In a case of this kind the usual rules as to limitations and laches do not apply.

Burckhalter v. Vann, 59 Okla. 114, 157 Pac. 1148; Shute v. Shute, 82 S. C. 264, 64 S. E. 145; Lake v. Perry, 95 Miss. 550, 49 So. 569; O'Connor v. O'Connor, 100 Iowa, 476, 69 N. W. 676; Farmers' Bank & Trust Co. v. Southern Granite Co. 96 S. C. 106, 79 S. E. 985; Onn Lumber & Shingle Co. v. Powell Lumber Co. 94 Neb. 267, 143 N. W. 216; Scott v. Hubbard, 67 Or. 498, 136 Pac. 653; Sheffield Car Co. v. Constantine Hydraulic Co. 171 Mich. 423, 137 N. W. 305, Ann. Cas. 1914B, 984; Huntsville Elks Club v. Garrity-Hahn Bldg. Co. 176 Ala. 128, 57 So. 750; Torbitt & Castleman v. Middleboro Grocery Co. 147 Ky. 343, 144 S. W. 16; Osburn v. Court of Honor, 152

Mo. App. 652, 133 S. W. 87; First M. E. Church v. White Bear Beach Church, 126 Minn. 282, 148 N. W. 271; Martin v. German Reformed Church, 149 Wis. 19, 134 N. W. 1125; Poronto v. Sinnott, 89 Vt. 479, 95 Atl. 647; State v. Warner Valley Stock Co. 56 Or. 283, 106 Pac. 780, 108 Pac. 861; Chandler v. White, 84 Ill. 435; Cook v. Lasher, 19 C. C. A. 654, 42 U. S. App. 42, 173 Fed. 708; Bushnell v. Loomis, 234 Mo. 371, 36 L.R.A. (N.S.) 1039, 137 S. W. 257; Helm v. Brewster, 42 Colo. 25, 93 Pac. 1102; Terry v. Gibson, 23 Colo. App. 273, 128 Pac. 1127; Burritt v. Dickson, 8 Cal. 113; Davidson v. Young, 38 Ill. 145; Boynton v. Holcomb, 49 Ill. App. 503; Robbins v. Magee, 76 Ind. 381; Thorne v. Mosher, 20 N. J. Eq. 257; Tazewell v. Saunders, 13 Gratt. 354; Nelson v. Carrington, 4 Munf. 332, 6 Am. Dec. 519; Wissler v. Craig, 80 Va. 22; Cranmer v. McSwords, 24 W. Va. 594; Connecticut Mut. L. Ins. Co. v. Carson, 186 Mo. App. 221, 172 S. W. 69; Myers v. DeLisle, 259 Mo. 506, 52 L.R.A. (N.S.) 937, 168 S. W. 676.

Messrs. F. R. McAliney and W. B. Vates, for defendants in error:

It was the duty of plaintiff to amend its bill, and set forth with particularity its excuse for laches.

(67 Colo. 217, 184 Pac. 295.)

Price v. Immel, 48 Colo. 166, 109 Pac. 941; Baird v. Baird, 48 Colo. 506, 111 Pac. 79; Kelly v. Boettcher, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55; Hall v. Fullerton, 69 Ill. 448; Zeigler v. Hughes, 55 Ill. 288.

Assent or acquiescence on the part of the plaintiff to defendants' adverse claim will bar the action, and this is particularly true when continued for so long a period as in the present instance.

Graff v. Portland Town & Mineral Co. 12 Colo. App. 106, 54 Pac. 854; Long v. Olson, 115 Iowa, 388, 88 N. W. 933; 16 Cyc. 162; Green v. Dietrich, 114 Ill. 636, 3 N. E. 800; Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; Moreman v. Talbott, 55 Mo. 392.

Laches does not grow out of mere lapse of time, but is founded on the inequity of permitting claims to be enforced after change in condition or relation of parties.

Arkins v. Arkins, 20 Colo. App. 123, 77 Pac. 256; Cliff v. Cliff, 23 Colo. App. 183, 128 Pac. 860.

A party is entitled to bring a suit in equity any time within the Statute of Limitation except in cases of delay or acquiescence amounting to recognition of rights, or where other equitable considerations, equally strong, are established.

Graff v. Portland Town & Mineral Co. 12 Colo. App. 106, 54 Pac. 854; Dunne v. Stotesbury, 16 Colo. 89, 26 Pac. 333; Great West Min. Co. v. Woodmas of Alston Min. Co. 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771.

Plaintiff's action is barred by the Statute of Limitation.

Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614; Griffith v. Seattle Consol. Street R. Co. 36 Wash. 627, 79 Pac. 314; Bates v. Boyce, 135 Mich. 540, 106 Am. St. Rep. 402, 98 N. W. 259; DeMares v. Gilpin, 15 Colo. 77, 24 Pac. 568; Pipe v. Smith, 5 Colo. 146.

Denison, J., delivered the opinion of the court:

The plaintiff in error was plaintiff below. July 6, 1900, Greek Catholic Church of the St. Michaels was incorporated by the filing of the affidavit in accordance with the statute for incorporating churches.

June 12, 1901, an affidavit was filed, showing that a meeting of the church was held May 20, 1901, at which a change of name was at-

tempted to the "Greek Catholic Church of St. Michaels."

March 31, 1908, an affidavit was filed, purporting to change the name of the "Greek Catholic Church of St. Michaels" to the "Greek Orthodox Church of St. Michaels."

July 3, 1908, the attempt seems to have been made to change the name again to the "Russian Orthodox Greek Catholic St. Archangels Michaels Church of Pueblo, Colorado."

On the same day, by warranty deed, the Russian Orthodox Greek Catholic Archangels Michaels Church purports to convey to Archbishop Platon Roizdestvensky and his successors in office the church property, which had been conveyed in 1901 to the "trustees of the Greek Catholic Church of the St. Michael." The grantee was an archbishop of the Greek Orthodox Church.

March 15, 1913, this suit was brought in the name of the "Greek Catholic Church of St. Michaels" against Archbishop Platon Roizdestvensky. The Russian Orthodox Greek Catholic St. Archangels Michaels Church of Pueblo, Colorado, was afterwards added as a defendant.

The prayer was to cancel the last two changes of name and the deed to the archbishop, and to quiet the title in the plaintiff.

The plaintiff alleged, and its evidence tended to show, that these changes of name were, for various reasons, invalid, and also that the Greek Catholic Church was subject to the Roman Catholic Pope; that the Greek Orthodox Church was under allegiance to the Czar of Russia or the Holy Synod of Russia, not to the Pope of Rome; that the first priest in charge of the church at its organization was a Greek Catholic priest; that most of the members were Greek Catholics, and the church was organized as a Greek Catholic Church; that the land in question was purchased and a church built thereon during the incumbency of the Greek Catholic

priest; that after the first pastor died, no Greek Catholic priest could be obtained, and a priest of the Orthodox Greek Catholic Church was obtained about 1903 or 1904; that a succession of priests of that church has remained in charge thereof from thence hitherto; and that the property had been diverted from its purpose as a Greek Catholic Church, under the Pope, to that of an Orthodox Greek Catholic Church, under the Czar or Holy Synod.

It was claimed, on the other hand, that the church had always been an Orthodox Greek Catholic Church, and that the changes of name were made to express that more clearly, and the defendants' evidence tended to show this. The defendants, moreover, pleaded laches, and showed that, during the incumbency of the orthodox priests, from about 1904 to 1913, some \$3,000 or \$4,000 had been expended in improving the property and paying off mortgages upon it.

The opinion of the court below, which is made a part of the record on error, shows that the learned judge who tried the case was of the opinion that the plea of laches had been sustained by the evidence, and, accordingly, he gave judgment for the defendants.

Argument is made here that mere lapse of time is not sufficient to con-

stitute laches. While we think that is not always the case, yet the question does not now arise, because, during the long delay from 1904 to 1913, the parties in possession, in apparent good faith,—we must assume that the court below found that it was in good faith,—expended the money, as stated above.

Religious society—delay in suing for recovery of property—laches.

It is also urged that the proceedings sought to be canceled are absolutely void, and therefore the doctrine of laches does not apply. The rule here invoked does not itself apply to a case where the party pleading the laches has, by reason of the delay, been put to disadvantage.

Laches—delay in proceedings to cancel void deed—disadvantage.

We can see no equity in returning to the plaintiff the property with additions made and debts removed which would not have been made or removed if the plaintiff's action had been prompt.

We think the record shows other grounds to support the judgment, but it is not necessary to notice them.

The judgment should be affirmed.

Garrigues, Ch. J., and Scott, J., concur.

Petition for rehearing denied October 6, 1919.

ANNOTATION.

Laches as preventing recovery of property diverted from one religious sect or denomination to another.

Controversies between religious bodies, especially between rival factions of religious societies, have been a prolific source of litigation in the civil courts in regard to property rights, as is illustrated by the annotation in 8 A.L.R. 105, which deals with only one branch of the subject. An extended search, however, has disclosed but little authority other than the reported case (*GREEK CATHOLIC CHURCH v. ROIZDESTVENSKY*, ante, 690) as to the

effect of laches on the part of the society or faction seeking relief. In *Atty.-Gen. v. Meeting-House* (1854) 3 Gray (Mass.) 1, a lot in Boston having been conveyed in trust for a place of religious worship for the preaching and maintaining of the doctrine and form of government known as the "Presbyterian Church of Scotland," the court was of the opinion that from 1786 when a majority of the congregation passed a vote purporting to re-

solve themselves into a society different from a Presbyterian society, the possession, whether lawful or not, became adverse, so as to bar a suit in equity to enforce the trust in the interest of a Presbyterian society formed in Boston in 1846, the body in possession having continued in the meantime, with various changes of worship, to be a society other than Presbyterian. But, in any event, whether such vote and the acts and possession under it were to operate as a bar or not, it was held that the possession was adverse from the time of the passage, in 1805, of an act declaring and confirming the incorporation of those "who now are or who may hereafter be the proprietors of the pews in the Congregational Meeting-house in Federal street, in the town of Boston."

In discussing the effect of the vote of 1786, the court said: "It is not now the question whether they have a right to do so, and whether their possession was lawful, but whether it was adverse. If it was, then all those who had any claims, legal or equitable, including all synods and Presbyterian bodies with whom they had at any time been associated, were bound to come forward and assert their rights; otherwise, their consent was to be presumed. We believe the Statute of Limitations was not then in force; but the rule of twenty years' acquiescence in similar cases was held equivalent. That vote was passed nearly seventy years ago."

In discussing the effect of the act of incorporation of 1805, and the possession thereunder, the court said: "Regarding the question as affecting the

realty, these acts would seem to constitute a seisin either by right or by wrong, and, of course, a disseisin of trustees and cestuis que trust, claiming to hold for a different purpose, and against whom such entry and holding by the respondent society must be deemed adverse; and after the lapse of twenty years, or, perhaps, as the law then stood, thirty years, from the time of such acts, all right of entry and of action would be barred. In fact, the act itself implies that they had been long in possession before its date; and more than forty years elapsed, after its passage, before their right was questioned. If this would have been a good bar at law, on a question of title in a real action, a fortiori must it be regarded as a long-continued adverse possession, sufficient to preclude all claim in equity."

In *Rehoboth v. Carpenter* (1834) 23 Pick. (Mass.) 131, where, after the repeal of an act incorporating a committee to manage the parish fund, which was independently incorporated, and after the incorporation of a new society upon the petition of the parish and most of its members, the proprietors of the common lands of the town reconsidered a vote by which they had granted a lot for a meetinghouse to the parish, and conveyed the same by warranty deed to the new society, which took possession thereunder and enjoyed the same for a long term of years,—it was held that, even if the old parish corporation continued to exist, it was disseised of the property by the adverse possession of the new society, whether the latter's entry in the first instance was legal or not.

G. H. P.

E. N. ARMSTRONG, Receiver of Toledo, Peoria, & Western Railway Company, et al.,

v.

LOUIS L. EMMERSON, Secretary of State.

Illinois Supreme Court—October 22, 1921.

(300 Ill. 54, 132 N. E. 768.)

Tax — on railroad in hands of receiver.

1. A state may assess a franchise tax on a railroad company incor-

porated by it, although the road is in the hands of a receiver appointed by a Federal court.

[See note on this question beginning on page 700.]

— capital stock — amount authorized by charter or commission.

2. The annual franchise tax to be assessed on the authorized stock of a corporation must be reckoned upon the full amount of stock authorized by its charter, and not be limited to the amount which the public utilities commission has sanctioned.

— effect of Federal control.

3. The assumption by the Federal government of control of the railroads

did not deprive the states of the power to impose franchise taxes upon roads incorporated by them.

Commerce — tax on interstate railroad.

4. The imposition by a state of a franchise tax upon a railroad chartered by it to do an interstate business does not impose an unlawful burden on interstate commerce.

[See 26 R. C. L. 123.]

CROSS APPEALS from an order of the Circuit Court for Sangamon County (Smith, J.) overruling a demurrer to plaintiffs' bill, enjoining payment of a certain amount into the state treasury, and requiring its return to plaintiffs; defendant appealing from a decree in favor of plaintiffs, and plaintiffs appealing from so much as denied full relief. *Reversed with directions.*

The facts are stated in the opinion of the court.

Messrs. Edward J. Brundage, Attorney General, Clarence N. Boord, and James W. Gullett, Assistant Attorney General, for defendant:

The annual franchise fee or tax provided for by the General Corporation Act of 1919 is based on the amount of capital stock authorized in and by the charter or articles of incorporation of the corporation, whether such corporation is a public utility or otherwise.

American Can Co. v. Emmerson, 288 Ill. 289, 123 N. E. 581; Hump Hairpin Mfg. Co. v. Emmerson, 293 Ill. 387, 127 N. E. 746.

A receiver is liable for a franchise tax where he continues the business.

Chesapeake & O. R. Co. v. Atlantic Transp. Co. 62 N. J. Eq. 751, 48 Atl. 997; Central Trust Co. v. New York City & N. R. Co. 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92; Re George Mather's Sons Co. 52 N. J. Eq. 607, 30 Atl. 321; State ex rel. Dawson v. Sessions, 95 Kan. 272, 147 Pac. 789; New York Terminal Co. v. Gaus, 204 N. Y. 512, 98 N. E. 11; Bright v. Arkansas, 162 C. C. A. 148, 249 Fed. 950; Ohio & M. R. Co. v. Russell, 115 Ill. 55, 3 N. E. 561; Safford v. People, 85 Ill. 558; Bartlett v. Cicero Light, Heat & P. Co. 177 Ill. 68, 42 L.R.A. 715, 52 N. E. 339.

Messrs. George B. Gillespie, George M. Gillespie, and J. M. Elliott, for plaintiffs:

No franchise tax can be imposed upon a corporation for the exercise of its franchise, at the time its franchise is being exercised by a receiver or the Federal or state government.

Chicago City R. Co. v. People, 116 Ill. App. 633; Knickerbocker v. McKindley Coal & Min. Co. 67 Ill. App. 291; Coates v. Cunningham, 80 Ill. 467; 23 R. C. L. 46; High, Receivers, 4th ed. p. 207; 8 Fletcher, Cyc. Corp. pp. 8898, 8967; United States v. Whitridge, 231 U. S. 144, 58 L. ed. 159, 34 Sup. Ct. Rep. 24; Johnson v. Johnson Bros. 108 Me. 272, 80 Atl. 741, Ann. Cas. 1913A, 1304; Johnson v. Monson Consol. Slate Co. 108 Me. 296, 80 Atl. 750; Com. v. Lancaster Sav. Bank, 123 Mass. 493; State v. Bradford Sav. Bank, 71 Vt. 234, 44 Atl. 349; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419.

A state has no power to levy a tax on interstate commerce or foreign commerce, either directly or indirectly; and if a franchise tax, or tax on business, is measured or apportioned upon the basis of division of interstate commerce between the taxing state and other states in which a transportation company does business, that is a direct tax on interstate commerce in violation of the Federal Constitution.

26 R. C. L. 124; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126; Western U.

Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Western U. Teleg. Co. v. Taggart, 141 Ind. 281, 60 L.R.A. 681, 40 N. E. 1051; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261; Missouri P. R. Co. v. Public Utilities Commission, 292 Ill. 429, 127 N. E. 41.

Dunn, J., delivered the opinion of the court:

The Toledo, Peoria, & Western Railway Company is a corporation organized under the laws of the state of Illinois, and on July 2, 1917, E. N. Armstrong was appointed receiver for it under a decree of the United States district court for the southern district of Illinois, and has, since his appointment, been in possession of all its property, and has operated its railroad exclusively under the control of that court, except during such time as the railroad was in the possession of the government of the United States and was operated under the act known as the Federal Railway Control Act (Comp. Stat. §§ 3115½a-3115½p, Fed. Stat. Anno. Supp. 1918, p. 757). The secretary of state assessed the annual license fee or franchise tax provided by § 105 of the General Corporation Act, as amended in 1919 (Hurd's Rev. Stat. 1919, chap. 32, § 28a77), upon the capital stock of the railway company in the year 1919, and notified the railway company and its receiver of such assessment, amounting to \$2,250, which they were required to pay on or before July 31, 1919, or else the assessment would become delinquent and the penalties provided by the act would be added. The receiver appeared before the secretary of state by counsel, and endeavored to obtain a cancellation of the assessment, but, the secretary having refused to cancel or modify it, the receiver paid to the secretary of state the sum of \$2,250, the amount of the assessment, under protest, and a bill was filed in the name of the railway company and the receiver, to restrain the secretary of state from paying the

money over to the treasurer and to require him to repay it to the receiver. The bill, in addition to the facts stated, alleged that the railway company, previous to the receivership, was operating the railroad extending from Effner, in the state of Indiana, through the state of Illinois and into the state of Iowa, and was engaged as a public utility in intrastate and interstate commerce as a common carrier of passengers and goods; that, during the whole of the year 1919, for which the license fee or franchise tax was assessed, the railroad was operated exclusively by the Director General of Railroads of the United States; that neither the railway company nor its receiver was in possession, control, or operation of the railroad, or transacted any transportation business within the state of Illinois or elsewhere; and that, if any franchise tax may be assessed against the railway company, it should be assessed under § 107 of the General Corporation Act (Hurd's Rev. Stat. 1919, chap. 32, § 28a79), instead of under § 106, as it was assessed by the secretary of state. It is also charged that the assessment was wrongfully made upon the total amount of capital stock authorized to be issued under the laws of the state of Illinois (\$4,500,000), of which \$4,076,900 only had in fact been issued, and before any additional stock of the company can lawfully be issued it will have to be authorized by the public utilities commission of the state of Illinois. A temporary restraining order was entered, restraining the secretary of state from paying the amount received into the state treasury. A demurrer to the bill was overruled, and, the defendant having elected to stand by the demurrer, an order was entered, perpetually enjoining the payment of the sum of \$211.56 into the state treasury and requiring its return to the receiver. The defendant has appealed, and the complainants have assigned cross errors.

The only question raised by the appellant's assignment of errors is whether the assessment should be based upon the amount of \$4,500,000, the total amount of capital stock which the corporation was authorized to have, or upon the amount of \$4,076,900, the amount of capital stock which had been issued. The claim of the appellees that the assessment should be based upon the latter amount is founded on the fact that the corporation is a utility corporation, and its power to issue its stock is subject to the supervision, regulation, and control of the state public utilities commission, and can be exercised only under such rules and regulations as the commission may prescribe. The decision of the question requires the determination of the meaning of the words "authorized capital stock," in § 105 of the General Corporation Act. The appellant contends that the language refers to the total amount of capital stock authorized by the articles of incorporation; the appellees, that it refers to the amount of capital stock which the corporation has been authorized to issue under the regulations of the Public Utilities Commission, in accordance with §§ 20 & 21 of the Public Utilities Act (Hurd's Rev. Stat. 1919, chap. 111a).

The expression "capital stock," or "authorized capital stock," is capable of use to express different meanings. It may be used to designate the capital stock which the corporation is authorized to have, or the capital stock authorized by the directors to be issued, or, in the case of a public utility, the capital stock authorized by the public utilities commission to be issued in accordance with its regulations. "Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation.

Occasionally it happens that, under the terms of statutes relating to taxation which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean all the actual property of the corporation. But this is for the purpose of carrying out the intent of the statute, and is not the real meaning of the term. At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses or increased by gains." 1 Cook, Stocks & Stockholders, § 9; Morawetz, Priv. Corp. § 781; 2 Beach, Priv. Corp. § 466; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; Tradesman Pub. Co. v. Knoxville Car Wheel Co. 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; State v. Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22. It is this invariable sum fixed by the charter as the amount to be paid in by the stockholders, for the prosecution of the business of the corporation and for the benefit of the corporate creditors, which is ordinarily understood by the term "capital stock," unless the context indicates a different meaning. The capital stock is not the same thing as the capital of the corporation, or its actual property, the value of which may fluctuate from time to time. However much the value of the property of the corporation may increase in the prosecution of a successful enterprise, or may be diminished by losses incurred, the capital stock remains unchanged. The fees and franchise taxes which every corporation must pay under the General Corporation Act are fixed by §§ 96 to 107, inclusive, of that act (Hurd's Rev. Stat. 1919, chap. 32, §§ 28a68-28a79). The initial fee is provided for by § 96, and is $\frac{1}{2}\%$ of 1 per centum upon the amount of the capital stock which the corporation is authorized to have, and the

section provides that each public utility corporation shall pay the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit. Section 99 provides that when a public utility corporation shall renew its charter, or extend the term of its existence, the secretary of state shall charge and collect the same fees as provided in the case of a new company. The annual license fee or franchise tax which each corporation for profit, including railroads (except insurance companies), is required to pay by § 105, is also $\frac{1}{20}$ of 1 per centum upon the authorized capital stock. Public utility corporations are not specifically mentioned, but there is nothing to indicate that the authorized capital stock upon which the franchise tax of such corporations is to be assessed is any different from the authorized capital stock upon which other corporations are to be assessed.

In *American Can Co. v. Emmer-son*, 288 Ill. 289, 123 N. E. 581, an objection was made to the amount of the tax assessed against a foreign corporation, under § 5b of the Foreign Corporation Act (Laws 1917, p. 306), then in force, that in ascertaining the proportion of the capital stock represented by property located and business transacted in the state of Illinois, the secretary of state used as a basis the entire capital stock of the company, including the unissued as well as the issued capital stock, but it was held that the words referred to the amount of capital stock authorized by the charter, and not the stock actually issued; and so it was held in *Hump Hairpin Mfg. Co. v. Emmer-son*, 293 Ill. 387, 127 N. E. 746.

A public utility corporation, upon filing the statement required by § 4 of the General Corporation Act (Hurd's Rev. Stat. 1919, chap. 32), becomes a corporation having an authorized capital stock of the amount provided in the statement, although such stock can only be issued with the consent and approval

of the public utilities commission. So, under § 28, any corporation which, in its statement of incorporation, has specified an amount of stock which it is proposed to issue at once, less than the total amount fixed by such statement, cannot issue any stock in addition to that specified as to be issued at once, until a statement showing the total amount of the capital stock authorized by the articles of incorporation, the amount already issued, the extent to which it is paid up, the additional stock proposed to be issued and the manner in which it is to be paid up, with a description and valuation of the property, if any, to be received in payment of such stock, and stating that, of the capital stock then proposed to be issued, at least one half of the par value of such stock having a par value, and not less than \$5 per share for each share of capital stock having no par value, will be paid in in money or property, has been filed with and approved by the secretary of state. In either case the unissued part of the stock of the corporation is a part of its authorized capital stock, though it may be issued only in compliance with the provisions of the statute authorizing its issue.

The court erred in holding that the tax should have been assessed only upon the stock actually issued, and not upon the full amount of the authorized capital stock of the corporation.

Tax—capital stock—amount authorized by charter or commission.

By the assignment of cross errors it is contended that no franchise tax could be imposed upon the corporation for the exercise of its franchise while its property and business were in the hands of a receiver or the Federal government. There is a conflict in the decisions as to whether a corporation is liable to a franchise tax when its property is in the hands of a receiver who operates and controls it. In *McCoach v. Minehill & S. H. R. Co.* 228 U. S. 295, 57 L. ed. 842, 33 Sup. Ct. Rep. 419, it was held that a railroad com-

pany which had leased its entire railroad, with all its rights, powers, privileges, and franchises, except that of being a corporation, for a term of years at an annual rental, the lessees agreeing to keep the road in good repair, and in public use, and efficiently operated, and return it to the lessor at the termination of the lease, was not engaged in business within the meaning of the Federal Corporation Tax Law (Act Cong. Aug. 5, 1909, chap. 6, 36 Stat. at L. 112, 4 Fed. Stat. Anno. 2d ed. p. 260), and was not, therefore, liable to the franchise tax imposed by that act upon corporations doing business in the state, although it retained the franchise of corporate existence, maintained its organization, and held itself ready to exercise its corporate powers when required by the lessees, and ready to resume possession of the property at the expiration of the lease. It was held by the same court that the income derived from the management of street railways by receivers operating such railways under the order of the court are not subject to the tax imposed by the same act. *United States v. Whitridge*, 231 U. S. 144, 58 L. ed. 159, 34 Sup. Ct. Rep. 24. It has been held by some courts that the right of a corporation to do business ceases upon the appointment of a receiver, and the franchise tax cannot be assessed against the corporation after such appointment. *Johnson v. Johnson Bros.* 108 Me. 272, 80 Atl. 741, Ann. Cas. 1913A, 1303; *State v. Bradford Sav. Bank*, 71 Vt. 234, 44 Atl. 349; *Obm. v. Lancaster Sav. Bank*, 123 Mass. 493. In those cases, however, the receiver was appointed to wind up the affairs of the corporation under a proceeding for its dissolution, and the corporation was deprived of the exercise and use of its franchise. It is said in *Thompson on Corporations* (vol. 5, § 6443): "The receiver is liable for a franchise tax where he continues the business, but not where he was appointed to wind up the corporation in a proceeding instituted by the state, and the reason

is that the state has intervened and prevented the corporation from further exercising its franchises."

We have held that the appointment of a receiver for a railroad company creates no change in the corporate body, but its existence remains, with its legal functions unimpaired, its acts being performed by agents appointed by the court, and not by the corporation. The court does not enlarge or restrict the powers and duties conferred by the charter, but assumes the management of the corporation under and in accordance with the charter, and is bound by its provisions, and the agents appointed by the court are required to act within the limits of the charter and to perform the duties imposed by it. *Safford v. People*, 85 Ill. 558; *Ohio & M. R. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561; *Bartlett v. Cicero Light, Heat & P. Co.* 177 Ill. 68, 42 L.R.A. 715, 69 Am. St. Rep. 206, 52 N. E. 339.

In *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92, it was held the receiver was liable to the franchise tax. It was said: "It is claimed, however, that, when a receiver is appointed by the court, if he operates the railroad under its order he does so by virtue of the equity powers of the court conferred by the Constitution, and hence that the receiver is not bound to pay the taxes, although he receives all the earnings of the company. But what does the receiver operate? Under this order of the court he takes possession of all the property of the corporation and proceeds to operate, that is, to run its trains and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the state upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court he acts as the company to the same extent, *pro hac vice*, as if the board of directors were operating the railroad. It is the franchise

which is being used in both cases, only in one case it is used for the company, and substantially by it, by means of its board of directors, while in the other case the same franchise is being used and the road is operated under it by an officer of the court, until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by law."

In *New York Terminal Co. v. Gaus*, 204 N. Y. 512, 98 N. E. 11, where the corporation was in the hands of a receiver, who continued to operate the property, it was held that the corporation was not dissolved, but its franchise to conduct the ferry business was in existence, and any operation must have been by virtue of that franchise; that the receiver's operation of the ferry was under the corporate franchise, and he was bound to pay the franchise tax for such operation, which was a lien on the corporate assets paramount to all prior encumbrances. "Where a receiver is carrying on the business of a corporation as a going

concern, he is, in effect, exercising its corporate franchise, and the state properly looks to him to pay the tax imposed upon it." *State ex rel. Dawson v. Sessions*, 95 Kan. 272, 147 Pac. 789; *Chesapeake & O. R. Co. v. Atlantic Transp. Co.* 62 N. J. Eq. 751, 48 Atl. 997; *Re George Mather's Sons Co.* 52 N. J. Eq. 607, 30 Atl. 321.

Section 102 of the act, which requires the report to be made to the secretary of state upon which the assessment of the franchise tax is to be based, provides, further, that, in case the corporation is in the hands of an assignee, receiver, or trustee, then such report shall be signed and verified by such assignee, receiver, or trustee, thus specifically indicating an intention that the franchises of corporations whose property might be in the hands of assignees, receivers, or trustees

should be subject to the franchise tax.

It was held in *Wabash R. Co. v. Board of Review*, 288 Ill. 159, 123 N. E. 259, that the act of Congress providing for the operation and control of railroads by the Federal government should not deprive the states of the power of taxation of railroads which they possessed and exercised prior to the passage of the act. By § 1 of the act (Comp. Stat. § 3115½a, Fed. Stat. Anno. Supp. 1918, p. 757) it was provided that taxes assessed "either on the property used under such Federal control, or on the right to operate as a carrier," should be paid out of the revenues derived from railway operation while under Federal control, thus expressly providing for the payment of franchise taxes.

The appellees, by way of cross error, also contend that the tax imposes a burden upon interstate commerce; but this question was determined adversely to their contention in *American Can Co. v. Emmerson*, and *Hump Hairpin Mfg. Co. v. Emmerson*, supra. Those cases involve a license fee required to be paid by foreign corporations for the privilege of doing business in the state of Illinois, based upon the proportion of their capital stock represented by their property and business in this state, and it was held that the tax, though measured by capital used in part in the conduct of interstate commerce, was within the authority of the state, since the circumstances indicate no purpose to impose a burden on interstate commerce, or that such will be the effect. This principle is sustained by the Supreme Court of the United States. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *Kansas City, M. & B. R. Co. v.*

—effect of
Federal control.

Commerce—tax
on interstate
railroad.

—on railroad in
hands of
receiver.

Stiles, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58.

The decree of the Circuit Court will be reversed, and the cause re-

manded, with directions to dismiss the bill.

Petition for rehearing denied December 9, 1921.

ANNOTATION.

Imposition of franchise or excise tax on corporation in hands of receiver.

- I. Introductory, 700.
- II. Where receiver carries on ordinary business of corporation:
 - a. General rule, 700.
 - b. Contrary view, 703.
- III. Where receiver does not carry on ordinary business:
 - a. Theory that corporation is practically dissolved, 704.
 - b. Where tax is on doing business, 704.
- IV. New Jersey doctrine, 705.
- V. Ohio, 705.

I. Introductory.

It is difficult to reconcile or to classify the cases on this subject. One class of cases seems to be decided on the theory that the corporation at the time of the assessment was practically, if not actually, dissolved, and so there was no taxable franchise. In another class of cases, where the tax has been regarded as one upon doing business, it is held that if the receiver does not carry on the ordinary business of the corporation there is no ground for the tax. The United States Supreme Court, while stating that the statute involved did not impose a tax upon corporate franchises as such, takes the view that a corporation carried on by receivers is not itself operating anything, while the courts of New York and of several other jurisdictions, in effect, consider that the operation by the receiver is a use of the franchise.

The New Jersey cases go upon the theory that the tax, while in terms a franchise tax, was not really such, but an imposition upon corporate existence, and so is rightly imposed during such corporate existence, whether the receiver carries on business or not. The Ohio cases (which are separately grouped) are not always clear as to whether or not the receiver carried on

the ordinary business of the corporation.

II. Where receiver carries on ordinary business of corporation.

a. General rule.

Where the ordinary business of the corporation is continued by the receiver, it would seem reasonable that the franchise tax should accrue.

Arkansas.—Bright v. Arkansas (1918) 162 C. C. A. 148, 249 Fed. 950.

Illinois.—ARMSTRONG v. EMMERSON (reported herewith) ante, 693.

Kansas.—See State ex rel. Dawson v. Sessions (1915) 95 Kan. 272, 147 Pac. 789.

Massachusetts.—Harvey v. Bay State Street R. Co. (1920) 234 Mass. 336, 125 N. E. 614.

New Jersey.—Re George Mather's Sons Co. (1894) 52 N. J. Eq. 607, 30 Atl. 321.

New York.—Central Trust Co. v. New York City & N. R. Co. (1888) 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92; People ex rel. Joline v. Williams (1910) 200 N. Y. 528, 94 N. E. 1097; New York Terminal Co. v. Gaus (1912) 204 N. Y. 512, 98 N. E. 11. See also Spencer v. Babylon R. Co. (1916) 233 Fed. 803; People ex rel. Kalbach v. State (1919) 189 App. Div. 347, 178 N. Y. Supp. 486, affirmed in (1920) 229 N. Y. 630, 129 N. E. 936.

Ohio.—Gerke Brewing Co. v. Kuerze (1916) 7 Ohio App. 37. See also the obiter remarks in Ohio v. Harris (1916) 144 C. C. A. 174, 229 Fed. 892, *infra*, V.

In Bright v. Arkansas (1918) 162 C. C. A. 148, 249 Fed. 950, *supra*, it was held that receivers of the property of a railroad company, which would have been liable to pay taxes accruing during the receivership for the

privilege of exercising its corporate powers, should be directed by the courts of equity controlling such receivers to pay such taxes as accrued while they were operating the property and before they surrendered it to purchasers or others, and it was also held that the receivers should pay the penalties on such unpaid taxes out of earnings or property received, the state having applied promptly for payment of the taxes.

It was held in the reported case (*ARMSTRONG v. EMMERSON*, ante, 693) that the annual license fee or franchise tax was properly imposed by the state on the capital stock of a railroad corporation of which a receiver had been appointed by the Federal court, and which railroad was in operation. The receiver paid the tax to the state secretary of state under protest, and a bill was filed in the name of the company and the receiver to restrain the secretary of state from paying the money over to the state treasurer, and to require him to repay it to such receiver, and the court directed that the bill be dismissed.

In *State ex rel. Dawson v. Sessions* (1915) 95 Kan. 272, 147 Pac. 789, supra, where it seems that the tax in question was a tax on a foreign corporation to pay an annual fee as a condition to doing business in the state, it was held that, where a receiver is carrying on the business of a corporation as a going concern, he is in effect exercising its corporate franchise, and the state properly looks to him to pay the tax imposed upon it, the court citing the first and third of the preceding New York cases. It does not appear, however, whether the receiver was appointed before or after the tax had been assessed.

In *Harvey v. Bay State Street R. Co.* (1920) 234 Mass. 336, 125 N. E. 614, supra, it was held that the commutation excise tax, to be based upon receipts from actual operation, assessed upon a street railway corporation under the Massachusetts Statute of 1909, chap. 490, pt. 3, §§ 47, 48, & 50, was "an excise upon the operation of the street railway in public ways," that it was not a property tax upon the

physical assets of the corporation, or an excise tax upon the franchise as a corporation and the right to do business and exist as such; that such tax was properly assessed as a unit upon a street railway corporation for the entire period between October 1, 1917, and September 30, 1918, although on December 12, 1917, a receiver appointed by the Federal court took possession, and operated the corporation for the remainder of the period. The action was by the tax collector against both the corporation and the receiver, and was brought by leave of the Federal court, and the state court entered judgment for the taxes against the corporation only, stating that it was the duty of the receiver to pay the tax when assessed, and that, "under the decree whereby he was appointed, the receiver was authorized 'to pay all taxes due or to become due from the said Bay State Street Railway Company, or any part thereof.'"

A tax to be computed on the gross earnings in the state of a railroad, "as a tax upon its corporate franchise or business in" the state, is payable by the receiver who is operating the road and collecting such gross earnings, notwithstanding he is receiver in a suit to foreclose mortgages which antedate the taxes. *Central Trust Co. v. New York City & N. R. Co.* (1888) 110 N. Y. 250, 1 L.R.A. 260, 18 N. E. 92, supra. The court said: "Under this order of the court he takes possession of all the property of the corporation, and proceeds to operate—that is, to run—its trains, and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the state upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and, through the court, he acts as the company to the same extent, *pro hac vice*, as if the board of directors were operating the railroad. It is the franchise which is being used in both cases, only in one case it is used for the company, and substantially by it, by means of its board of directors; while in the other case the same fran-

chise is being used, and the road is operated under it, by an officer of the court." The court distinguished *Com. v. Lancaster Sav. Bank* (1878) 123 Mass. 493, *infra*, III. b, stating that there the corporation was practically dissolved, but that in the New York case it was not dissolved in form or in substance.

Upon the authority of this case, the court in *People ex rel. Joline v. Williams* (1910) 200 N. Y. 528, 94 N. E. 1097, sustained a tax imposed as a tax on franchise or business, based on the gross earnings of a street railroad company operated by receivers appointed by the United States court, which court had decreed that the corporation was insolvent and that its property constituted a fund in which its creditors were interested, and the receivers claimed that the corporation was, for all practical purposes, dissolved. The tax was imposed under § 185 of the tax law, providing that a corporation of this class "shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be 1 per centum upon its gross earnings," etc. (This was one of the corporations involved in the United States tax case, *infra*, II. b.)

So it was held that, where the receiver appointed in an action to foreclose a mortgage on a ferry company continues to operate the ferry, the annual franchise tax upon the corporation levied during the receivership is a lien upon its property prior to encumbrances of record, and that where all the property of the ferry company, save its franchise to be a corporation, is sold subject to all taxes which might be liens thereon at the time of the sale, the purchaser takes the property subject to such lien. *New York Terminal Co. v. Gaus* (1912) 204 N. Y. 512, 98 N. E. 11. The judges of the court stood four to three on the question whether the franchise tax was superior or not to a prior mortgage. The statute provided that "for the privilege of doing business or exercising its corporate franchises in

this state every corporation, joint stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state," and that this tax "shall be due and payable on or before the 15th day of January in each year," and "such tax shall be a lien upon and bind all the real and personal property" of the corporation, "from the time when it is payable until the same is paid in full." The court overruled the contention that the provisions for a franchise tax did not apply where the corporation was in the hands of a receiver, and had ceased itself to operate, and said: "I think the fallacy of the contention is in an evident assumption that, in his conduct of the business of the corporation, the corporate franchise is not being used by the receiver. . . . The receiver who was appointed of this corporation continued to operate its ferry business. . . . As he had no individual interest, but only the official possession of the property, the receiver could only have operated under the corporate franchise. That he was not a general receiver, as in sequestration proceedings, but only a receiver of the mortgaged property *pendente lite*, however marked the distinction, is not material to our consideration. By virtue of his appointment this receiver took possession of the mortgaged property and received the earnings as the officer of the court. The title to the property was not changed, but remained in the company, the mortgagor, until the sale under the decree in the action. . . . The corporation was not dissolved; its franchise to conduct the ferry business was in existence, and any operation must have been by virtue of that franchise. The right of its officers to operate was taken away, for the time, by the court, and was conferred upon the receiver, as its officer. Operation, therefore, could only have been under the corporate franchise."

Although the statute imposing franchise taxes on a certain class of rail-

road companies provided a less tax upon railroad corporations whose property was leased to another corporation, it was held that the tax must be assessed as if there had been no lease, in a case where both the lessor and lessee railroad corporations were insolvent and in the hands of different receivers, and the lessor corporation was operated by its own receiver. *People ex rel. Kalbach v. State Tax Commission* (1919) 189 App. Div. 347, 178 N. Y. Supp. 486, affirmed in (1920) 229 N. Y. 630, 129 N. E. 936.

In *Spencer v. Babylon R. Co.* (1916) 233 Fed. 803, it was held that the Federal court which appointed the receiver might reduce the assessment on which was based the franchise taxes assessed during the receivership of a railroad company, to what it deems reasonable, although the corporation never, during the receivership, appeared before the grievance committee of the assessors to protest against the assessment.

It may be noted that the "franchise tax accruing, during the receivership," on a railway company was paid by the receiver in *Farmers' Loan & T. Co. v. Fidelity Ins. Trust & S. D. Co.* (1897) — *Tex. Civ. App.* —, 41 S. W. 113, but the court does not discuss the general question.

In *Philadelphia & R. R. Co. v. Com.* (1883) 104 Pa. 80, where it was held that, when a railroad is being operated by receivers of the company appointed by a United States court, the gross receipts of such receivers are taxable under the act taxing gross receipts of railroads, and the assessment is properly made against the railroad, as the order appointing the receivers did not change the title of the road. The state argued that the tax was a tax on the franchise of the corporation, but the court did not, it seems, decide this question.

b. Contrary view.

It has been held by the United States Supreme Court that the income derived from the management of a street railway line by a receiver authorized and required by the order for his appointment to manage and

operate such railway, and to discharge his public duties subject to the supervision of the court, is not subject to the excise or privilege tax imposed by the United States Corporation Tax Law of 1909, upon the carrying on or doing business by a corporation, as the receivers were acting as officers of the court, and not as officers of the corporation, and the possession and control of the receivers constituted an ouster of corporate management. *United States v. Whitridge* (1913) 231 U. S. 144, 58 L. ed. 159, 84 Sup. Ct. Rep. 24. The statute provided: "That every corporation . . . organized for profit and having a capital stock represented by shares . . . organized under the laws of the United States or of any state . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation." The court said: "A reference to the language of the act is sufficient to show that it does not, in terms, impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it, in terms, impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income. And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads, and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the con-

trary, an ouster of corporate management and control, with the accompanying advantages and privileges."

III. Where receiver does not carry on ordinary business.

a. Theory that corporation is practically dissolved.

An annual license or franchise tax assessed as of July 1st, 1910, and for the year beginning on that date, is not a good claim against a corporation which passed into the hands of receivers by order of the court made in April, 1910, under proceedings to force a dissolution, although the statute makes the franchise tax a preferred debt in case of insolvency. *Johnson v. Monson Consol. Slate Co.* (1911) 108 Me. 296, 80 Atl. 750; *Johnson v. Johnson Bros.* (1911) 108 Me. 272, 80 Atl. 741, Ann. Cas. 1913A, 1303. In the case last cited the court said: "This so-called tax is not levied on property, but is imposed on the corporation in the nature of an annual license fee for the right to continue to exercise the privileges conferred upon it by the state. . . . The defendant corporation had passed into the hands of receivers by order of court in April, 1910, under proceedings for its dissolution. The defendant thereafter had no right to exercise for itself any of the privileges conferred upon it by the state. Its franchise—its right to do business for itself—had ceased, and the state had taken possession of its assets for distribution among its then-existing creditors."

And this seems to be the theory of the Federal court in *Ohio v. Harris* (1916) 144 C. C. A. 174, 229 Fed. 892, writ of certiorari denied in (1916) 242 U. S. 634, 61 L. ed. 538, 37 Sup. Ct. Rep. 18 (infra, V.), where the receiver, while authorized to continue the ordinary corporate business, did not do so, and where the court said: "As we understand the facts of the present case, however, the receiver was, during those years, no more engaged in exercising the corporate franchises than the trustees in bankruptcy were, during the tax years for which recoveries are sought against them. The

corporations were, and so far as appears still are, to all intents and purposes, extinct, and so could not then, any more than they can now, exercise their franchises."

See also *Keeney v. Dominion Coal Co.* (1915) 225 Fed. 625, infra, V.

b. Where tax is on doing business.

There is another class of cases where the franchise tax is regarded as one upon doing business, and in which it is held that, if the receiver does not carry on the ordinary business of the corporation, there is no ground for the tax. *Com. v. Lancaster Sav. Bank* (1878) 123 Mass. 493; *Greenfield Sav. Bank v. Com.* (1912) 211 Mass. 207, 97 N. E. 927; *State v. Bradford Sav. Bank & T. Co.* (1899) 71 Vt. 234, 44 Atl. 349.

Thus, where an insolvent savings bank is placed in the hands of a receiver on February 1st, by order enjoining it from doing business, and has since done no business, and the receiver has done none except to proceed in the winding up of its affairs, such bank has ceased to be doing business within the meaning of the statute, and consequently ceased to be liable to pay the franchise tax imposed by such statute, which provided that "a state tax . . . is hereby assessed upon the property, business, or corporate franchises of this state, of . . . savings banks. . . . Every . . . savings bank . . . incorporated by this state, and doing business herein, shall pay a tax," at a certain rate, upon deposits, which "shall be paid semiannually, one half in the month of February and one half in the month of August, and shall be based upon the returns for the six months terminating with the last day of December, and June next preceding." The court stated that it was clear that this was a franchise tax. *State v. Bradford Sav. Bank & T. Co.* (Vt.) supra.

A savings bank corporation which, in the latter part of December, had been placed in the hands of a receiver and prohibited perpetually from transacting the business for which it was incorporated, is not liable for taxes on its deposits, to be assessed one half

on the average amount for the six months preceding the 1st day of the following May, the court considering the tax as one on the franchise to do business, and that it was to be assessed as of the 1st of May. *Com. v. Lancaster Sav. Bank (Mass.) supra.*

A similar tax for the six months preceding November 1, 1910, was held illegal against a savings bank, restrained in 1909 from receiving deposits, etc., and, since sometime in June, 1910, in the hands of the state bank examiner, although the bank still existed and might, perhaps, be allowed to resume business. *Greenfield Sav. Bank v. Com. (1912) 211 Mass. 207, 97 N. E. 927, supra.*

IV. New Jersey doctrine.

A corporation in the hands of a receiver is liable to the "annual license fee or franchise tax" on the amount issued of its capital stock. *Re United States Car Co. (1900) 60 N. J. Eq. 514, 43 Atl. 673, reversing (1899) 57 N. J. Eq. 357, 42 Atl. 272, and holding that, although the statute designated an imposition of this kind as a license fee or franchise tax, it certainly was not a tax on the corporate franchises, and not a tax at all, but really an arbitrary imposition laid upon the corporation, without regard to the value of its property or its franchises, and without regard to whether it was exercising the latter or not, solely as a condition of its continued existence, and that, as the statute provided that such tax should be a preferred debt in case of insolvency, it must be paid, the statute also providing that all the real and personal property of an insolvent corporation, and all its franchises, rights, privileges, and effects, shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.*

This case was followed in *Duryea v. American Woodworking Mach. Co. (1904) 133 Fed. 329, and in Conkling v. United States Shipbuilding Co. (1906) 148 Fed. 129, holding that the receiver should pay as a preferred claim the annual (New Jersey) license fee or franchise tax imposed during his receivership.*

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It was also followed in *Chesapeake & O. R. Co. v. Atlantic Transp. Co. (1901) 62 N. J. Eq. 751, 48 Atl. 997, where it was held that the franchise tax was to be paid, and was preferred over other liabilities, but not over the allowance to the receiver and the expenses of winding up the corporation.*

Where the return of a corporation, on which the assessment for a franchise tax was computed, was made May 3, and the assessment was made June 5, and between the two dates a receiver was appointed, it was held that this did not interfere with the taxability of the corporation, the court observing that putting a corporation in charge of a receiver does not work a dissolution. *Kirkpatrick v. State Assessors (1894) 57 N. J. L. 53, 29 Atl. 442, where, however, the court ordered that testimony should be taken for the purpose of seeing whether the corporation was taxable on other grounds or not.*

In view of the later cases, probably the obiter observations in *Re George Mather's Sons Co. (1894) 52 N. J. Eq. 607, 30 Atl. 321, are no longer of interest.*

V. Ohio.

In Ohio, where the cases are not always clear as to whether or not the receiver carried on the ordinary business of the corporation, it seems somewhat doubtful whether there is full harmony between the state and Federal courts on the subject.

In *Morley v. Cleveland Hippodrome Co. (1914) 23 Ohio C. C. N. S. 295, it was held that, in Ohio, the annual franchise tax upon the subscribed or issued and outstanding stock of a corporation, accruing after the appointment of a receiver, is entitled to a preference where the statute provides: "The fees, taxes and penalties required to be paid by this act shall be the first and best lien on all property of a public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business, or is in the hands of an assignee, trustee or receiver, for the benefit of the creditors and stockholders thereof." It does not*

appear whether or not the receiver carried on the corporation's business. The court said: "The result here reached is the same as that reached under a similar statute in the state of New Jersey, where the same questions were raised. *Re West Car Co.* (1900) 60 N. J. Eq. 514, 43 Atl. 673."

This case was approved in *Gerke Brewing Co. v. Kuerze* (1916) 7 Ohio App. 37, where it was held that this franchise tax should operate at least as long as the receiver is in control of the corporate assets and conducting its corporate business, distinguishing the decision in *Ohio v. Harris* (1916) 144 C. C. A. 174, 229 Fed. 892, as there the business of the two corporations in question was not being carried on.

In *Ohio v. Harris* (1916) 144 C. C. A. 174, 229 Fed. 892, writ of certiorari denied in (1916) 242 U. S. 634, 61 L. ed. 538, 37 Sup. Ct. Rep. 18, it was held that the Ohio corporation franchise tax was not to be imposed upon an insolvent corporation in the hands of a receiver, who, as the court states it, "though empowered to continue the business, such as that of mining and selling coal, is not shown or claimed to have continued the business except only so far as this may have been in-

volved in his admitted collection of claims and discharge of debts of the corporation." The court states that if the receiver had, during the tax years in question, conducted the corporation business in the regular way, "he would have been chargeable with having exercised the franchises. *Central Trust Co. v. New York City & N. R. Co.* (1888) 110 N. Y. 257, 1 L.R.A. 260, 18 N. E. 92." The court said of *Morley v. Cleveland Hippodrome Co.* (1914) 23 Ohio C. C. N. S. 295, *supra*, in part: "The facts stated in the report of the decision do not distinctly show whether they are in all essential respects like the facts of the present receivership case, though we regret that the decision in that case, and the present decision, seem in some particulars not to be in accord."

In *Keeney v. Dominion Coal Co.* (1915; Dist. Ct. S. D. Ohio) 225 Fed. 625, it seems to be a similar tax which was held, as against an insolvent corporation in the hands of a receiver, to be invalid on many grounds; but the court does not inform us whether or not the receiver carried on the business of the corporation. (This case does not seem to be referred to in subsequent decisions.) B. B. B.

EX PARTE ROBERT J. LANCASTER.

Alabama Supreme Court—April 21, 1921.

(— Ala. —, 89 So. 721.)

Venue — effect of entry of nolle pros.

1. Where by statute a trial can be removed but once, the venue of a criminal action cannot be restored to the county where the crime was committed by the entry of a nolle pros. after mistrial by the court of the county to which the venue was changed.

[See note on this question beginning on page 714.]

—action of grand jury—right to change.

2. Under a constitutional provision that the local jurisdiction of all public offenses is in the county where the offense was committed, there can be no change of venue for the action of a grand jury.

—verification of application for change.

3. Under constitutional and statutory provisions that the legislature may provide for change of venue on application of defendant, and that any person charged may have his trial removed to another county on making

(— Ala. —, 89 So. 781.)

application setting forth the reasons, which application must be sworn to by him, the state cannot, after consenting to a change on application sworn to by the attorney for accused, attack the trial pursuant to such change as illegal.

Courts — jurisdiction — change of venue — when complete.

4. Upon order for change of venue in a criminal case, the jurisdiction of the court in the case where the indictment was found ceases, and that of the court of the county to which the case is removed begins.

[See 27 R. C. L. 825.]

Maxim — indirect action.

5. What cannot be done directly by law, the law does not permit to be done indirectly.

Grand jury — effect of removal of case for trial.

6. The removal of an indictment to another county for trial does not deprive the grand jury of the county where the crime was committed of jurisdiction to find a new indictment in case the first one is dismissed for any cause.

APPLICATION for a writ of prohibition to restrain the judges of the Circuit Court of Walker County from putting petitioner on trial in that county, on an indictment charging him with murder in the first degree. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. Foster, Verner, & Rice, Harwood, McKinley, McQueen, & Aldridge, L. D. Gray, A. H. Carmichael, E. B. Fite, K. B. Fite, and Charles E. Rice, for petitioner:

If change of venue is made by consent, neither party can afterward object.

40 Cyc. 182; *Oborn v. State*, 143 Wis. 249, 31 L.R.A.(N.S.) 966, 126 N. W. 787.

At common law courts possess the inherent right to change venue in order to secure fair and impartial trial of the accused.

16 C. J. p. 201, § 302 (notes 30 and 31). *State v. Albee*, 61 N. H. 423, 60 Am. Rep. 325.

An order made and entered for change of venue on motion of the accused by his attorney, the solicitor being present, is valid.

Ex parte Reeves, 52 Ala. 394; *Rosenbaum v. State*, 33 Ala. 354.

If the order changing the venue is regular on its face, and shows that the change was made at the instance of the accused, it cannot be attacked by showing that no ground was shown to exist, or that the petition was not properly made.

40 Cyc. 177; *Lewis v. State*, 49 Ala. 1; *State v. McLendon*, 1 Stew. (Ala.) 195.

The judgment of a court of general jurisdiction cannot be collaterally attacked unless it is void on its face. Matters *de hors* the record cannot be considered for the purpose of impeach-

ing its validity. Nor does the silence of its records create a presumption of a want of jurisdiction.

Louisville & N. R. Co. v. Tally, 203 Ala. 370, 83 So. 114; 15 R. C. L. §§ 358, 373, p. 839; *White v. Simpson*, 124 Ala. 238, 27 So. 297; *Alabama G. S. R. Co. v. Hill*, 139 Ga. 224, 43 L.R.A.(N.S.) 236, 76 S. E. 1001, Ann. Cas. 1914D, 996; *Barclift v. Treece*, 77 Ala. 528; *Breeding v. Breeding*, 128 Ala. 412, 30 So. 881; *Winter v. London*, 99 Ala. 263, 12 So. 438; *Max J. Winkler Brokerage Co. v. Courson*, 160 Ala. 374, 49 So. 341; *Falkner v. Christian*, 51 Ala. 495; *Drinkard v. Oden*, 150 Ala. 475, 43 So. 578; *Carr v. Illinois C. R. Co.* 180 Ala. 159, 43 L.R.A.(N.S.) 634, 60 So. 277; *Conniff v. McFarlin*, 178 Ala. 160, 59 So. 472; *Burke v. Mutch*, 66 Ala. 568; *Bromberg v. Sands*, 127 Ala. 411, 30 So. 510; *Wood v. Wood*, 134 Ala. 557, 33 So. 847; *Peavy v. Griffin*, 152 Ala. 256, 44 So. 400.

Upon a change of venue, the court from which the case is transferred loses all jurisdiction to try the accused upon the indictment preferred at the time of the change, or upon any other indictment charging the same offense.

16 C. J. 220; *Johnston v. State*, 118 Ga. 310, 45 S. E. 381, 46 S. E. 488; *Smith v. Com.* 95 Ky. 322, 25 S. W. 106; *Keefe v. District Ct.* 16 Wyo. 381, 94 Pac. 459; 12 Cyc. 253; *Woodring v. State*, 33 Tex. Crim. Rep. 26, 24 S. W. 293; *Bowles v. State*, 5 Sneed, 360;

State v. Swepson, 81 N. C. 571; State v. Twiggs, 60 N. C. (1 Winst. L.) 142.

When an order for change of venue is made by the court at the instance of the accused, all jurisdiction over the prisoner is out of that court, and the same is vested, *eo instanti*, in the court to which the case is transferred.

Bramlett v. State, 31 Ala. 376.

Where successive indictments are found for the same felony, an order for the change of venue of the last applies to the others, as they are merely different counts in the same proceeding.

16 C. J. p. 217; State v. Johnson, 50 N. C. (5 Jones, L.) 221.

Jurisdiction once acquired on change of venue cannot be divested.

Gay v. Brierfield Coal & I. Co. 106 Ala. 615, 17 So. 618; 40 Cyc. 176.

Venue can be changed only once, and cannot be remanded to the court where the indictment was returned.

Ex parte Dennis, 48 Ala. 304; Aikin v. State, 35 Ala. 399.

The court making order for change of venue loses jurisdiction as soon as the order is made, and before the transcript of the papers in the case is forwarded to the county to which the case is sent.

16 C. J. p. 218; Re Terrill, 75 C. C. A. 418, 144 Fed. 616; Ex parte Rivers, 40 Ala. 712; Goodhue v. People, 94 Ill. 37; State v. Weddington, 103 N. C. 364, 9 S. E. 577; Bramlett v. State, 31 Ala. 376.

Messrs. Harwell G. Davis, Attorney General, Horace C. Wilkinson, Special Assistant Attorney General, J. M. Pennington, and W. C. Davis, for respondents:

An affidavit made by an attorney is insufficient, and, without an affidavit of the defendant himself in support of the application for change of venue, the court is without jurisdiction or authority to order the case tried in some other jurisdiction.

Young v. People, 54 Colo. 293, 130 Pac. 1011; Smith v. Clarke, 70 Wis. 137, 35 N. W. 318; Winn v. State, 82 Wis. 571, 52 N. W. 775; Brouillette v. Judge of Tenth Dist. Ct. 45 La. Ann. 243, 12 So. 134; Stevens v. Burr, 61 Ind. 464; Western Bank v. Tallman, 15 Wis. 92; Crowell v. Maughs, 7 Ill. 419, 43 Am. Dec. 63; Hedge v. Gibson, 58 Iowa, 656, 12 N. W. 713; Fidelity & C. Co. v. Carroll, 186 Ind. 633, 117 N. E. 858; State v. Buck, 108 Mo. 622, 18 S. W. 1113; Ex parte Dennis, 48 Ala.

304; Huckabee v. State, 168 Ala. 27, 53 So. 251; Goodloe v. State, 60 Ala. 93; 8 R. C. L. 96, § 55; Ex parte Payne, 130 Ala. 189, 29 So. 622.

When the state enters a *nolle pros.* to an indictment, it has the effect of entirely destroying the indictment, and to leave the proceedings as if the grand jury had never preferred an indictment.

Walker v. State, 61 Ala. 30.

A *nolle prosequi* does not absolve the defendant from liability from further prosecution for the same offense. Its only effect is to end the then prosecution.

O'Brien v. State, 91 Ala. 25, 8 So. 560.

The finding of a new indictment is the beginning of a new prosecution.

Bazell v. State, 89 Ala. 14, 8 So. 22.

The presence of a defendant is not required when the *nolle pros.* is entered.

Lizotte v. Dloska, 200 Mass. 327, 86 N. E. 774.

A *nolle prosequi* may be entered after a mistrial.

People v. Pline, 61 Mich. 247, 28 N. W. 83; State v. Main, 31 Conn. 572; State v. Shirer, 20 S. C. 392.

A *nolle prosequi* ends the then-pending case, and authorizes a new indictment and a subsequent trial in the county of original jurisdiction.

State v. Patterson, 73 Mo. 695; State v. Billings, 140 Mo. 193, 41 S. W. 778; State v. Goddard, 162 Mo. 198, 62 S. W. 697.

Miller, J., delivered the opinion of the court:

This is a petition for writ of prohibition, filed by Robert Lancaster, to prevent the judges of the circuit court of Walker county from putting him on trial in that county on a certain indictment charging him with murder in the first degree.

On the night of January 13, 1921, Will Baird was forcibly taken from the jail of Walker county and killed. The petitioner was, on the 19th of January, 1921, arrested under warrant charging him with the offense of unlawfully and with malice aforethought killing said Will Baird in Walker county. On the same day the grand jury of the circuit court of Walker county returned an indictment into said court, charging

petitioner with said offense in the form of murder in the first degree.

On January 21, 1921, the petitioner-defendant in said case, by his attorneys, filed in writing in said circuit court an application for, and "moves the court to grant him, a change of venue, and that this court make an order removing the trial of the above-stated cause from Walker county, Alabama, to some other county in the state of Alabama, which is free from exception." This application set forth specifically the reasons why he could not have a fair and impartial trial in the county in which the indictment was found. It was signed by his attorneys, and it was verified by the affidavit of L. D. Gray, one of his attorneys. In the minutes of the court of January 21, 1921, we find on ruling on this application the following: "On the hearing of the petition in this case for change of venue, come the state of Alabama by its solicitors and the defendant by his attorneys and the solicitors stating in open court that the application for a change of venue will not be resisted. . . . It is, therefore, the order and judgment of the court that the motion be granted, and the case is removed to the county of Marion and state of Alabama for trial."

The petitioner was tried on that charge under an indictment on the 1st day of February, 1921, in the circuit court of Marion county, Alabama. The jury could not agree in the case, and a mistrial was entered on February 7, 1921. On the 22d day of February, 1921, an order of nolle prosequi in said case was made in the circuit court of Marion county, and on the same day a similar order was made in the circuit court of Walker county. The defendant, Robert Lancaster, was immediately arrested under affidavit and warrant charging him with the same offense as was alleged in the said indictment. On February 25, 1921, the grand jury of Walker county, Alabama, returned into the circuit

court another indictment against the petitioner, charging him with the same offense, murder in the first degree. This second indictment charged the same offense, the same degree of the offense, as the first indictment. To all legal intents and purposes it was an exact copy of the first indictment, the only practical difference being, one was filed in the circuit court of Walker county on February 25, 1921, and the other on January 19, 1921. The same grand jury found and returned both true bills. The defendant is now under arrest and in prison under the last indictment.

The record shows that the deceased, Will Baird, was killed in Walker county, Alabama, on January 13, 1921.

The county of Walker had jurisdiction of the offense. The circuit court of that county had exclusive jurisdiction. If he was killed unlawfully, the grand jury of that county alone could indict the person charged with the offense. There may be a change of venue for his trial, but there can be no change of venue for a grand jury to investigate and return a true bill. Const. 1901, §§ 6, 8; Code 1907, §§ 7851, 7130, 7140. "The local jurisdiction of all public offenses, unless it is otherwise provided by law, is in the county in which the offense was committed." Code 1907, § 7225.

The Constitution of Alabama gives the defendant "in all prosecutions, by an indictment," the right to "a speedy, public trial, by an impartial jury of the county or district in which the offense was committed." Const. 1901, § 6. When the defendant thinks he cannot secure a fair and impartial trial in the county where the alleged offense is committed and the indictment is found, then he has the right to apply to the court for a change of venue. An application was made in the circuit court of Walker county for a change of venue. The court granted the application, and ordered the trial re-

Venue—action of
grand jury—
right to change.

moved from Walker county to the circuit court of Marion county.

The state contends that this was error; that the order of the circuit court of Walker county, granting the petition for change of venue and removing the trial to the circuit court of Marion county, was null and void, because the Constitution requires the change of venue to be applied for by the defendant, and the statute requires the application for change of venue to be sworn to by the defendant, neither of which, he claims, was done in this case.

Section 6 of the Constitution of 1901, germane to the question, reads: "The legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement."

This does not require the application to be in writing. It does not require it to be verified by affidavit or sworn to by the defendant. It must be made by defendant. This does not require the defendant should personally sign the application, or personally rise up in court and make the motion; he may, but the Constitution does not require it. This same section of the Constitution gives the accused "the right to be heard by himself and counsel, or either." In cases of this kind—charged with a capital offense—the defendant must have counsel, if able to employ one, and, if unable to employ one, it is the duty of the court to appoint counsel for him, not exceeding two. Code 1907, § 7839; *Ex parte Bryan*, 44 Ala. 402; *Slocovitch v. State*, 46 Ala. 227.

Section 7851 of the Code of 1907, as amended in Acts 1909, p. 212, reads as follows: "Change of Venue: Trial Removed on Defendant's Application, etc. — Any person

charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found; which application must be sworn to by him, and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the Supreme Court shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment of ruling of the lower court on said application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court."

There is nothing in this act to prevent the attorneys for defendant, in his name, making the application. The application in this case is in writing. It is signed by attorneys for the defendant. It is verified by the affidavit of one of his attorneys.

On direct appeal to this court by the defendant in the case of *Lewis v. State*, 49 Ala. 1, "the transcript did not contain any affidavit stating the reasons for changing the venue in said cause," and the minutes of the court showed that on motion of the defendant, and for cause shown, etc., the trial was removed from the circuit court of Dallas county to the city court of Montgomery. On these facts this court decided: "As the trial was removed from Dallas county, at the instance and on the motion of the defendant, and as the record states that cause for the removal was shown, we will presume it was an affidavit, and that the cause shown was sufficient; we will also presume that Montgomery county was the nearest adjoining county free from exception, as it is so stated in the order. At any rate, it did not lie in defendant's mouth to complain that the order was ir-

regularly made, as it was made at his instance, and in his favor, and without objection on his part; and, besides, it does not appear that he was prejudiced by the alleged irregularity."

See also *Paris v. State*, 36 Ala. 232; *Ex parte Rice*, 102 Ala. 675, 15 So. 450.

In said case of *Lewis v. State*, on direct attack on appeal, the order granting change of venue was presumed to be correct, when the minutes of the court recited on motion of defendant and for cause shown the order of removal was granted. The court presumed it was on affidavit, and the cause shown was sufficient; and, "at any rate, it did not lie in defendant's mouth to complain." *Lewis v. State*, *supra*.

The state in this case did not question the sufficiency of the application for change of venue by demurrer because not sworn to, or verified by affidavit of defendant. Hence, *Huckabee v. State*, 168 Ala. 27, 53 So. 251, has no application to facts of this case. The state did not move to strike it from the file because not sworn to by the defendant personally. The state did not object to the court granting the petition because the facts alleged in it were not sworn to personally by the defendant. What did the state do? The state, by its solicitors, "on the hearing of the petition in this case for a change of venue," stated "in open court that the application for a change of venue will not be resisted." From this it would appear that the evidence and facts were so clear and convincing that the defendant could not have a fair and impartial trial by a jury in Walker county that the solicitors for the state were even convinced thereof; and they informed the court, openly in court, before the decision was rendered, "that the application for change of venue will not be resisted by the state."

The defendant, Robert Lancaster, by his attorneys, made the application, on the hearing the solicitors for the state did not resist it, the

court was convinced that it should be granted, and made proper order of removal. Neither the state nor the defendant can complain at the action of the court. The attorneys for the state are eminently correct when in their brief they state: "The whole purpose of the statute providing for a change of venue is to insure a fair and impartial trial."

The law never intended for this purpose to be defeated by formal pleadings. *State v. McLendon*, 1 Stew. (Ala.) 195; *Lewis v. State*, 49 Ala. 1; *Paris v. State*, 36 Ala. 232; *Ex parte Rice*, 102 Ala. 675, 15 So. 450; *Ex parte Reeves*, 52 Ala. 394.

Under the facts of this case the order of the circuit court of Walker county, removing the trial of Robert Lancaster for the offense charged in the indictment from the circuit court of Walker county to ^{—verification of application for change.} the circuit court of

Marion county, was legal and valid. It is binding on the defendant and on the state of Alabama. *Lewis v. State*, 49 Ala. 1; *State v. McLendon*, 1 Stew. (Ala.) 195; Const. 1901, § 6; Code 1907, § 7851.

The design of the Constitution and the purpose of the statute are for the court, on application of a defendant under an indictment, for change of venue, to ascertain by sworn evidence, by affidavits of defendant and others, or examination of them orally in court, whether the defendant can get a fair and impartial trial by a jury in the county where the alleged offense is committed. If the sworn evidence convinces the court that he cannot, then the defendant is entitled to have, as a matter of law, with a constitutional right, his trial for the offense removed by the court to the nearest county free from exception. Const. 1901, § 6; Code 1907, § 7851; *Lewis v. State*, 49 Ala. 1; *State v. McLendon*, *supra*.

This court in *Bramlett v. State*, 31 Ala. 381, writes: "We maintain that when the circuit court of Cherokee county, at the instance of the prisoner, made the order for the

change of venue, and adjourned the court without revoking or qualifying that order, all jurisdiction over the prisoner was out of that court, and the same vested *eo instanti* in the circuit court of Benton county. The jurisdiction was not, and could not be, in abeyance."

By this order of the court the jurisdiction to try Robert Lancaster for said offense was changed from Walker county to Marion county.

Courts—jurisdiction—change of venue—when complete. The jurisdiction in Walker county to try him ceased, and the jurisdiction in Marion county commenced, when the order of removal was made by the circuit court of Walker county. *Bramlett v. State*, supra; 16 C. J. p. 218, § 330; 27 R. C. L. ¶ 46, p. 825.

Can this jurisdiction of the circuit court of Marion county to try this defendant for this offense be taken away? This is the next and final question to be decided. The state of Alabama contends that it can, by dismissing, with consent of the court, the prosecution in the circuit court of Marion county. The defendant was tried under the indictment in the circuit court of Marion county. There was a mistrial. The solicitor then, with consent of the court, had a *nolle prosequi* entered in the case. The defendant was immediately arrested for the same offense under affidavit and warrant. The grand jury of Walker county within a few days returned another indictment—just exactly like the first one—against this defendant for the same offense. He was arrested under it, and it is now on the circuit court docket of Walker county.

Did these proceedings divest the jurisdiction to try this defendant for this offense out of the circuit court of Marion county, and restore jurisdiction to the circuit court of Walker county? The state of Alabama insists that Walker county circuit court now has the jurisdiction, and if the defendant desires his trial removed into another county, he must make another application therefor to the circuit court of Walker county. The defendant con-

tends that the Marion county circuit court still has jurisdiction of the trial of defendant for the offense charged.

The general rule of law under the above facts, as gathered in C. J. vol. 16, § 335, p. 220, reads: "Upon a change of venue, the county from which the case is transferred loses all jurisdiction to try accused upon the indictment transferred at the time of change, or upon any other indictment charging the same offense." *Johnson v. State*, 118 Ga. 310, 45 S. E. 381, 46 S. E. 488; *Smith v. Com.* 95 Ky. 322, 25 S. W. 106; *Keefe v. District Ct.* 16 Wyo. 381, 94 Ky. 459; *State v. Milano*, 138 La. 989, 71 So. 131; *Coleman v. State*, 83 Miss. 290, 64 L.R.A. 807, 35 So. 937, 7 Ann. Cas. 406; *State v. Chinault*, 55 Kan. 326, 40 Pac. 662.

A different rule prevails in the state of Missouri. It is as follows: "Loss of jurisdiction in the new court does not occur by reason of defendant withdrawing his application after it has been granted; but it is otherwise where the district attorney enters a *nolle prosequi*." 16 C. J. p. 221 (headnotes 26, 27); *State v. Hayes*, 88 Mo. 344; *State v. Patterson*, 73 Mo. 695.

What is the rule in Alabama? We have a statute. It settles the rule, if not on its face, by the clear intent and purpose of the legislature. It reads as follows: "Section 7852. Removal to Nearest County, and but Once.—The trial must be removed to the nearest county free from exception, and can be removed but once."

What does this mean? It means the trial of the accused for this offense charged in the indictment must be removed to the nearest county free from exception, and can be removed but once. In *Ex parte Dennis*, 48 Ala. 304, this court held, after order granting removal of the case, it could not be returned to the original county where the offense was committed, for trial by agreement of defendant and solicitor for the state; and said that § 4207 (now 7852) "declares that the trial can be

removed but once." In *Aikin v. State*, 35 Ala. 399, the defendant made application in Lowndes county circuit for change of venue. The court granted it, and removed the trial to the circuit court of Autauga county. Before the trial commenced in Autauga county the prisoner made application for change of venue from that county. The court overruled the application. The defendant excepted. This court, in reviewing the case on appeal, said: "In refusing to change the venue from Autauga county, the court simply followed the express direction of the Code, which provides that 'the trial can be removed but once.'"

If the defendant, on application and proof, cannot have the court remove the trial, after a change of venue has once been granted, then can the state do so by a nolle prosequi, with consent of the court? The trial can be removed but once. The court removed it, on application of the defendant, from Walker to Marion county. The trial of what was removed? The trial of Robert Lancaster for the offense of murder in the first degree, as charged in the indictment.

Neither the Constitution nor the statutes of Alabama authorize the state to apply for, or to secure, a change of venue in any criminal case. Will the courts allow the state

Maxim—indirect action.

to secure a change of venue indirectly, when it is not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a court in a criminal case, except on application, petition, or motion of the defendant. The defendant must be the moving party for the change of venue, and not the state.

It is clear that, when the order of removal of the trial of this defendant from Walker to Marion county was granted, jurisdiction in Walker county circuit court to try this defendant for this offense ended, and jurisdiction was given to Mari-

on county circuit court. It is clear that the state cannot have the court grant a change of venue. It is clear that the trial can be removed but once. Now can the state deprive the circuit court of Marion county of this jurisdiction to try this defendant for this offense, by entering, with the consent of the court, a nolle prosequi in the case, and thereby transfer the trial back to Walker county? If so, it would permit the state to have a change of venue by entering a nolle prosequi with the consent of the court, and without the consent even of the defendant. It would permit the state, without the consent of defendant, with the consent of the court, by entering a nolle prosequi, to remove the trial to another county, Walker, which the statute expressly forbids. The trial can be removed but once.

The state, with the permission of the court, may dismiss a prosecution. Code 1907, § 7159. But the law did not intend, and does not allow thereby, directly or indirectly, a change of venue of the trial of a case. Section 7852. There can be no change of venue by the state. To allow the trial of this defendant for this offense to be removed from Marion to Walker county, by a dismissal of the case on motion of the state, with consent of the court, would permit, in practical effect, a change again of the venue. To give the state this right would thereby nullify § 7852 of the Code, which states there can be but one removal of the trial. To give the state this right to have the trial returned to Walker county would deprive the defendant of his right to be tried in Marion county for this offense. This would allow the state a change of venue, if permitted. The defendant cannot be deprived of this right to be tried in Marion county by motion of the state for a nolle prosequi

to be entered, which is granted by the court. Neither the

Venue—effect of entry of nolle pros.

Constitution nor the statutes of Alabama ever contemplated that the defendant could in that way be deprived of his right of trial for the

offense charged in Marion county. To permit it, the state, with the approval of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids; namely, a change of the trial of the defendant, on the offense charged, from Marion back to Walker county,—or some other county, perhaps.

This court cannot approve, or encourage, or permit such practice. It will set up no such precedent. It cannot permit a defendant to be liable to be harassed in that way. The offense charged in each indictment is the same. It matters not whether one is a continuation of the other, or not, or a renewal thereof. The statute provides, when he stands indicted for said offense, the trial thereof may be removed, and can be removed, only one time. When the change of venue was granted for the trial of the defendant for this offense to Marion county, the statute contemplates that Marion county is the only one in which the trial of the defendant for that offense may be had, regardless of the number of the indictments that may afterwards be preferred against him for the same offense.

This section of the Code (7852) deprives Walker county, where the offense was committed, of the right to try the defendant for this offense; but it does not deprive it of the jurisdictional right to indict for the offense. The order of removal confers on Marion county jurisdiction

to try the defendant for the offense charged, but no right to indict for the offense, if the case is dismissed by the state with the consent of the court for any defect in the indictment or other cause. If a new indictment for the same offense is desired by the state, it would have to be returned by a grand jury of the circuit court of Walker county, and a certified copy of it sent to the circuit court of Marion county, where the jurisdiction to try the defendant for that offense has been placed by the court on the order of removal. Const. 1901, § 6; Code 1907, §§ 7130, 7140, 7851, and 7852; 16 C. J. § 335, p. 220, headnotes 9, 10, and authorities there cited; *Bramlett v. State*, 31 Ala. 376.

Let the new indictment for the same offense in the Circuit Court of Walker County be certified, with transcript of all the entries, orders, and proceedings in the case before and since the nolle prosequi was entered, to the Circuit Court of Marion County, as the law requires, where the trial of the defendant under the second indictment, for the same offense as the first, can proceed as the law directs. Code 1907, §§ 7130, 7140, 7854, 7857.

The writ of prohibition is granted.

Anderson, Ch. J., and Sayre and Gardner, JJ., concur.

Petition for rehearing denied May 12, 1921.

ANNOTATION.

Dismissal, nolle prosequi, or mistrial after change of venue in criminal case, as affecting jurisdiction or power of courts of respective districts as to subsequent proceedings.

Jurisdiction to find new indictment.

It has been held that, where an indictment which has been transferred for trial to another court by a change of venue is for some reason quashed or dismissed, a new indictment for the same offense may be found by the grand jury of the county

to which the trial was transferred. *Watkins v. United States* (1900) 3 Ind. Terr. 281, 54 S. W. 819, wherein the place of trial of the accused, who was indicted for murder, was changed from Ardmore to Pauls Valley. Because of a defect in the indictment, the grand jury at Pauls

Grand jury—
effect of removal
of case for trial.

Valley returned an indictment against the accused, charging him with murder under the same state of facts and circumstances as alleged in the original indictment. On appeal, the accused contended that the grand jury at Pauls Valley had no power to find and return an indictment for the same offense, but that the indictment should have been returned from the place where the original proceedings began, and where the alleged murder was committed. The court said: "Where a change of venue is taken from one court to another, the latter one has full jurisdiction of the case. If it comes to it with an imperfect indictment, it may use its own grand jury to correct it, or do any other thing that the court from which it came could do, incident to the trial, if the case were pending there. The latter court is substantially the one of the defendant's choosing. By taking the change of venue he has waived every objection to the territorial jurisdiction of the court, if it be within the district."

In such a case the new indictment should state the county in which the offense was committed. *Parker v. Com.* (1876) 12 Bush (Ky.) 191.

But the new indictment need not allege the order of removal giving jurisdiction to the court to which the removal was made. *Kelley v. Com.* (1920) 189 Ky. 778, 225 S. W. 739.

And see *Ruffin v. State* (1921) — Ga. App. —, 110 S. E. 311, *infra*.

However, a contrary rule was laid down in *State v. Billings* (1897) 140 Mo. 193, 41 S. W. 778, wherein it was held that where the defendant, after indictment, obtained a change of venue, and the trial resulted in a disagreement, the grand jury of the county where the indictment was found, and where the crime was committed, had jurisdiction to find a new indictment. See to the same effect, *State v. Patterson* (1881) 73 Mo. 695, and *State v. Goddard* (1901) 162 Mo. 198, 62 S. W. 697.

And in the reported case (*EX PARTE LANCASTER*, ante, 706) it is held that, where the venue has changed in a criminal case, the grand jury of the

original county has exclusive jurisdiction to return a new indictment for the same offense.

Jurisdiction to try on new indictment.

It has been held that the court to which an indictment has been transferred on a change of venue is not divested of jurisdiction by a dismissal, *nolle prosequi*, or mistrial, and retains exclusive jurisdiction to try the case after a new indictment for the same offense.

Thus, in *Johnston v. State* (1903) 118 Ga. 310, 45 S. E. 381, 46 S. E. 488, it appeared that the accused, who had been indicted for murder in Dade county, obtained a change of venue to Whitfield county where he was placed on trial, and a mistrial resulted. Subsequently the grand jury of Dade county returned a presentment against the accused, based on the same transaction as the indictment under which he had been tried, and charging him with the same offense. On being arraigned in Dade county on this presentment, the accused contended that the court was without jurisdiction to try him, under any indictment or presentment, for the offense charged in the indictment which had been transferred to Whitfield county. The court, in holding that the court of Dade county had no jurisdiction of the accused under the presentment, said: "The grand jury of Dade county may have authority to prefer as many indictments as it sees proper against the accused, but the superior court of that county cannot legally place the accused upon trial upon any of these indictments. The superior court of Whitfield county has the exclusive right to try the accused, as long as the order changing venue to that county stands unrevoked and unchanged."

But in *Ruffin v. State* (1921) — Ga. App. —, 110 S. E. 311, where, after the return of two indictments against the defendant for the murder of different persons on the same date, a change of venue was ordered and both cases were duly transferred to the superior court of another county, and, after the acquittal under both indictments in that county, the de-

fendant was again indicted in the county from which the other cases had been transferred, for a third murder alleged to have been committed on the same date charged in the other indictments; it was held that, even upon the assumption, for the purposes of the point, that the last indictment charged the same offense and related to the same transaction as the other two, the judge of the court to which the other cases had been transferred did not err in directing the defendant to proceed before the judge of the other court, and in refusing to assume jurisdiction himself over the subject-matter of defendant's petition for an order directing a like transfer of the subsequent indictment. The court said that, while the county from which the case is transferred loses at the time of the change all jurisdiction to try the accused, either upon the transferred indictment, or upon any other indictment charging the same offense, the power of that court to compel obedience to its judgment changing the venue is neither lost nor impaired. The court, however, did not undertake to decide whether or not it would have been error for the judge of the court to which the venue in the other cases was changed, to assume jurisdiction of the petition, but merely that the refusal to do so was not error, as its jurisdiction, in any event, was not exclusive of that of the court of the other county.

And in the reported case (*EX PARTE LANCASTER*) it is held that the court to which a change of venue has been made in a murder case cannot be, divested of its jurisdiction by the entering of a *nolle prosequi* and the indictment of the accused again, for the same offense, in the original county. This holding is founded on the argument that, as the state is

not authorized to obtain a change of venue, and the Statute (Code 1907, § 7852) provides that the trial can be removed but once, therefore, the changing of the place of trial back to the original county, by the entering of a *nolle prosequi* by the state, would be allowing the state to procure something indirectly which it could not procure directly.

But it has been held that where there has been a change of venue, and on the trial the jury fails to agree, and the case is, on motion of the accused, remanded to the court of original jurisdiction, he cannot, after being tried and convicted in that court, complain that it had no jurisdiction. *Hourigan v. Com.* (1893) 94 Ky. 520, 23 S. W. 355.

In Missouri, it has been held that where an indictment was sent to another county for trial on a change of venue, and a *nolle prosequi* was entered before trial, a second indictment returned by the grand jury of the county of original jurisdiction became triable in the county where it was found, and it was not the duty of that court to send the indictment to the court of the county to which the first indictment was transferred. *State v. Patterson* (Mo.) *supra*. See to the same effect, *State v. Goddard* (Mo.) *supra*. Likewise, where a change of venue has been granted in a criminal case, and a new indictment is found for the same offense by the grand jury of the county where the first indictment was found, and as a result the court to which the venue was removed quashes the indictment pending in it, *mandamus* will not lie to compel the former court to certify the second indictment to the court to which the change of venue was taken. *State ex rel. English v. Normile* (1891) 108 Mo. 121, 18 S. W. 975.

L. W. B.

MALLEABLE COAL COMPANY, Appt.,
v.

JAMES POTTER et al.

West Virginia Supreme Court of Appeals — October 11, 1921.

(— W. Va. —, 108 S. E. 900.)

Injunction — removing sidetracks — dissolution.

1. Uncontradicted testimony of the owner of land on which a railroad sidetrack is located and the operators of such railroad, to the effect that such track or facility was not constructed and operated within the limits of a lease executed by the former to the latter, which is very general and indefinite as to the land covered by it, aided by conduct amounting to a practical construction of the lease excluding the location in question from it, warrants the dissolution of an injunction inhibiting the landowner from tearing up such track and commanding the railway company to resume the use of it.

[See note on this question beginning on page 722.]

Pleading — demurrer with answer.

2. A demurrer incorporated in a paper with an answer, but not in any way filed or acted upon as a demurrer, is disregarded and treated as a fugitive paper, because not shown to have been brought to the attention of the court, notwithstanding the filing of the paper as an answer to be used as an affidavit, on a motion to dissolve an injunction.

Railroad — reconstruction of sidetracks.

3. A common carrier railroad can-

not be required, by any judicial process, to reconstruct and operate a sidetrack or other facility temporarily constructed and operated on land adjoining its right of way, under a verbal and gratuitous permission of the owner of the land, and an agreement between him and the owner of the railroad that the privilege so granted should be terminable at the will and option of the owner of the land.

Headnotes by **POFFENBARGER, J.**

APPEAL by plaintiff from an order of the Circuit Court for Lincoln County dissolving an injunction prohibiting interference with a certain railway, and requiring restoration of its tracks, and resumption and continuance of the hauling of plaintiff's coal. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Price, Smith, Spilman & Clay, for appellant:

Plaintiff is entitled to enforce the obligation of the Cobbs Creek Railway to serve it as a common carrier, either by mandamus or by mandatory injunction.

Pennsylvania R. Co. v. Stineman Coal Min. Co. 242 U. S. 298, 61 L. ed. 316, 37 Sup. Ct. Rep. 118; United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571, 80 S. E. 931; State ex rel. Mt. Hope Coal Co. v. White Oak R. Co. 65 W. Va. 15, 28 L.R.A.(N.S.) 1013, 64 S. E. 630; Rex v. Severn & W. R. Co. 2 Barn. & Ald. 646, 106 Eng.

Reprint, 501, 7 Eng. Rul. Cas. 445; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; Chicago & A. R. Co. v. Sufferin, 129 Ill. 282, 21 N. E. 824; State ex rel. Bridgeton v. Bridgeton & M. Traction Co. 62 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 40 L.R.A. (N.S.) 798, 96 C. C. A. 322, 172 Fed. 117; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Zanesville Gaslight Co. v. Zanesville, 47 Ohio St. 35, 23 N. E. 60; Washington v. Washington

Water Co. 70 N. J. Eq. 254, 62 Atl. 390; 1 Michie, Carr. § 378; 10 C. J. 69; Rogers Locomotive & Mach. Works v. Erie R. Co. 20 N. J. Eq. 379.

The tipple and tipple track are included in the lease to Potter & Company as a part of the "terminal" of the Cobbs Creek Railway.

Mary Helen Coal Co. v. Hatfield, 75 W. Va. 148, 83 S. E. 292; Crosby v. Bradbury, 20 Me. 61; 2 Devlin, Deeds, 1946.

The lessor's reservation of certain rights connected with the tipple and the part of the tract where it is situated prove conclusively that the tipple and tipple track were leased.

Small v. Wright, 74 Me. 428; Starr v. Child, 5 Denio, 599; Clayton v. County Ct. 58 W. Va. 253, 2 L.R.A. (N.S.) 598, 52 S. E. 103.

The inaccurate and inconsistent reference to the former lease to Mohler will not control as against the description clearly including the tipple track.

Melvin v. Locks & Canals, 5 Met. 15, 38 Am. Dec. 384; Crosby v. Bradbury, 20 Me. 61; 8 R. C. L. 1088; 18 C. J. 281.

A license to build this track for the necessary use and enjoyment of the tipple, which was undoubtedly leased, is coupled with an interest and irrevocable.

Baker v. Chicago, R. I. & P. R. Co. 57 Mo. 265; 33 Cyc. 157.

Mr. D. E. Wilkinson also for appellant.

Mr. Murray Briggs, for appellees:

The remedy by injunction should be allowed only in cases of extreme necessity.

Michie, Carr. § 378; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425.

The track actually torn up was on the private property of defendant Pickens, not leased to James Potter & Company, but constructed some months after the date of said lease, and in no way a part of it. This track was built under a mere license, without consideration paid or promised, and was specifically revocable at the pleasure of Pickens.

Stratton's Independence v. Midland Terminal R. Co. 32 Colo. 493, 77 Pac. 247; Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble, 112 Mich. 4, 70 N. W. 319; Wood v. Michigan Air Line R. Co. 90 Mich. 334, 51 N. W. 263; Baker v. Chicago, R. I. & P. R. Co. 57 Mo. 265; Johanson v. Atlantic City R. Co. 73

N. J. L. 767, 64 Atl. 1061; Pontiac, O. & N. R. Co. v. Reed, 130 Mich. 661, 90 N. W. 658.

The railroad company could not deny defendant Pickens the right reserved in the lease, nor can this plaintiff.

Porter v. Kansas City, & N. Connecting R. Co. 103 Mo. App. 422, 77 S. W. 582.

A court of equity will not lend its aid to a party plainly seeking to acquire a monopoly of the coal-shipping facilities of the railroad.

Louisville & N. R. Co. v. Pittsburg & K. Coal Co. 111 Ky. 960, 55 L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969; 16 Cyc. 144; Poling v. Williams, 55 W. Va. 69, 46 S. E. 704; Craig v. Craig, 54 W. Va. 183, 46 S. E. 371.

The plaintiff must always be ready to sustain the allegations of a bill of injunction.

Steelsmith v. Fisher Oil Co. 47 W. Va. 391, 35 S. E. 15; Crossland v. Crossland, 53 W. Va. 108, 44 S. E. 424; Cox v. Douglass, 20 W. Va. 175.

Poffenbarger, J., delivered the opinion of the court:

Appellant, the Malleable Coal Company, complains of an order of the circuit court of Lincoln county, entered in vacation, dissolving an injunction inhibiting the appellee Roman Pickens from interfering with the operation of what is called the tipple track of the Cobbs Creek Railway, and especially from tearing up that track, and commanding the appellees James Potter and Charles Morgan, alleged owners and operators of said railway, without discrimination against said Malleable Coal Company, to haul its coal over said tipple track, for dumping into railway cars on a side-track of the Coal River branch of the Chesapeake & Ohio Railway.

The theory of the bill and of the injunction order awarded thereon is that the Cobbs Creek Railway is a common carrier, and, as such, wrongfully ceased and refused, on or about September 18, 1920, further to haul coal of the plaintiff from its mine, situated somewhere on the main line of the railway in the Cobbs Creek valley, over said tipple track, at the instance and by

reason of the protest of the defendant Roman Pickens, on whose land said tipple track is located; and that, soon after September 27, 1920, the public service commission of this state having ordered said railway company to resume the hauling of the plaintiff's coal, Pickens and his employees wrongfully tore up portions of that track and thus prevented obedience to the order.

The temporary injunction inhibited Pickens from further molestation of the track and required the railway company to restore the portion of it that had been torn up, and resume and continue the hauling of the coal.

If the facts disclosed by the pleadings and the depositions taken and filed justified dissolution of the injunction, it will be unnecessary to enter upon any inquiry as to the propriety of the remedy invoked by the plaintiff. Sufficiency of the bill was not tested by any demurrer thereto. In a paper filed by him, the defendant Pickens demurred to the bill and answered it, but that paper was not filed as a demurrer. On the hearing of the motion, it was filed as an answer, together with the answer of Charles Morgan filed in the same way, and treated as an affidavit. A demurrer incorporated in the body of an answer, but not mentioned or referred to in the caption thereof, or in any decree or order in the cause, is disregarded and treated as a fugitive paper, because it does not

Pleading—
demurrer with
answer.

appear to have been
brought to the at-
tention of the court.

Pheasant v. Hanna, 63 W. Va. 613, 60 S. E. 618. It is not perceived that mention of the demurrer in the caption can make any difference. The paper was never filed as a demurrer and the caption is not material. Nothing in the order suggests consideration of the bill as to its sufficiency.

The Cobbs Creek Railway is a narrow-gauge road, built primarily for the hauling of logs and lumber, about the year 1906, by the Mohler Lumber Company, in conjunction

with one W. W. Smoot; the former furnishing the materials and the latter doing the construction work, with the understanding that he should have 45 per cent of the profits arising from the operation of the road, and the lumber company 55 per cent. Near the mouth of Cobbs creek, it connected with what was then the Coal River Railroad, now the Coal River branch of the Chesapeake & Ohio Railway. At that point, it was necessary to pass over the land of Pickens for some distance, and the Mohler Lumber Company procured a lease of about 2 acres of the Pickens land, within which the main line, and a sidetrack called the loading track, and some other terminal facilities were located. The track now in controversy—the tipple track—was not built at that time, nor until the year 1917. Nor is the Mohler Lumber Company lease very important now, since it expired in the year 1913. Lumber and timber transportation over the road, by the Mohler Lumber Company, seems to have terminated about the year 1909, and early in that year the operators of the road began to transport oil-well supplies over it up into the Cobbs Creek region of country. Thereupon a controversy is said to have arisen between Pickens and the lumber company, as to right in the latter to transport anything other than timber and timbering supplies over the land. Smoot says he became the sole owner of it in July, 1918, and operated it until September 1, 1919, on which date it passed into the hands of James Potter & Company, under a contract of purchase made about July 1, 1919. Smoot may have owned the road individually at an earlier date.

He operated it under the arrangement between himself and the Mohler Lumber Company, or as his own, and constructed what is known as the tipple track in 1917, when he was paying Pickens rent at the rate of \$75 per month. It seems to be about 500 feet long, and turns off from the main line near the point

at which that line emerges from the Cobbs Creek valley, and, crossing level land between that line and the hill, runs up along the hillside to a point at which the tipple used by the Malleable Coal Company stands, apparently on the right of way of the Chesapeake & Ohio Railway, in part, and on the land of Pickens, in part. The ownership of the tipple seems to be conceded to the Malleable Coal Company, but by whom it was erected is not clearly disclosed. This track was never used for any purpose other than the transportation of the Malleable Coal Company's coal from its mine somewhere up Cobbs creek to this tipple. Both Smoot and Pickens testify that it was constructed under a verbal permit given by the latter, and without charge for the use and occupation of the land. Smoot says he hauled coal for the Malleable Coal Company until December, 1918, at which time that company closed its mine, but that Pickens had interrupted his use of it, on two occasions, before he ceased to use it by reason of the closing of the mine. Pickens says he gave Smoot permission to use the land for that track until he should need it himself. Under the impression that he would have no further use for the track, Smoot took up the rails from it in March, 1919. Between that date and July 1, 1919, he entered into negotiations with James Potter & Company for sale of the railway to them for use in connection with their oil and gas operations in the Cobbs Creek country, in which they had a lease of 12,900 acres of oil territory. The sale seems to have been made as of July 1, 1919, but late in June of that year a flood damaged the railway, and Smoot had to repair it before the purchasers would consummate their contract. In doing so, he used the rails taken from the tipple track.

On July 1, 1919, the date of the purchase of the railway, and after the rails had been taken from the tipple track, and while the mine of the Malleable Coal Company was closed, James Potter & Company

leased from Pickens, for a period of five years, at a rental of \$100 per month, what is described as about a quarter of an acre of land, as being the same tract of land which was occupied by the terminal of the Cobbs Creek Railway, as having one office building, one hoisting house, one small freight house, and one sand house on it, and as being then under lease by the month to the Cobbs Creek Railway Company. Under this lease the lessee has the privilege of renewal for an additional five years, and also the privilege of termination, upon three months' notice and the payment of all rentals, at any time within the term. Having coal in the land of the leased premises, Pickens made this reservation: "Right to load coal on and over the eastern part of the property hereby leased, where the coal dumps are now located"—if he should desire to do so. The only dumps disclosed by the evidence as being located on the eastern part of the leased property are the loading tipple of the Malleable Coal Company and what is called the Jarrett & Wright coal chute. At a date not disclosed, Pickens had leased his coal to Jarrett & Wright, and they had opened a mine in the hillside, near the right of way of the Chesapeake & Ohio Railway, and constructed a chute leading to a side-track. Finding the dip of the coal to be in the direction of their mining, they discontinued their operation. At a date not given, Pickens leased his land to Smoot & Carter for mining, and they opened a mine and erected a tipple near the main line of the Cobbs Creek Railway, with intent to load the coal into the narrow-gauge cars of that road, for transportation over the main line and the tipple track, and transfer thereof, by means of the Malleable Coal Company's tipple, into the standard-gauge cars of the Chesapeake & Ohio Railway Company.

In August, 1919, under a verbal permission given by Pickens to James Potter & Company, operators of the Cobbs Creek Railway, the

Malleable Coal Company replaced the rails on the tipple track, and began the shipment of coal over it to their tipple. At about the same time, Smoot & Carter endeavored to obtain permission of the Malleable Coal Company to land their coal into Chesapeake & Ohio cars from the same tipple. Their request having been refused, they endeavored to obtain permission for the placing of box cars on the Chesapeake & Ohio Railway Company sidetrack, apparently owned or controlled by the Malleable Coal Company. This privilege having been denied, Pickens notified James Potter & Company not to haul any more coal over the tipple track for the Malleable Coal Company, and, in obedience to this order, they ceased to do so. Thereupon the Malleable Coal Company applied to the public service commission of this state for an order requiring the railway to transport its coal. A temporary order was awarded, and then Pickens took up some of the rails from the track and thus prevented resumption of transportation. In this state of affairs, the Malleable Coal Company applied for and obtained said injunction.

It is manifestly unnecessary to determine whether or not the Cobbs

**Railroad—
reconstruction
of sidetracks.** Creek Railway is a common carrier. If it is, it does not follow

that the tipple track is permanently or irrevocably located upon the land of Pickens. Whether the track in question belongs to that company, or not, is left in doubt by the evidence. It desired to haul the coal, and the producer of the coal wanted it hauled. It obtained permission for restoration of the track, and the coal-producing company restored it under that permission. It was originally built by the railway company as a tenant at will of Pickens, and restored and the use thereof resumed in the same manner, except as to the reconstruction. The contention that Pickens leased the tipple to James Potter & Company is not well founded. The ar-

gument is that he must have leased it, because he reserved the right to use it, and that the lease of the tipple impliedly included a lease of the means of using it, namely, the tipple track. The terms of the reservation in the lease do not warrant this conclusion. Pickens reserved the right to load coal on and over the eastern part of the property at the point where the coal dumps were located. There are no words in the reservation fairly indicative of intention to reserve right to use the Malleable Coal Company's tipple. The reserved right was to load coal over the eastern part of the property. The mention of the dumps was mere matter of description of the portion of the land the lessor reserved the right to use.

The indefinite lease, giving no boundary lines interpreted by the evidence bearing upon its meaning, found in the record, does not include the land on which the tipple is located. If the terms, "Now under lease by the month to the said Cobbs Creek Railway Co.," could be treated as a reference to the lease given the Mohler Lumber Company, the land on which part of the tipple track is located is not within that lease, and that track was no part of the Cobbs Creek Railway terminal while the lease was in force, or between the year 1913, in which it expired, and the year 1917. If the lease was continued as a verbal holding over from year to year, on payment of rental, it still cannot be regarded as embracing all of the land on which the tipple track is located. If the payments of rental from 1913 until 1917 were made merely for terminal facilities, and did not continue the lease, the terminal facilities did not then include the tipple track. They included only the main track, the loading track, sand house, freight house, office, and hoist. In the new lease taken July 1, 1919, the area of the leased land is described as being about a quarter of an acre. In the Mohler Lumber Company lease of 1906, the area

is described as embracing about 2 acres. Hence, it is clear that there was no intention to lease, on July 1, 1919, all of the land that was in the former lease. Moreover, in 1919, the tipple track was not one of the terminal facilities of the railway. It was not then in operation. The rails had been taken from it and used for repair of the main line. Besides, it was not used for general railway purposes, but only for the hauling of the Malleable Coal Company's coal to its tipple. According to the evidence of Smoot and Pickens, it was not constructed under the monthly lease referred to in the later lease. It was a mere privilege outside of the lease, gratuitously and temporarily conferred. No witness expressly contradicts this testimony, nor do any established facts or circumstances overthrow it. The grant and acceptance of this privilege amounted to a practical construction of the monthly lease by

the parties thereto. Likewise, the conduct and circumstances attending the restoration of the track practically construed both the monthly lease and the new lease of July 1, 1919.

Upon this view of the evidence, including the situation, purposes, and relations of the parties, we are of the opinion that the court below did not err in its dissolution of the injunction. The order under review is an interlocutory one, entered upon proof that is very incomplete as to some of the vital issues involved. It does not appreciably tend to sustain the contention of the appellant. Additional evidence to be taken for the final hearing and disposition of the cause may be sufficient to establish right to the relief sought, if the remedy adopted is appropriate.

*Injunction—
removing side-
tracks—dis-
solution.*

For the reasons stated, the decree complained of will be affirmed.

ANNOTATION.

Duty of railroad to operate side and switch tracks and spurs.

A railroad company may abandon a sidetrack or spur at which it has been accustomed to receive freight, where not prohibited by its charter, special contract, statute, or rule or order of the railroad commission. *Durden v. Southern R. Co.* (1907) 2 Ga. App. 66, 58 S. E. 299. The court said that the safety of public travel frequently demands the abolition of sidetracks or spurs, and the discretion of the railway company in removing them will rarely be interfered with by the courts.

So, in *Mercantile Trust Co. v. Columbus, S. & H. R. Co.* (1898) 90 Fed. 148, it was held, citing *Jones v. Newport News & M. Valley R. Co.* (1895) 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736, *infra*, as authority, that, in the absence of an express obligation to continue its operation for a definite time, or forever, a mine owner cannot compel a railroad company, or the receiver exercising its franchises for the time, to continue operation at a

loss, or when it cannot be rendered safe except by the expenditure of a considerable sum of money, of a spur or switch track built by the railroad company for the purpose of bringing business to its road.

And in *Twin City Separator Co. v. Chicago, M. & St. P. R. Co.* (1912) 118 Minn. 491, 137 N. W. 193, an action to restrain a railway company from depressing its main track, on the ground that such depression involved the abandonment of a sidetrack to a business plant, it was held that the right to sidetrack connections, from whatsoever source they may have been derived, is subject to the police power of the city.

So, too, in *Detroit v. Michigan C. R. Co.* (1909) 156 Mich. 121, 120 N. W. 593, in dismissing the petition of a foundry company for damages claimed for the expense it was compelled to incur in changing its plant and building to correspond with the elevation of a railroad, so as to preserve its connec-

tion with the railroad company on change of grade of street, the court, after referring to the fact that there was no evidence of any contract as to the construction of this switch, said: "In the construction of these switch or side tracks to manufacturing plants, three parties are interested: The manufacturer desiring the most inexpensive way to get his wares to market, the railroad company in obtaining business and profit by transporting such wares, and the public, who consume or use the product of the manufacturer. If the railroad company considers that the transportation of the product of the manufacturer will compensate it and yield it a profit, it usually, upon request, puts in the necessary sidetracks and switches. By the construction of such a track, at the request of one and the assent of the other, no contract is implied binding either to the continuance of such arrangement for any specified time. Clearly, the manufacturer has made no contract by which he is liable to the railroad company in damages for discontinuing its shipment, at any time, or for any reason. He may move his plant within a month after the construction of the sidetrack. He may conclude to ship his goods to market by other railroads, or by other routes. I am not aware that any claim was ever made that the manufacturer is bound by such an arrangement to ship his goods over the one railroad. Neither can a contract be implied on the part of the railroad company to maintain the sidetrack and ship the goods of the manufacturer at a loss, or without profit."

Under an agreement between a railroad company and a coal company for the construction by the former of a spur track, which contained a provision "that, whenever said first party may find it necessary for the accommodation of its business to remove said spur track," it may remove the same, the railroad company is the sole judge as to the necessity for removing such spur track. *Whittemore v. New York, N. H. & H. R. Co.* (1906) 191 Mass. 392, 77 N. E. 717.

So, too, a spur track, which has

been put in under an agreement that it may be removed on sixty days' notice, may be removed in accordance with the terms of the contract. *Southern R. Co. v. Byrum & King* (1910) 135 Ga. 426, 69 S. E. 550. The court stated that the plaintiffs, having contracted that the spur track might be removed, cannot complain that the railroad company is proceeding to avail itself of its contractual right to remove it. Also, parties other than those who entered into the contract with the railroad sought to restrain the removal of the spur track, but the court said that they had no right to interfere, as their only claim was that of convenience, and not of loss.

In *Louisiana R. & Nav. Co. v. Railroad Commission* (1918) 143 La. 660, 79 So. 212, it was held that a railroad company was not required to maintain at its own expense a spur which it had constructed on a plantation, under an agreement with the owner thereof, where such spur was for the private benefit, virtually, of the plantation, and especially, where there was in the neighborhood two regular public traffic stations, either one less than 2 miles distant from the spur. The court said: "No good reason can be given why, if the plaintiff railroad is to maintain this spur at its sole expense, it should not do the same with all the plantation spurs along its line, and all the other railroads do the same with all the private spurs along their lines."

And see the reported case (*MALLEABLE COAL CO. v. POTTER*, ante, 717) to the effect that a railroad company will not be required to reconstruct and operate a sidetrack built on private land, under an agreement that the privilege to operate may be terminated at the landowner's will.

The contract between a railroad company and a coal dealer that the former "shall and may have the right to maintain" a switch through the coal yards does not obligate the railroad company to operate and maintain such switch permanently. *Brown v. Southern R. Co.* (1911) 109 C. C. A. 333, 187 Fed. 481. The court stated

that the phrase, "shall and may have the right to maintain," should be interpreted as "shall have the right to maintain and may have the right to maintain," and not, as contended, as meaning "shall maintain and may have the right to maintain."

In *New York C. & H. R. R. Co. v. General Electric Co.* (1914) 83 Misc. 529, 146 N. Y. Supp. 322, the court said: "The private siding is a siding on private land outside the common carrier's property. The shipper cannot compel the common carrier to make and maintain a private siding, though switch connections with a constructed private siding may be compelled. The Act to Regulate Commerce (§ 1) provides: Any common carrier 'shall construct, maintain and operate upon reasonable terms a switch connection with any such . . . private sidetrack which may be constructed to connect with its railroad, where such connection is reasonable, practicable,' etc. The Public Service Commissions Law (§ 27) provides: 'A railroad corporation upon the application of any shipper tendering traffic for transportation shall construct, maintain and operate upon reasonable terms a switch connection . . . with a private sidetrack owned, operated or controlled by such shipper, and shall upon the application of any shipper provide upon its own property a sidetrack and switch connection with its line of road whenever such sidetrack and switch connection is reasonably practicable, can be put in with safety, and the business thereof is sufficient to justify the same.' Laws 1907, chap. 429. The meaning of these two sections is substantially the same. There is no requirement that a common carrier shall carry freight over the private siding, or any requirement that it shall construct any part of the track off its own lands. In the state statute the carrier is required to construct and operate a switch and a sidetrack upon its own lands, to connect with a private sidetrack owned, operated, or controlled by said shipper. It seems to me there could be no inference from this that the common

carrier is required to convey freight over the private sidetrack, any more than it is required to carry freight over another common carrier's line with which it is compelled to make connections; but the inference is that it must receive freight from the private sidetrack, and deliver freight to it and upon it. A private siding off the carrier's property is not a part of the main line, nor the property of the carrier."

The establishment and maintenance of a switch connection of the main line with a private warehouse for any length of time does not create a duty of the railroad company, at common law, forever to maintain it. *Jones v. Newport News & M. Valley R. Co.* (1895) 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736. The court stated: "The switch connection, and transportation over it, may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does or not. At one time in the life of the company it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient, or dangerous, or both."

Nor, in the absence of an express agreement, will there be implied into a contract for a private switch connection, a term that it shall be perpetual, and thus forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in the use of its road. *Ibid.*

So, also, where by its charter and by statute a railroad company has the duty of elevating its tracks whenever public safety requires it, a railroad company will not be required specifically to perform an agreement with private parties to maintain switching connections with their warehouse, when in furtherance of such obligation it does elevate its tracks. *Swift v. Delaware, L. & W. R. Co.*

(1904) 66 N. J. Eq. 34, 57 Atl. 456, affirmed in (1904) 66 N. J. Eq. 452, 58 Atl. 939. The court stated that, in its view, a contract made by a railroad company for such private use or interest in its lands used by its railway, or any of its appurtenances, as would prevent its performance of these public obligations to arrange for the public safety by the removal of grade crossings in cities, would be either altogether void, or it must be considered as made and taken subject to any contract subsequently made to remove its grade crossings; that a contract of this character for the permanent location or use of its road or works has been held to be subject to termination whenever the interest of the road itself requires it; and quoted as follows from a United States Supreme Court case, *Eckington & Soldiers' Home R. Co. v. McDevitt* (1903) 191 U. S. 103, 48 L. ed. 112, 24 Sup. Ct. Rep. 36: "Railroad companies, while private corporations, are quasi public agencies engaged in the performance of public duties, and contracts which prevent them from the discharge of these duties cannot be sustained."

And a railroad company may sever connections at any time, under a contract for switch connections, made with a coal company, which reserves to the railroad company the right to disconnect the switch at any time without let or hindrance from the company. *Queen City Coal Co. v. Louisville & N. R. Co.* (1898) 19 Ky. L. Rep. 1628, 44 S. W. 103.

But, where a railroad company entered into an agreement that if one would locate a cotton gin at a certain place it would maintain and operate a spur track thereto, as long as the cotton gin was operated, such spur track could not be removed. *Graham v. Jonesboro, L. C. & E. R. Co.* (1914) 111 Ark. 598, 164 S. W. 729. The contract in this case, though verbal, was held not to be within the Statute of Frauds, nor, it was held, was it too indefinite to be enforced. The court distinguished this case from *Jones v. Newport News & M. Valley R. Co.* (1895) 13 C. C. A. 95, 31 U. S.

App. 92, 65 Fed. 736, and the *Mercantile Trust Co. v. Columbus, S. & H. R. Co.* (1898) 90 Fed. 148, cited supra, stating that in each of those cases the point was made that there was no contract for any time at all. Nor, the court added, does this case fall within the decisions which have held that it is against public policy to permit a railway company to make a contract which would restrict or impair the performance of its duty to the public, the court stating that in this case no question of public policy or duty to the public is involved, because the contract covers only a private arrangement for service furnished to one patron of the road; that a different question might be presented if the railroad company should see fit to change its tracks in order to serve the public, and thus render itself unable to connect with a spur track, but that no such state of affairs is shown in the case; that the agreement permanently to maintain the spur track is merely a private matter with the shipper, and does not involve its duty to the public.

So, too, where one railroad enters into an agreement with another that, if an electric light company will do the necessary grading and furnish any additional right of way necessary, it will construct a spur track to such electric light works, and allow the other railroad to use such spur for switching cars to the electric light works, the electric light company, although not a party to the original agreement, has such an interest therein that, before the railroad company constructing the spur track can remove the same to the disadvantage of the other railroad company, it must give the electric light company the thirty days' notice provided therein. *Cedar Rapids & I. City R. & Light Co. v. Chicago, R. I. & P. R. Co.* (1910) 145 Iowa, 528, 124 N. W. 323.

And under the constitutional provision that "all railroad companies shall permit connections to be made with their tracks so that . . . any public warehouse, coal bank, or coal yard may be reached by the cars on said railroad," a railroad company,

which has permitted a mine owner to make switch connections with its track which have been used for several years, will be compelled to restore such connections if they have been removed without right or authority. *Chicago & A. R. Co. v. Suffern* (1889) 129 Ill. 274, 21 N. E. 824.

And an improper use of a switch for a sidetrack, to the injury of the railroad company, will not justify the company in severing the connections. *Ibid.* The court stated that the courts will furnish a remedy for any wrong it may suffer, and that it has no right to take the law into its own hands, and to refuse to do what the Constitution requires it to do.

A contract by a railway company to construct and operate a switch or spur track, no time when the contract should end being stated, was interpreted in *Payne v. Mt. Franklin Fuel & Feed Co.* (1921) — *Tex. Civ. App.* —, 234 S. W. 595, to obligate the railway company to operate the switch permanently, and so the railway company would have no right to discontinue its operation unless the public interest so required.

A railway company, having wrongfully taken up and removed the rails forming a connection between its line and the siding belonging to the applicant, was ordered, at its own expense, forthwith to restore the communication, in *Portway v. Colne Valley R. Co.* 7 Eng. Ry. & C. Traffic Cas. 102.

A railroad company, having permitted a lighting company to reconstruct a trestle at a considerable expense, cannot arbitrarily impose upon the lighting company the condition that a sidetrack be discontinued at the will of the railroad company on thirty days' notice, and so the public service commission is clearly within its statutory power in declining to make the lighting company subject to such a condition. *People ex rel. New York C. R. Co. v. Public Service Commission* (1916) 173 App. Div. 407, 159 N. Y. Supp. 997, affirmed in (1916) 219 N. Y. 584, 114 N. E. 1078.

Under the Missouri Public Service Commission Act of 1918, a railroad

cannot abandon the operation of a spur or branch line without permission of the commission, notwithstanding such operation is not included in its franchise. *State ex rel. Public Service Commission v. Missouri Southern R. Co.* (1919) 279 Mo. 455, P.U.R. 1919F, 575, 214 S. W. 381.

And an order requiring the operation of a spur track is not necessarily unconstitutional because it may result in some financial loss. *Ibid.*

Since, under the Public Utility Act, a railroad may be compelled to build a spur track to an industry if such connection is reasonable, practicable, and can be installed and used without materially increasing the hazard or expense of the railroad with which such connection is sought, and the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company, the court, in *State Public Utilities Commission ex rel. Cameron v. Lake Erie & W. R. Co.* (1917) 277 Ill. 574, 115 N. E. 519, upheld an order of the public utilities commission requiring restoration of a sidetrack operated to a grain elevator and coal yard, the elevator standing partly on the right of way under the lease, and which sidetrack had been torn up by the railroad company, against the protest of the owner of the elevator, upon the railroad company exercising its reserved option to cancel the lease. In affirming this decision in *Lake Erie & W. R. Co. v. State Public Utilities Commission* (1918) 249 U. S. 422, 63 L. ed. 684, P.U.R. 1919D, 459, 39 Sup. Ct. Rep. 345, the United States Supreme Court held that an order of a state public utilities commission, upheld by the highest court of the state, requiring the restoration of a sidetrack by a railway company, being legislative in its nature, and made by an instrumentality of the state, is a state law within the meaning of the Federal Constitution and the laws of Congress regulating the appellate jurisdiction of the Federal Supreme Court over state courts.

And it was further held by that court that an order of a state public utilities commission, made after notice and hearing, and upheld by the highest court of the state, requiring a railroad company to restore a sidetrack which, before its removal, had served a grain elevator and coal yard, does not deny due process of law as taking its property either for private use or for public use without compensation, where, under the laws of the state such a sidetrack was open to use by the public and subject to public control like other parts of the company's road, and the statute under which its restoration was ordered contains express provisions whereby it will retain its public character, and be open to use by other shippers as well as by the elevator owner. *Ibid.* The court said: "The shipments for which the track has been used have yielded the company a revenue of about \$20,000 each year, for several years. What the cost of restoration will be, the record does not disclose, but the commission, with knowledge of such matters, has found that it is justified by the business reasonably to be expected; and the supreme court of the state, besides sustaining that and other findings of the commission, aptly points out that, but for the hasty and improper removal of the track, the company 'would not be at the expense of replacing it.' When the track is restored the company will own it and be entitled to a reasonable charge for its use, just as is the case with other property employed in the company's transportation service."

And in *Canadian Northern R. Co. v. Robinson* (1906) 37 Can. S. C. 541, where the board of railroad commissioners had ordered the railway company to restore spur track facilities, the discontinuance of which, the board said, was unreasonable, it was held that the commissioners had, in the circumstances, jurisdiction to make the order complained of.

However, in *People ex rel. Erie R. Co. v. Public Service Commission* (1916) 176 App. Div. 28, 162 N. Y. Supp. 520, affirmed without opinion in

(1917) 220 N. Y. 674, 116 N. E. 1066, it was held that the public service commission is without authority to compel a railroad company to operate a sidetrack constructed on the private property of a shipper. The court said: "The power of the commission to make such an order must be found in the statute, and the only statute which it is claimed confers such power is § 27 of the Public Service Commissions Law (Consol. Laws, chap. 48; Laws 1910, chap. 480), which provides as follows: 'A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private sidetrack owned, operated or controlled by such shipper, and shall, upon the application of any shipper, provide upon its own property a sidetrack and switch connection with its line of railroad, whenever such sidetrack and switch connection is reasonably practicable, can be put in with safety and the business therefor is sufficient to justify the same.' Under this statute all that a railroad company can be required to do, with reference to a private sidetrack of a shipper, is to construct, maintain, and operate a proper switch connection or connections therewith. The operation of such sidetrack cannot be exacted of the railroad. This is emphasized by the subsequent provision in the statute that a sidetrack for the benefit of a shipper may be required under certain circumstances to be constructed by a railroad company 'upon its own property.' The reason for the distinction between the sidetrack of a shipper and one of a railroad is a sound one, and was manifestly intended by the legislature, for reasons to it satisfactory. This controversy illustrates the ground of the distinction and emphasizes its importance. A railroad company cannot control the property of the shipper, and, if it operates a railroad on the property of the latter, it is powerless to take such precautionary measures, or establish such rules and

regulations, as it may think advisable to minimize the possibility of accident and lessen its liability therefor. This sidetrack in question, being on the property of the machine and knife works, is not within the control of the railroad company, and accidents and liabilities may arise which could be obviated if the railroad company had the sole control and possession thereof."

The discontinuance of a siding constructed for a shipper's convenience is initially a matter between the shipper and the carrier, and the intervention of the public service commission is not authorized unless the parties have been unable to agree. *Adikes v. Long Island R. Co.* (1914) 165 App. Div. 221, 151 N. Y. Supp. 49.

J. H. B.

**OLD NATIONAL BANK OF WAUPACA, Plff. in Err.,
v.
PEOPLE'S BANK OF HARRISVILLE.**

West Virginia Supreme Court of Appeals — September 27, 1921.

(— W. Va. —, 108 S. E. 716.)

Draft — against bill of lading — right to inspect goods.

1. A consignee of goods, who is required to pay for the same before delivery, is entitled to inspect the goods before receiving the same and paying therefor. He may waive this right, however, by paying for the goods and receiving them before such inspection, and, in case he does so, he cannot, upon later deciding to reject the goods, require repayment of his money to him from a bank which is the assignee in good faith of a draft for the purchase money with bill of lading attached. His remedy, after paying the draft and receiving the goods, is an action against the seller for damages.

[See note on this question beginning on page 732.]

— against bill of lading — interest in goods.

2. A party discounting a sight draft and receiving therewith a bill of lading for the goods, against the purchase price of which the draft is drawn, acquires a special property in such goods, and has a complete right to have them held as security for the payment of the draft.

Bank — discounting draft — liability for default of consignor.

3. A bank which discounts a draft with bill of lading attached is not, in the absence of bad faith, answerable to the drawee for the performance of the consignor's contract.

— right to proceeds of draft as against collecting bank — surrender of goods for inspection.

4. A bank which discounts a sight

draft for the purchase price of goods, with a bill of lading attached, is entitled to recover the amount of such draft from a correspondent bank to which it is sent for collection, where it is shown that such correspondent bank delivers such draft and bill of lading to the consignee upon deposit with it of the amount of the draft, who, in turn, surrenders such bill of lading to the carrier and receives the goods, even though it appear that the correspondent bank delivered the bill of lading with the understanding that the consignee might have his money back if he determined to reject the goods. Such correspondent bank has no authority to deliver such bill of lading upon such conditions, unless it is specifically authorized to do so by the assignee bank.

ERROR to the Circuit Court for Ritchie County to review a judgment in favor of defendant in a suit brought to recover the amount of a draft with a bill of lading attached, indorsed to plaintiff and sent by it to defendant for collection. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Merrick & Smith, for plaintiff in error:

The bill of lading was rightfully issued and was purchased by the plaintiff for a valuable consideration, and the burden of proving the contrary is upon him who denies it.

Buckeye Nat. Bank v. Huff, 114 Va. 1, 75 S. E. 769; Thomas v. Citizens Nat. Bank, 157 Wis. 635, 147 N. W. 1005; Aebi v. Bank of Evansville, 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329; Northfield Nat. Bank v. Arndt, 132 Wis. 383, 12 L.R.A.(N.S.) 82, 112 N. W. 451.

A party discounting a draft, and receiving therewith, and deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft.

Neill v. Rogers Bros. Produce Co. 41 W. Va. 37, 23 S. E. 702; 2 Michie, Bkg. p. 1400, note 75; American Thresherman v. De Tamble Motors Co. 49 L.R.A.(N.S.) 644, and note, 154 Wis. 366, 141 N. W. 210; 4 R. C. L. 32; Marsh Mill. & Grain Co. v. Guaranty State Bank, — Okla. —, L.R.A.1918D, 704, 171 Pac. 1122.

Delivery and possession are essential to a pledge, but they may be symbolical, and are effected by delivery of the bill of lading.

Jones, Pledges, § 37; First Nat. Bank v. Harkness, 42 W. Va. 167, 32 L.R.A. 408, 24 S. E. 548; Neill v. Rogers Bros. Produce Co. supra; Means v. Bank of Randall, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. Rep. 186; Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123; 4 R. C. L. 32, 33; 4 Am. & Eng. Enc. Law, 546; Cosmos Cotton Co. v. First Nat. Bank, 171 Ala. 392, 32 L.R.A.(N.S.) 1173, 54 So. 621, Ann. Cas. 1913B, 42.

Even if the potatoes were in fact defective, this would not release Marshall from returning the bill of lading to the defendant, and would not release the defendant from paying to the plaintiff \$856.64, the amount of the draft.

Mason v. A. E. Nelson Cotton Co. 148 N. C. 492, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625; Cosmos Cotton Co. v. First Nat. Bank, 171 Ala. 392, 32 L.R.A.(N.S.) 1173, 54 So. 621, Ann. Cas. 1913B, 42; Hawkins v. Alfalfa Products Co. 152 Ky. 152, 44 L.R.A.(N.S.) 600, 153 S. W. 201; Central Mercantile Co. v. Oklahoma State Bank, 83 Kan. 504, 33 L.R.A.(N.S.) 954, 112 Pac. 114; Springs v. Hanover Nat. Bank, 209 N. Y. 224, 52 L.R.A.(N.S.) 241, 103 N. E. 156.

The bank receiving a sight draft for collection should not surrender the accompanying bill of lading until the draft has been paid.

2 Michie, Bkg. p. 400, note 75; 3 R. C. L. 613; Minneapolis Sash & Door Co. v. Metropolitan Bank, 77 Am. St. Rep. 617, note; Hobbs v. Chicago Packing & Provision Co. 98 Ga. 576, 58 Am. St. Rep. 320, 25 S. E. 584; Second Nat. Bank v. Cummings, 89 Tenn. 609, 24 Am. St. Rep. 618, 18 S. W. 115.

Messrs. Adams & Cooper and S. O. Prunty for defendant in error.

Ritz, P., delivered the opinion of the court:

The plaintiff brought this suit for the purpose of recovering the amount of a draft drawn by Leonard, Crossett, & Riley upon R. C. Marshall, to which was attached a bill of lading for a carload of potatoes, which draft had been indorsed, together with the bill of lading, to the plaintiff, and by it sent to the defendant for collection. A trial in the court below resulted in a directed verdict in favor of the defendant, and a judgment of nil capiat thereon, to review which this writ of error is prosecuted.

The facts out of which this controversy grew are that, on the 4th day of October, 1918, Leonard, Crossett, & Riley, pursuant to an order received by them from R. C. Marshall, shipped from Waupaca, Wisconsin, a carload of potatoes to Cairo, West Virginia, consigned to their own order, with instructions to notify R. C. Marshall, and at the

time of shipment of this carload of potatoes received from the carrier a bill of lading showing the consignment aforesaid. On the 7th of October Leonard, Crossett, & Riley drew a sight draft on the said R. C. Marshall for the sum of \$856.64, the purchase price of the potatoes, and attached to this draft the said bill of lading. This draft, with the bill of lading attached, was transferred or assigned to the plaintiff bank upon full payment therefor, and it forwarded the same, with the bill of lading attached, through the Marine Bank of Milwaukee, Wisconsin, to the defendant bank at Harrisville for collection. Not having received a remittance from the defendant bank to cover this draft, the plaintiff bank, on the 24th day of October, telegraphed to the defendant, stating that it was advised that the draft had been paid, and requested that the amount be remitted. To this telegram the defendant replied by a letter dated the 24th day of October, in which it made a statement at some length as to the facts as represented to it. It advised the plaintiff bank that, upon the arrival of the carload of potatoes at Cairo, Mr. Marshall telephoned to it that the railroad agent would not permit inspection except upon production of the bill of lading, and that he, Marshall, accordingly remitted to it the amount of the draft, and had the bill of lading forwarded to him by mail, together with the draft, in order that he might inspect the potatoes; that after inspecting them he returned the draft with a letter dated October 15th, stating that the potatoes were refused for the reason that the same were not satisfactory. The railroad agent declined to return the bill of lading, it having been surrendered to the carrier by Marshall, so that he was unable to return it to the bank. The defendant advised that, under the circumstances, it had decided to keep the money which was in its possession until the rights of the parties thereto were determined by a court of competent jurisdiction, and this suit resulted. What became of the

carload of potatoes does not appear. As to whether or not the potatoes were of inferior quality, and were for that reason rejected, does not appear in the record, except from statements contained in the letter from the cashier of the defendant to the plaintiff, and these statements purport to be made by him upon information derived from the purchaser and the county food administrator, and the rejection of the potatoes appears only in the same way. The court below, however, evidently treated this as proof, and the parties upon this hearing likewise considered these facts as sufficiently proven by the introduction of the aforesaid letter by the plaintiff. The question thus presented is purely one of law.

It is very well established that, where the consignor of goods discounts a sight draft representing the purchase price thereof, to which draft is attached a bill of lading, the holder of this draft has a property in the goods, and is entitled to have the same held by the carrier until he surrenders the bill of lading. *Neill v. Rogers Bros. Produce Co.* 41 W. Va. 37, 23 S. E. 702. The bill of lading is in the nature of a muniment of title, the holder of it being entitled to demand possession of the goods shipped when they reach their destination, and the carrier being relieved of liability on account of the carriage of said goods, when it delivers the same to the holder of such bill of lading.

That Marshall had a right to inspect these goods before receiving them is true. The bill of lading provided for this inspection, and, whether it did or not, he would be entitled to make it before receiving the goods. 10 C. J. 253. The railroad company did not have the right to require the surrender of this bill of lading before permitting inspection of the goods. It might be proper for the carrier's agent to require that the bank holding the bill of lading direct him to

Draft—against
bill of lading—
interest in
goods.

—against bill of
lading—right to
inspect goods.

permit inspection, simply for the purpose of knowing that the party making such inspection was authorized thereto by the holder of the bill of lading. The defendant bank, when it received this draft, was acting as an agent of the plaintiff. Its authority in the premises was limited to collecting the draft, and delivering it with the bill of lading attached to Marshall, or returning it, with the bill of lading attached, upon refusal of the purchaser to pay the same. It could not deliver the bill of lading to him upon any conditions, or under any agreement that it should be returned and the money repaid, should he thereafter be dissatisfied with the goods. To hold that Marshall could pay this draft as he did, and, upon discovering that the goods did not comply with the seller's warranty, demand his money back, would be, in effect, holding that the assignee of the draft with the bill of lading attached was liable to answer for the quality of the goods, while it is held with practical uniformity in this country that under such circumstances the purchaser's remedy is against the seller, and the assignee of the draft with the bill of lading attached cannot be held for a failure in quality or breach of warranty. *Cosmos Cotton Co. v. First Nat. Bank*, 171 Ala. 392, 32 L.R.A. (N.S.) 1173, 54 So. 621, Ann. Cas. 1913B, 42; *Central Mercantile Co. v. Oklahoma State Bank*, 83 Kan. 504, 33 L.R.A. (N.S.) 954, 112 Pac. 114; *Hawkins v. Alfalfa Products Co.* 152 Ky. 152, 44 L.R.A. (N.S.) 600, 153 S. W. 201; *Springs v. Hanover Nat. Bank*, 209 N. Y. 224, 52 L.R.A. (N.S.) 241, 103 N. E. 156.

These authorities clearly establish the doctrine in this country that the bank which discounts a draft with a bill of lading attached is not,

in the absence of bad faith on its part, answerable to the drawee for the performance by the assignor of the contract. It is quite true, as before stated, that Marshall was entitled to inspect these goods

before receiving them. This is a right, however, that he was not required to exercise. He could pay the draft and take up the bill of lading if he desired, and rely upon the seller's warranty to protect him. This right of inspection he must exercise seasonably. He could not pay off the draft and deliver the bill of lading to the carrier, and then demand his money back upon finding that the goods did not meet his expectations. When the defendant bank delivered the bill of lading to him, it passed the title to the goods, and the title to the money passed to the plaintiff bank, and when Marshall delivered this draft to the carrier's agent, and accepted the carload of goods, he cannot be said to have accepted it for any qualified purpose, for, by delivering the bill of lading to the carrier, he discharged the carrier of liability in connection with the carriage of the shipment, and received to himself not only the title, but the possession of the property. When a bank receives a draft with a bill of lading attached, as did the defendant bank in this case, it makes itself liable to the owner of the draft, if it delivers the bill of lading to the assignee without requiring payment of the draft; and likewise, if it does require such payment before delivery of the bill of lading, it cannot withhold the money it thus collects from the party for whom it undertook to collect it.

The stability of commercial transactions of this character requires that the rights of the parties thereto be definitely and certainly fixed at each stage of the proceeding, and not dependent on any whim or caprice of either party. Every act done must have attached to it a definite and certain meaning and effect, regardless of what may have been the intention of either party. When Marshall, upon the refusal of the railway company's agent to permit him to examine the goods, paid this draft and surrendered the bill of lading to the carrier's agent, he became vested with the full title in

Bank—dis-
counting draft—
liability for
default of
consignor.

the property. He waived his right to have an inspection of the goods before acceptance, and he cannot, after having waived the same, subsequently rely upon it. The doctrine of the liability of a bank, standing in the position of the defendant in this case, to the holder of a draft, for an unauthorized delivery of a bill of lading attached thereto, is fully recognized by the authorities. *Michie, Banks & Bkg. § 161, p. 1401; Gulf, C. & S. F. R. Co. v. North Texas Grain Co. 32*

—right to
proceeds of
draft as against
collecting bank
—surrender of
goods for
inspection.

Tex. Civ. App. 93, 74 S. W. 567; Second Bank v. Cummings, 89 Tenn. 609, 24 Am. St. Rep. 618, 18 S. W. 115; Hobbs v. Chicago Packing & Provision Co. 98 Ga. 576, 58 Am. St. Rep. 320, 25 S. E. 584. We are of opinion that the money now in possession of the defendant bank is the property of the plaintiff, and that it had the right to maintain this suit to recover the same, upon refusal of the defendant to pay it over.

The judgment of the Circuit Court is therefore reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

ANNOTATION.

Right of bank which receives for collection draft with bill of lading attached, to deliver bill of lading conditionally to consignee to enable him to inspect the goods.

The position is taken in the reported case (*OLD NAT. BANK v. PEOPLE'S BANK*, ante, 728) that, unless specifically authorized to do so, a correspondent bank which receives for collection a sight draft with bill of lading attached has no authority to deliver the draft and bill of lading to the consignee, upon deposit of the amount of the draft, for the purpose merely of enabling him to inspect the goods, and with the understanding that the consignee may have his money back if he determines to reject them. In this case the correspondent bank had retained the money, the railroad company to which the consignee had surrendered the bill of lading having refused to return it. It was held that the correspondent bank should be compelled to pay the same over to the assignee bank.

No other case presenting the precise question indicated in the above title has been found. The consignee, of course, has ordinarily a right to an inspection of the goods before delivery, without a surrender of the bill of lading, and, therefore, a bank which receives for collection a draft with bill of lading attached would be under no practical necessity of turning over

the bill of lading, either to the carrier, or to the drawee of the draft, in order to obtain for the latter the right of inspection. The court in the *OLD NAT. BANK CASE* points out that the railroad company did not have the right to require the surrender of the bill of lading before permitting inspection of the goods, although it might be proper for the carrier's agent to require that the bank holding the bill of lading direct him to permit inspection, simply for the purpose of knowing that the party making such inspection was authorized to do so by the holder of the bill of lading.

One or two other cases may be referred to, because of their analogy on the facts, although they turn on different principles.

In *Second Nat. Bank v. Bank of Alma* (1911) 99 Ark. 386, 138 N. W. 472, 2 N. C. C. A. 737, the defendant bank, which had received from the plaintiff bank a draft with bill of lading attached, with instructions to deliver the bill of lading only upon payment of the draft, which was for the rental value of a machine shipped to the drawee, delivered the same to the latter to enable it to test the

machine before acceptance and payment. It thus appears that the defendant violated its instructions in the delivery. The plaintiff, however, had not discounted the draft, but had received it from the lessor for collection only. The court laid down the rule that, when a bank receives a bill or draft for collection from a forwarding bank, it is liable for any loss occurring through any neglect of duty or unauthorized act, and, where it surrenders the bill of lading accompanying a draft contrary to instructions, it is liable as for conversion, for any damages which have been sustained by reason thereof. But recovery was denied in this instance, because the plaintiff did not show actual loss, since the lessor, whose representative had assisted in installing and making the test of the machine, had ratified the act of the defendant in turning over to the drawee the bill of lading without payment of the draft, and the plaintiff, being only the agent of the lessor in making the collection, had therefore not sustained any damage.

Attention is called, also to *People's Nat. Bank v. Freeman's Nat. Bank* (1897) 169 Mass. 129, 61 Am. St. Rep. 279, 47 N. E. 588, where the defendant bank, which had received by mail a sight draft from the plaintiff, attached to a sealed package addressed to the drawee of the draft, with instructions to deliver the papers only on payment by the drawee, who was a broker, was held not liable on the ground of violation of instructions, in permitting the drawee to open the package at the bank and examine its contents, after which he returned the same and refused to pay the draft,

since there was no delivery. The package, unknown to the defendant, contained a report on mines which the drawee desired, and the plaintiff contended that the defendant, through its negligence, had destroyed the money value of the draft and of the report, and that but for such negligence the defendant could have collected the draft in full.

There are many cases, of course, on the question—which is beyond the scope of the annotation—as to the rights and liabilities, of the assignee of a bill of lading with draft attached, as against a consignee who does not get the goods, or who finds them defective. As illustrative of cases involving that question, attention is called to *Mason v. A. E. Nelson Cotton Co.* (1908) 148 N. C. 492, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635, 62 S. E. 625, in which it was held that the fact that the holder of a bill of lading, taken as collateral security for a draft on the consignee of the property which he has discounted, refuses to permit the consignee to examine the goods without paying the draft, does not bring him under the obligations of the contract, so as to render him liable for breach of warranty in the sale.

Although, on its facts, not within the scope of the annotation, attention is called in this connection to *Monongahela Nat. Bank v. First Nat. Bank* (1910) 226 Pa. 270, 26 L.R.A.(N.S.) 1098, 75 Atl. 359, stating that "it is never a defense to an action by a principal for money collected by the agent, for the latter to show that, in equity and good conscience, the money belonged to a third person." R. E. H.

CHARLES POWER, Respt.,

v.

AUGUST NORDSTROM et al., Appts.

Minnesota Supreme Court — November 4, 1921.

(— Minn. —, 184 N. W. 967.)

Municipal corporation — prohibition of Sunday shows.

1. In the exercise of the discretion delegated to village councils by §§

Headnotes by LEES, C.

1268, 1269, Gen. Stat. 1913, they may ordain that there shall be no public exhibitions of motion pictures within the village on Sundays.

[See note on this question beginning on page 738.]

Theater — regulation of motion pictures.

2. Though a lawful business, the exhibition of motion pictures may be licensed and regulated by the state and the political subdivisions thereof in the exercise of the police power.

[See 26 R. C. L. 696.]

Municipal corporation — purpose of ordinance.

3. Such an ordinance is not aimed to secure the observance of the Sabbath day, but to regulate a business, and is not in conflict with the general law or public policy of the state.

[See 25 R. C. L. 1426.]

(Hallam, J., dissents.)

APPEAL by defendants from an order of the District Court for Chisago County (Searles, J.) overruling a demurrer to the complaint in an action brought to restrain the enforcement of an alleged illegal city ordinance. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. Alfred P. Stolberg, for appellants:

Defendants have authority to pass and enforce an ordinance prohibiting the exhibition of moving pictures on Sunday.

Higgins v. Lacroix, 119 Minn. 148, 41 L.R.A. 737, 137 N. W. 417; Duluth v. Marsh, 71 Minn. 248, 73 N. W. 962; Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361; Re Wilson, 32 Minn. 145, 19 N. W. 723; State v. Pamperim, 42 Minn. 320, 44 N. W. 251; State v. Barge, 82 Minn. 256, 53 L.R.A. 428, 84 N. W. 911; Ex parte Florence, 78 Ala. 419; State v. Ludwig, 21 Minn. 202; Economopoulos v. Bingham, 109 N. Y. Supp. 728; Hamlin v. Bender, 92 Misc. 16, 155 N. Y. Supp. 963; Smith v. Wilcox, 24 N. Y. 354, 82 Am. Dec. 302; People ex rel. Bender v. Joyce, 174 App. Div. 574, 161 N. Y. Supp. 771; People v. Moses, 140 N. Y. 214, 35 N. E. 499; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; People v. Dunford, 207 N. Y. 17, 100 N. E. 433; Dillard v. State, 104 Neb. 209, 175 N. W. 668; Myers v. State, 5 Ohio App. 156; Ex parte Brewer, 68 Tex. Crim. Rep. 387, 152 S. W. 1068; Capital Theater Co. v. Com. 178 Ky. 781, 199 S. W. 1076; Re Sumida, 177 Cal. 388, 170 Pac. 823.

Messrs. Moore, Oppenheimer, & Peterson, for respondent:

The ordinance in question is simply and solely Sunday legislation, and in direct conflict with the general statutes and well-settled public policy of the state; it is an attempt by the

village to override and render ineffective the general law of the state, and because of such fact is void.

St. Paul v. Laidler, 2 Minn. 190, Gil. 159, 72 Am. Dec. 89; St. Paul v. Briggs, 85 Minn. 290, 89 Am. St. Rep. 554, 88 N. W. 984; State v. Priester, 43 Minn. 373, 45 N. W. 712.

The act does not prohibit the exhibition of motion pictures on Sunday.

State v. Chamberlain, 112 Minn. 52, 30 L.R.A. (N.S.) 335, 127 N. W. 444, 21 Ann. Cas. 679; Houck v. Ingles, 126 Minn. 257, 148 N. W. 100.

The legislature is the sole judge of what shall be permitted and what shall be prohibited on the Sabbath day.

Block v. Crockett, 61 W. Va. 421, 56 S. E. 826; Lindenmuller v. People, 33 Barb. 548; Neuendorff v. Duryea, 69 N. Y. 557, 25 Am. Rep. 235; People v. Dunford, 207 N. Y. 17, 100 N. E. 433; People ex rel. Kieley v. Lent, 166 App. Div. 550, 152 N. Y. Supp. 18, 215 N. Y. 626, 109 N. E. 1088; Klinger v. Ryan, 91 Misc. 71, 153 N. Y. Supp. 937.

The power to prohibit the motion picture business is limited to such means as are necessary to prevent it becoming a nuisance.

State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; Johnson v. Philadelphia, 94 Miss. 34, 19 L.R.A. (N.S.) 637, 47 So. 526, 19 Ann. Cas. 103; State v. Mott, 61 Md. 297, 48 Am. Rep. 105; Denver v. Bach, 26 Colo. 530, 46 L.R.A. 848, 58 Pac. 1089; State v. Barge, 82 Minn. 256, 53 L.R.A. 428, 84 N. W. 911.

Lees, C., filed the following opinion:

The village of North Branch was incorporated under the provisions of chapter 9, Rev. Laws 1905. It has less than 1,000 inhabitants.

Section 727, Rev. Laws 1905, now § 1268, Gen. Stat. 1913, grants power to village councils to adopt such ordinances as they deem expedient for certain enumerated purposes. Among such purposes is preventing, or licensing and regulating, the exhibition of circuses, theatrical performances, or shows of any kind. Section 1269, Gen. Stat. 1913, contains a similar grant of power, coupled with a proviso authorizing village councils to refuse to grant a license "where, in their opinion, the public interests of the citizens of the village require it."

In October, 1920, the village council of North Branch adopted an ordinance entitled "An Ordinance to Regulate and License Peddlers, Hawkers, Auctioneers, Transient Merchants, Amusements and Shows." It required one following such an occupation or engaged in such a business within the village to take out a license and pay a specified license fee. Section 9 of the ordinance reads: "The exhibition or attempt to exhibit in said village of any moving picture show, show, circus, menagerie, vaudeville or theatrical entertainment for the amusement of the public on Sunday is prohibited and forbidden."

Plaintiff applied for and was granted a license to operate a motion picture theater, and paid the required license fee. The village officers threatened to arrest and prosecute him under the ordinance if he exhibited motion pictures on Sunday, and he has accordingly desisted, thereby sustaining a financial loss. He is the owner of a modern and well-equipped theater where he exhibits motion pictures in an orderly manner to respectable audiences. The pictures are of moral character, and tickets are sold only in the vestibule of the theater, with-

out any calling out or announcement of the exhibition or of their sale.

Setting out these facts in his complaint, plaintiff brought this action to restrain the village officers from enforcing § 9 of the ordinance, on the ground that it is illegal and void. The defendants demurred on the ground that the complaint failed to state a cause of action, the demurrer was overruled, the court certifying that the question presented was doubtful, and defendants appealed from the order.

No question is or could be raised about the meaning of the word "shows," as used in the statute. Clearly enough, it is sufficiently broad to include exhibitions of moving pictures. 38 Cyc. 258. It must be conceded that the motion picture business is a lawful business. Nevertheless it is a business which is

subject to regulation by the state by virtue of its police power, and by the political subdivisions of the state to which the power has been delegated by the legislature. 2 Dill. Mun. Corp. 664; 38 Cyc. 255, 258; Mutual Film Corp. v. Ohio Industrial Commission, 236 U. S. 230, 244, 59 L. ed. 552, 559, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296; Greenberg v. Western Twp. Asso. 148 Cal. 126, 113 Am. St. Rep. 216, 82 Pac. 684, 19 Am. Neg. Rep. 72; note to *Zucarro v. State*, L.R.A.1918B, 361.

This court has twice declared that places of public amusement, such as theaters and motion picture houses, are proper subjects for police regulation and control. *State v. Scaffer*, 95 Minn. 311, 104 N. W. 139; *Higgins v. La Croix*, 119 Minn. 145, 41 L.R.A.(N.S.) 737, 137 N. W. 417. The reasons leading to that conclusion are convincingly stated in the latter case, and need not be repeated.

Possibly the power to license and regulate shows includes the power to prohibit them. *State ex rel. Labovich v. Redington*, 119 Minn. 402, 138 N. W. 430. But, assuming it does not, can it be said that to

Theater—
regulation of
motion pictures.

forbid the carrying on of the business at specified times, as on Sundays or between certain hours of the day, is beyond the power of a municipal corporation? Under a grant of police power to license and regulate a business, the municipal authorities have power to determine where and within what limits the business may be conducted. *Re Wilson*, 32 Minn. 145, 19 N. W. 723. They may impose reasonable restrictions as to the time, place, and manner of conducting the business. *State v. Barge*, 82 Minn. 256, 53 L.R.A. 428, 84 N. W. 911. They may prohibit exhibitions of motion pictures in portions of a city in which for reasons of public welfare it is undesirable to have them. *State v. Redington*, *supra*. An ordinance enacted under a grant of power to license billiard and pool halls may impose any reasonable conditions or terms to make the license efficacious as a police regulation. The licensee may be required to keep an orderly house, or to keep it closed on certain days and during certain hours at night. *State v. Pamperin*, 42 Minn. 320, 44 N. W. 251. That was a case where the ordinance required billiard and pool halls to be kept closed on Sundays and after certain hours at night. Generally speaking, a city, under its authorized police power, may regulate any business the unrestrained pursuit of which might affect injuriously the public health, morals, safety, or comfort. *St. Paul v. Kessler*, 146 Minn. 124, 178 N. W. 171. And in respect to theatrical exhibitions and amusements of a similar character, a larger discretion is recognized than in the case of ordinary trades, because they are liable to degenerate into nuisances, and also because they require more police surveillance. *Duluth v. Marsh*, 71 Minn. 248, 73 N. W. 962. It is our opinion that, in the exercise of such discretion pursuant to the powers granted by §§ 1268 and 1269, Gen. Stat. 1913, a village may ordain that motion pic-

ture exhibitions shall not be given on Sundays, unless such a provision in an ordinance is inconsistent with the

Municipal corporation—prohibition of Sunday shows.

Constitution or general laws of the state, or is unreasonable. The legislature, in the exercise of the police power, may prohibit all manner of labor and business on Sundays, except works of necessity or charity, and may delegate authority to municipal corporations to enact ordinances with like prohibitions. *State v. Ludwig*, 21 Minn. 202. Sunday laws are generally sustained on the theory that there should be one day of rest in each week to promote the moral and physical well-being of society, and hence the enactment of such laws falls within the scope of the police power of the state. *State v. Petit*, 74 Minn. 376, 77 N. W. 225; *State ex rel. Hoffman v. Justus*, 91 Minn. 447, 64 L.R.A. 510, 103 Am. St. Rep. 521, 98 N. W. 325, 1 Ann. Cas. 91; *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127, 7 Ann. Cas. 932; *State v. Dean*, — Minn. —, 184 N. W. 275. But it is urged that an ordinance requiring motion picture houses to close on Sundays is inconsistent with the general laws of the state. Section 8753; Gen. Stat. 1913, as construed in *State v. Chamberlain*, 112 Minn. 52, 30 L.R.A. (N.S.) 335, 127 N. W. 444, 21 Ann. Cas. 679, and followed in *Houck v. Ingles*, 126 Minn. 257, 148 N. W. 100.

Counsel for respondent say that, stripped of all camouflage, the ordinance is simply and solely Sunday legislation, in direct conflict with, and an attempt to override, the general statutes and the well-settled public policy of the state. We do not regard it as legislation of that character. It is not the aim of the ordinance to compel the observance of the Sabbath day by the people of North Branch. Its only aim is to regulate the several occupations and kinds of business to

—purpose of ordinance.

which it refers. It is no more Sunday legislation than is § 3141, Gen. Stat. 1913, prohibiting the sale of intoxicating liquors on Sundays, or the same provision commonly found in city and village ordinances regulating the liquor traffic.

The contention that § 9 conflicts with the general law and public policy of the state is supported by a skilful and plausible argument, in substance this: Section 8753, Gen. Stat. 1913, is a legislative declaration of public policy relative to Sunday observance which prohibits the doing of certain things on Sunday, but not the indoor exhibition in an orderly manner of motion pictures. By failing to prohibit such exhibitions the legislature has impliedly sanctioned them, while § 9 of the ordinance expressly prohibits them.

We have examined all the cases cited in support of this contention, as well as others dealing with the vexed question of when a local ordinance must be held inconsistent with the general law. The conclusion we have reached is that the contention should not be sustained. It is elementary that an ordinance must not be repugnant to, but in harmony with, the laws enacted by the legislature for the government of the state. It cannot authorize what a statute forbids, or forbid what a statute expressly permits, but it may supplement a statute, or cover an authorized field of local legislation unoccupied by general legislation. Every business and occupation is subject to the reasonable exercise of the police power of the municipality where it is carried on, and in the exercise of the power a city or village may regulate that which the state has failed to regulate. There can be no conflict between a statute and an ordinance where there is no statute covering the subject-matter of the ordinance. Such is the case here. The statute is silent upon the subject of the exhibition of motion pictures on Sundays. It does not prohibit their exhibition. Neither does it expressly permit it, as it does the playing of baseball on

Sunday between certain hours.' By refraining from legislating on the subject, and by authorizing villages not only to regulate the business, but to refuse to grant licenses and so prevent such exhibitions, the legislature has treated the whole matter as one properly within the domain of the police power of villages. The public policy of the state should be determined by the legislature, and not by the courts. We see no reason why reasonable local regulations, adapted to local conditions and in harmony with the wishes of a majority of the inhabitants of a village, should not be permitted to stand, and such has been the opinion of the attorney general. Opinion 637, Rep. of Atty. Gen. 1916. Previous decisions of this court, cases in other states, and the textwriters have expressed views which support the conclusion we have reached. *State v. Ludwig*, supra; *Evans v. Redwood Falls*, 103 Minn. 314, 115 N. W. 200; *Mankato v. Olger*, 126 Minn. 521, 148 N. W. 471; *State ex rel. Zien v. Duluth*, 134 Minn. 355, 159 N. W. 792, Ann. Cas. 1918A, 683; *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192; *McQuillin*, Mun. Corp. §§ 647, 878; 19 R. C. L. 803; 25 R. C. L. 1419. Whether it is wise or unwise to prohibit theatrical and other like performances on Sundays is a question with which we are not concerned. North Branch has local self-government. If its people want an ordinance of this kind, they may have it. If they no longer want it, they can have it repealed.

For the reasons stated, we are constrained to hold that the learned trial judge erred in overruling the demurrer, and therefore the order appealed from must be and is reversed.

Hallam, J., dissenting:

In my opinion, the ordinance in question, so far as it relates to picture shows, is not regulation, but Sunday legislation, and is repugnant to the statutes of the state as con-

strued in *State v. Chamberlain*, 112 Minn. 52, 30 L.R.A. (N.S.) 335, 127 N. W. 444, 21 Ann. Cas. 679; and that it is, therefore, invalid. This is in accordance with the New York

decisions on similar legislation. *People ex rel. Kieley v. Lent*, 166 App. Div. 550, 152 N. Y. Supp. 18; *People ex rel. Kieley v. Lent*, 215 N. Y. 626, 109 N. E. 1088.

ANNOTATION.

Power of municipality to require closing on Sunday of amusements not forbidden on that day by state law.

This annotation is confined to cases involving the power of a municipality to require the closing on Sunday of places of amusement which are not forbidden by the state laws to be kept open upon that day.

Municipal ordinances must be in harmony with the general laws of the state, and with its public policy. *Clinton v. Wilson* (1913) 257 Ill. 580, 101 N. E. 192; *POWER v. NORDSTROM* (reported herewith) ante, 733.

And an ordinance cannot authorize what a statute forbids, or forbid what a statute expressly permits. The reported case (*POWER v. NORDSTROM*).

Nor can an ordinance be passed under a general grant of authority which infringes the spirit of the state laws. *Clinton v. Wilson* (Ill.) supra.

But an ordinance may supplement a statute, or cover an authorized field of local legislation unoccupied by general legislation. The reported case (*POWER v. NORDSTROM*).

And the police regulations of a city may differ from those of a state upon the same subject, if they are not repugnant thereto. *Clinton v. Wilson* (Ill.) supra.

In general, a municipal corporation may, by ordinance, require places of amusement to be kept closed upon Sunday, although they are not forbidden by the state laws from being kept open on that day. *Siddons v. Edmonston* (1914) 42 App. D. C. 459; *Clinton v. Wilson* (Ill.) supra; *POWER v. NORDSTROM* (reported herewith) ante, 733; *Re Ferguson* (1914) 80 Wash. 102, 141 Pac. 322.

In some of the cases a distinction is made between implied and express permission by the state statute, in passing upon the validity of ordinances compelling the closing of

places of amusement permitted by the state laws to be kept open.

Thus, in *Re Ferguson* (Wash.) supra, an ordinance of a municipality requiring the closing on Sunday of moving picture shows is held not to be void upon the ground that it is in conflict and inconsistent with a state statute which does not prohibit, but impliedly permits, moving picture shows to keep open and to run upon Sunday, unless they disturb the peace or quiet of the day, the court saying that if the state, by statute, had expressly permitted moving picture shows upon Sunday, it would be clear that the city could not pass an ordinance which prohibits such shows upon Sunday, but where the statute only impliedly permits such shows upon Sunday, and does not expressly permit them, it is within the power of the city to pass an ordinance prohibiting such shows, and such ordinance clearly would not be in conflict with the state law.

An ordinance requiring motion picture houses to close on Sundays was held, in the reported case (*POWER v. NORDSTROM*, ante, 733), not to be open to the objection that it was Sunday legislation in direct conflict with, and an attempt to override, the general state law and the well-settled public policy of the state, upon the ground that the state law, which prohibited certain sports and shows, but did not prohibit indoor exhibitions of moving pictures, was a legislative declaration of the public policy of the state relative to Sunday observance, and, by failing to prohibit motion picture exhibitions, impliedly sanctioned them, and the court stated that there could be no conflict between an ordinance and a statute, where the statute did not cover the subject-matter of

the ordinance, as in the case at bar, the statute in question being silent upon the subject of the exhibition of motion pictures on Sundays, neither prohibiting nor expressly permitting them; and further stating that the public policy of the state should be determined by the legislature, and not by the courts.

It was unsuccessfully argued in *Re Ferguson* (1914) 80 Wash. 102, 141 Pac. 322, that a municipal ordinance forbidding the keeping open on Sunday of theaters was void as against the public policy of the state, upon the ground that the policy of the state in favor of permitting theaters to be open upon Sunday was shown by the repeal of a statute prohibiting the opening of theaters upon Sunday, and the subsequent enactment of statutes prohibiting persons from promoting upon Sunday any noisy or boisterous sport or amusement, disturbing the peace of the day; and prohibiting persons from wilfully disturbing, interrupting, or disquieting any assemblage of people met for religious worship, by exhibiting shows or plays, the court saying that, while it is no doubt true that the repeal of the statute prohibiting the opening of theaters on Sunday was an implied permission to keep theaters open on Sunday, an implied permission did not create the policy of the state; but that the policy of the state was declared by express statutes, and not by implication, and that, if the state had expressly, by statute, authorized theaters and shows to be conducted upon Sunday, that would, no doubt, be a declaration of a policy upon the part of the state to permit shows on Sunday; but that, where the statute only impliedly permits theaters to be kept open on Sunday, no policy is declared.

An ordinance subjecting to fine any person who shall, on Sunday, keep open, or permit to be kept open, his place of business, or shall pursue his daily labor or occupation within the city, which was construed to embrace motion picture theaters, was held in *Clinton v. Wilson* (1918) 257 Ill. 580, 101 N. E. 192, not to contravene the public policy of the state,

as shown by the legislative enactments with reference to Sunday laws, the court stating that it was bound by the decision to the same effect in *McPherson v. Chebanse* (1885) 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454, since the statutes bearing on the question have not been changed since that decision was rendered.

In the *McPherson Case*, referred to in the preceding paragraph, a village ordinance prohibiting persons from keeping open their places of business in the village, for the purpose of vending goods, on Sunday, was held not inconsistent with the state law, which went only to the extent of forbidding such labor on Sunday as disturbs the peace and good order of society. The court, in answer to the contention that the ordinance went beyond the state legislation upon the subject, said that there was no repugnancy between the ordinance and the statute, but that both might consist together, as the ordinance did not prohibit what the statute permitted, and differed from it only in being more specific. The court, however, stated that it did not admit that the keeping open of the stores in the village on Sunday was allowable under the statute—that it would not disturb the peace and good order of society.

A police regulation of the District of Columbia, prohibiting the conducting of baseball games on Sunday, was held in *Siddons v. Edmonston* (1914) 42 App. D. C. 459, not to be in conflict with, but rather in aid of, the laws of Congress in force in the District, the laws in force being an act forbidding the shooting or carrying of guns on Sunday, an act imposing a fine for disturbing a religious congregation, an act requiring billiard and pool rooms to be closed on Sunday, an act forbidding the sale of liquor on Sunday, and an act classing Sunday with legal holidays. The court said that it thus appears that Congress has recognized what all other legislative bodies have recognized, namely, that Sunday is a day of rest.

But it was held in *People ex rel. Kieley v. Lent* (1915) 166 App. Div. 550, 33 N. Y. Crim. Rep. 90, 152 N. Y.

Supp. 18, affirmed without opinion in (1915) 215 N. Y. 626, 109 N. E. 1088, that, as the legislature alone might command how Sunday should be kept, a city could not independently compel and enforce Sunday closing of movies, by means of fines or imprisonment, unless such prohibition was part of the law and policy as declared by the legislature. In this case the city, under its charter, had the power to regulate amusements and common shows, including a right to license an exhibition of moving pictures; but the ordinance in question prohibited movies on Sunday, and made every person violating it liable to a penalty, and the court said: "A license may be conditionally granted. It may be given subject to certain reasonable hours of opening, and other limits upon its exercise. But the derivative power of a municipality to fine and imprison can only exist under and in due enforcement of authority clearly committed to the municipality. The intent that municipal corporations by ordinance can supersede the state law will not be inferred from general grants of power, nor will such authority be held to exist as an implied or incidental right. Dill. Mun. Corp. 5th ed. § 632. As all municipal authority comes from the legislature, the provisions of municipal charters, however broad, are subject to such restrictions as may be imposed by general laws. . . . The additional powers by chapter 247, Laws of 1913, amending the General City Law (Consol. Laws, chap. 21), giving authority to enforce ordinances by affixing penalties, forfeitures, and imprisonment (§ 20, subd. 22), did not, and could not, surrender the general power to legislate against criminal offenses, which remains in the legislature.

. . . . The legislature alone may command how Sunday shall be kept.

. . . . Hence the city of Yonkers cannot independently compel and enforce Sunday closing by means of fine or imprisonment, unless such prohibition is part of the law and policy as declared by the legislature."

And in *Klinger v. Ryan* (1915) 91 Misc. 71, 33 N. Y. Crim. Rep. 382, 153

N. Y. Supp. 937, denying, upon the ground that the plaintiff had an adequate remedy at law, a motion to continue a temporary injunction restraining the defendant, as chief of police of the city, from arresting the plaintiff for opening his moving picture show on Sunday contrary to the conditions of the mayor's license, the court said: "It now seems to be established (a) that the Penal Law of the state of New York does not prohibit the exhibition of moving pictures on Sunday (*People v. Hemleb* (1908) 127 App. Div. 356, 111 N. Y. Supp. 690), and (b) that a municipality cannot, independently of express legislative authority, by ordinance, compel and enforce Sunday closing of moving picture shows (*People ex rel. Kieley v. Lent* (N. Y.) *supra*). I am unable to distinguish between the inherent power of the city to prohibit Sunday shows by ordinance, and the inherent power of the mayor to prohibit them by the conditions of a license. The legislature alone may command how Sunday may be kept, and it has not delegated the power to the mayor of North Tonawanda by giving to that official the mere general power to license entertainments."

The case of *People v. Hemleb* (N. Y.) *supra*, cited in the preceding quotation, holds that § 265 of the New York Penal Code, prohibiting public sports, exercises, or shows upon Sunday, did not prohibit an indoor exhibition of moving pictures, as it applied only to out-of-door shows.

But in an earlier New York case, *Moore v. Owen* (1908) 58 Misc. 332, 109 N. Y. Supp. 585, denying a motion for a temporary injunction to restrain the chief executive officers of the city police department from closing or attempting to close the plaintiff's theater on Sunday, and from interfering with his presenting in such theater, on Sunday, exhibitions of moving pictures, it was held that such § 265 of the Penal Code, and other Sunday laws, prohibited movies upon Sunday, and that the public policy of the state as disclosed by its legislation was against the exhibition of moving pictures upon Sunday. The court, how-

ever, said that, if he was wrong in his views to the effect that movies were prohibited by the state law, the plaintiff had no right to exhibit moving pictures in his theater upon Sunday, because it was prohibited by city ordinances, saying: "Under the city charter, the common council has adopted ordinances in reference to the licensing of showmen. Article 1 of these ordinances is as follows: 'Without having procured a license as required by this ordinance, no person shall carry on any business herein named within the city of Rochester.' Then follow several sections in reference to different classes of licensed occupations, followed by § 10, which is as follows: 'Of showmen, which shall be construed to cover the exhibition of any circus, theatrical representation, or public show of any kind or permitting any place to be used for such purposes.' Then follow provisions for the issuing of licenses to showmen, and the fees to be paid therefor, and by article 5, § 39, it is provided that showmen shall not give any theatrical representation, circus, or other show on Sunday, and by article 6 are provided the penalties for violation. It appears from the complaint that the plaintiff is operating as a showman under a license granted pursuant to those ordinances. It is competent for the common council to regulate and control the licensing of theaters and public shows. Its ordinance, within the corporate limits of the city, has the same force as a statute. . . . It cannot, of course, permit, under its ordinances or license, any performance prohibited by the public statutes of the state; but it may impose further restrictions and limitations upon the character of the performance to be licensed, or to be authorized in licensed places. The plaintiff cannot lawfully carry on his business without a license under the city ordinances, and he is bound to comply with those ordinances or forfeit his license and right to do business. It follows that he cannot, under his license, violate the ordinance in respect to giving a show on Sunday, nor has he any right to restrain the police department from enforcing the

ordinance in that respect." The court, however, gave as another sufficient answer to the application for the injunction that the plaintiff's proper remedy was in the courts of law. (It may be noted here that, subsequently to the foregoing decisions in 1919, a form of local option on the subject was adopted by the legislature in New York.)

The preceding New York cases, and, more particularly, the following case, apparently discuss this question from the angle suggested by the contention of the counsel in the reported case (*POWER v. NORDSTROM*, ante, 733), opposing the municipality's power, which is upheld by the dissenting opinion therein, to the effect that such an ordinance, when stripped of all camouflage, is not a business regulation, but simply and solely Sunday legislation, aimed to compel the observance of the Sabbath day by the people of the community.

A municipal by-law requiring pool rooms or billiard rooms to be closed from Saturday evening until Monday morning was held in *Re Fisher* (1905) 16 *Manitoba L. R.* 560; not to be ultra vires, as against the contention that it was so because it related to Sabbath observance—counsel citing in support of such contention the case of *Atty. Gen. v. Hamilton Street R. Co.* [1903] *A. C. (Eng.)* 524, 72 *L. J. P. C. N. S.* 105, 89 *L. T. N. S.* 107, 19 *Times L. R.* 612, which held that a Lord's Day Observance Act, which imposed penalties for infringement of its provisions, was a matter of criminal law reserved by § 91, subsection 27, of the *British North America Act 1867*, for exclusive legislative authority of the Parliament of Canada, and that it was, therefore, ultra vires of a provincial legislature to pass such an act, the court saying: "Neither the by-law nor the provision of the municipal act [subsequently referred to in the quotation] makes any reference to the Lord's Day observance; but it is argued that the provision of the by-law requiring pool and billiard rooms to be closed from Saturday evening until Monday morning is intended for Sunday observance. This

may be true, but it would be so only by intendment, and not by express enactment. Considered in that light, the argument raises a constitutional point of great moment; and, as it might affect other legislation on cognate subjects, I do not think it would be advisable to determine that important question, without giving the attorney general of the province an opportunity of having the matter looked into, and of presenting the views of the government on the constitutional aspect of the case. But I do not deem it incumbent upon me to decide that point in the present application. The by-law was passed under a provision of the municipal act for 'licensing, regulating, and governing' pool and billiard rooms. To the power of licensing is added the power to regulate, namely, to determine the mode and

method by which the license is to be enjoyed; and these include, I should think, the conditions, as to time and otherwise, under which the licensee is to have the benefit of the license. It does not appear to me to be necessary to investigate and consider the particular reasons which may have induced the municipal council to impose upon the licensee the condition that his pool or billiard room shall not be opened during a certain day of the week, any more than during certain hours of the day. The reason may be surmised; but that is not sufficient to declare that the by-law is bad and should be quashed, when there is nothing on its face expressing or indicating what the reason may be. Taking this view of the case, I am not prepared to hold that the by-law is *ultra vires*." G. V. L.

FRANK HICKMAN, Respt.,

v.

LONDON ASSURANCE CORPORATION et al., Appts.

California Supreme Court (In Banc)—December 21, 1920.

(184 Cal. 524, 195 Pac. 45.)

Witness — constitutional immunity — application to examination under contract.

1. Constitutional immunity from being a witness against oneself does not absolve one who has suffered a loss under a fire insurance policy from complying with the provisions of the contract requiring him to submit to examination, although he is under indictment for arson for burning the property.

[See note on this question beginning on page 749.]

Insurance — right to enforce — refusal to submit to examination.

2. Refusal of the holder of a fire insurance policy to submit to examination, as required by the terms of the contract, on the ground that he has been indicted for burning the property and his testimony might be to his prejudice, deprives him of his right of action on the policy.

[See 14 R. C. L. 1342, 1343.]

—demand after dismissal of indictment.

3. An offer by the holder of a fire insurance policy who has been indicted for burning the property, to submit to examination according to the terms of the policy when the indictment is dismissed, which he refuses to do when called upon by the company pending the indictment, does not place any obligation upon the insurer to make a new demand upon him after dismissal of the indictment in order to place him in default.

APPEAL by defendants from a judgment of the Superior Court for Kings County (Short, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on defendants' respective fire insurance policies. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Miller, Thornton, Miller, & Watt for appellants.

Messrs. Earl Rogers and H. P. Brown for respondent.

Lawlor, J., delivered the opinion of the court:

The plaintiff, Frank Hickman, brought this action against the defendants, London Assurance Corporation, New Zealand Insurance Company, Limited, British & Federal Fire Underwriters of Norwich, England, Law Union & Rock Insurance Company, Limited, Yorkshire Insurance Company, Limited, Providence Washington Insurance Company, Sterling Fire Insurance Company, the Home Insurance Company of New York, and North British & Mercantile Insurance Company of London and Edinburgh, to recover for loss by fire on their respective policies. Judgment went for the plaintiff, and the several defendants appeal. The record is presented in typewriting.

Prior to November 21, 1915, the said policies were issued to respondent to cover his stock of general merchandise kept and used by him in his "clothing and gents' furnishing goods store," in a two-story brick building at 1922-1924 Mariposa street in the city of Fresno.

On the night of November 28, 1915, practically the entire stock of goods insured was destroyed by fire, and it is this loss which is the basis of respondent's asserted cause of action. Each of the policies was in the standard form prescribed by the legislature (Stat. 1909, p. 404), and contained a warranty that gasoline or benzine in excess of 1 quart would not be kept, used, or allowed on the premises. To the allegation of the complaint that the fire originated from causes unknown, the defendants set up in their answer that the fire was started with the knowledge, connivance, and design

of the respondent, and that in violation of the above warranty gasoline in excess of 1 quart was kept, used, and allowed on the premises.

In the employ of respondent at the time of the fire, and for some years previously, was W. H. Jenks, who testified in detail that in July, 1915, a portion of respondent's stock was destroyed, and that the latter was dissatisfied with the settlement made by him with the companies then carrying his insurance; that thereafter the policies in suit were issued; that respondent had planned with him "to have the stock totally destroyed," and had told him to bring oil and gasoline upon the premises "and make all the arrangements for burning the store;" that between the 5th and the 15th of October he purchased 5 gallons of gasoline in a tin container, which he placed in the basement of the store, and told respondent of this; that subsequently respondent gave him "a gallon jug and a black grip or handbag," in which he brought 5 or more gallons of kerosene and a number of gallons of gasoline into the store; that prior to November 28 he distributed gasoline around the basement, in vessels, and used shavings and different articles to absorb it, so that by seepage the gasoline would be ignited by the gas "pilot lights;" that about 4 or 5 o'clock on the afternoon of November 28 he raised a trapdoor in the basement, so that the draft thereby created would cause the gasoline to ignite, and went home, where he remained until notified by telephone that evening there was a fire in the store; and that thereupon, pursuant to the instructions of respondent, who had gone to San Francisco "to throw off all suspicion from him," he sent in his own name the following telegram to respondent: "Frank Hickman, care Washington Hotel, San

Francisco. Don't buy more goods. Your store is burning."

The respondent testified that he went to San Francisco "to visit the fair" and admitted having received the telegram while there, but denied that he induced Jenks to burn the property, or that he had any knowledge that it was to be done; that he had ever spoken to Jenks about burning the store or bringing gasoline or oil on the premises, or that he knew of any gasoline or oil being on the premises.

On December 2, 1915, a complaint was sworn to by J. G. Goehring, chief of police of Fresno, and filed on the following day, charging respondent and Jenks with the crime of arson, alleged to have been committed in the burning of the store. December 22 they were held to answer. The district attorney filed an information on December 31, upon which the accused were arraigned January 8, 1916, when respondent was released on bail. An amended information was filed January 13. February 14 respondent pleaded not guilty. The trial opened on April 18, and on April 24, while it was still in progress, the district attorney moved the court for an order dismissing the information on the ground "that the people have not sufficient evidence on which to warrant a conviction." The motion was granted, the information dismissed, and the bail exonerated.

On May 22 Jenks pleaded guilty and applied for probation. The application was referred to the probation officer, who reported on June 9, recommending that probation be denied, and it was so ordered. Jenks thereupon withdrew his plea of guilty, and pleaded not guilty. He was tried, convicted on October 11, 1916, and released on probation for the term of five years.

This action was commenced on February 27, 1917. The cause was tried by the court sitting without a jury. It was found in effect that Jenks set fire to the store, and that at the time he was insane; that the gasoline was carried upon the prem-

ises by him, without the knowledge or connivance of respondent; that respondent did not know there was any gasoline in the store; and that the fire occurred without any complicity on his part.

Each of the policies also contained the following warranty: "The insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given, and shall produce to such person for examination all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made. . . . No suit or action on this policy for the recovery of any claim shall be sustained until full compliance by the insured with all of the foregoing requirements."

On February 5 appellants made a written demand upon respondent that he appear before Leon Levy, a notary public, on February 11, and, pursuant to the above warranty, submit to examination and produce "all original invoices, bills, and vouchers of goods . . . claimed by him to have been damaged or destroyed, . . . and all books of account pertaining to the business." On the last-mentioned date the hearing was continued by consent to the following day, when respondent appeared. The following took place:

Respondent's counsel read into the record of the proceedings each of the letters in which the respective appellants had designated H. M. Farrar as their representative or adjuster "in any matters pertaining to the loss."

Respondent was then sworn and this colloquy ensued:

Farrar: Q. Your name in full?

A. Frank Hickman.

Q. Your age?

A. Forty-four.

Q. Your residence?

A. 430 Neilson avenue.

Q. Business location?

A. 1922 Mariposa.

Q. How long have you been in your present business location?

A. I refuse to answer on the advice of counsel.

Q. Now, Mr. Hickman, you refuse to answer any more questions?

A. For the same reason, at this time.

Thereupon respondent served and filed "a written statement" to the effect that he had been accused of arson, and was about to be tried upon that charge; "that any material testimony which he might give at said examination would relate either to the amount, value, cost of, or extent of damage to the goods . . . or to the cause of the fire, . . . both of which questions are at issue in said criminal proceeding;" that the criminal charge had been initiated and was being prosecuted by H. M. Farrar, appellants' adjuster; that he (respondent) had been advised by counsel that any testimony given by him at any examination could and would be used against him on his trial for arson; that, by virtue of article 1, § 13, of the Constitution, he refused to submit to examination, or to produce any books or papers at that time; that he was ready "to stipulate and agree that he will" submit to examination "immediately after the conclusion of the said criminal prosecution, and immediately after the trial of said cause and verdict and judgment therein;" and that, if appellants or Farrar would cause the arson charge to be dismissed, he would submit to examination at any time. In reply the following statement was made by Farrar: "The insurance companies . . . refuse to accept Mr. Hickman's offer, . . . and further demand that he now submit to examination and furnish the books, bills, invoices, etc., heretofore demanded."

Whereupon respondent said: "I stand by my reasons given this morning and the course adopted this morning."

No other demand by appellants,

or offer by respondents to submit to examination and produce the required books and papers, was made at any time.

The court found "that the examination of said plaintiff at said time [February 12] . . . would have had for its purpose inquiry into matters necessarily involved in a criminal prosecution; . . . that the course and conduct of said plaintiff in the matter of said hearing . . . were proper and right, and that he was justified in said course and conduct; that the plaintiff did comply with all . . . the terms and conditions of said policies; . . . and that he was justified in refusing to submit to an examination under oath at said time when said information and trial were pending."

The court justified respondent's refusal solely on the ground of his claim of privilege.

Appellants contend that respondent cannot recover because he "refused to submit to examination under oath, or to permit his books, or vouchers, or bills, or other papers concerning the property . . . to be inspected by the defendants herein, which refusal was in violation of the provisions of said policies;" further, "that the excuse given by plaintiff . . . has no merit, for the reason that in . . . § 1324 of the Penal Code it is expressly declared that no information which might be obtained from him on his examination . . . could be used against him in any criminal proceedings;" and that "the provision of the policies . . . is equivalent to a positive unconditional promise on the part of plaintiff that he will comply therewith, irrespective of how such compliance may affect him, and . . . his refusal would constitute such a violation . . . of the provision as would preclude him from instituting any action thereon."

Respondent's claim of privilege is thus stated in his brief: "A defendant on trial for his liberty has the

right to refuse to submit to a private inquisition."

It is a fact, as already appears, that two days after respondent's refusal issue was joined on the criminal charge, and thereafter, until April 24, it was pending against him.

The validity of provisions of the character here under consideration has been frequently upheld. *Gross v. St. Paul F. & M. Ins. Co. (C. C.)* 22 Fed. 74; *Fleisch v. Insurance Co. of N. A.* 58 Mo. App. 596; *Firemen's Fund Ins. Co. v. Sims*, 115 Ga. 939, 42 S. E. 269; *Pearlstone v. Westchester F. Ins. Co.* 70 S. C. 75, 49 S. E. 4; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922; *Liverpool L. & G. Ins. Co. v. Cargill*, 44 Okla. 735, 145 Pac. 1134; *National F. Ins. Co. v. Humphreys*, — Tex. Civ. App. —, 211 S. W. 811; *Richards, Ins. Law*, 416; 1 *Clement, Fire Ins.* 251; 5 *Joyce, Ins.* § 3330; 19 *Cyc.* 853; 4 *Cooley, Briefs on Ins.* 3395.

This rule is thus expressed in 13 *Am. & Eng. Enc. Law*, 358: "As the facts with respect to the amount and circumstances of a loss are almost entirely within the sole knowledge of the insured, and the opportunity and temptation to perpetrate a fraud upon the insurer is often great, it is necessary that it have some means of cross-examining, as it were, upon the written statements and proofs of the insured, for the purpose of getting at the exact facts before paying the sum claimed of it. Such considerations justify the provision universally to be met with in policies, requiring the insured, as often as demanded, to submit to an examination under oath touching all matters material to the adjustment of the loss, and provisions of that character are held to be reasonable and valid."

And in *Ostrander on Fire Insurance*, § 172, it is said: "The right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is clearly stipulated for in the form of policies now in general use. The

intent of this provision is to prevent fraudulent concealment, and to enable the insurer to obtain material information in regard to the origin and circumstances of the fire, the value of the property, and the claimant's interest therein. The requirement is a reasonable one, and will often, no doubt, be useful in securing important and truthful disclosures that would otherwise be withheld, to the injury of the insurer. When the assured refuses to be examined under oath, he will forfeit all right to recover."

In *Connecticut F. Ins. Co. v. George*, 52 Okla. 432, 153 Pac. 116, the court held: "There may be logic in plaintiff's argument that defendant was not conducting the examination in good faith, but the fact still remains that defendant was acting within the terms of an expressed stipulation found in the policy, which gave it the right to demand such an examination, and it is not for the insured to inquire into the motive actuating the company in exacting the examination, but on his part to comply therewith, and to answer all material questions, notwithstanding he might believe that the principal object of the company is to find a loophole whereby it might evade payment of the policy."

It was in *Bonner v. Home Ins. Co.* 13 Wis. 677, that the court, speaking through Mr. Chief Justice Dixon, said: "This action should have been dismissed because prematurely commenced; for, until examination was had, the losses were not, by the terms of the policy, due and payable."

And it was declared in *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 *Am. Rep.* 594, that "to excuse nonperformance it must appear that the act to be done could not by any means have been accomplished."

It is to be noted that under the policies a loss was not payable until ninety days after the receipt by appellants of respondent's preliminary proofs of loss, and that no action on the policies should be sustained "un-

less begun within fifteen months next after the commencement of the fire." The latter period would have expired on February 28, 1917, and the action, as we have stated, was commenced the day before.

No case has been cited, and we are aware of none, where the constitutional immunity of an insured was urged as a ground for refusing to submit to examination, or to produce books and papers. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, and *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230, however, are cited by respondent in support of his failure to comply with the demand. In the first of these cases *Counselman* had been subpoenaed to appear before a Federal grand jury and give testimony concerning certain alleged violations of the Interstate Commerce Act (24 Stat. at L. 379, chap. 104, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337). He refused to testify on the ground that any testimony he might give could be made the basis for a criminal prosecution against him under said act. Upon his continued refusal to testify he was committed for contempt, and he sued out a writ of habeas corpus. The supreme court, in discharging the petitioner, said: "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. . . . It is an ancient principle of the law of evidence that a witness shall not be compelled, *in any proceeding*, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures." (Italics ours.)

The *Clarke Case* was also a pro-

ceeding in habeas corpus. The petitioner had been adjudicated an insolvent, and he was cited to appear before the superior court to be examined concerning his assignee's charge that he had fraudulently concealed property which should have been turned over to such assignee for the benefit of his creditors. Clark declined to testify "upon the ground that his answers might be made the foundation of a criminal action against him." He was committed for contempt, and in discharging him from custody this court, speaking through the late Chief Justice Beatty, said: "To bring a person within the immunity of this [the constitutional] provision, it is not necessary that the examination should be attempted in a criminal prosecution against the witness, or that such a prosecution should have been commenced and actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law under which the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding unless the law absolutely secures him against any use in a criminal prosecution of the evidence he may give."

And the court followed *Counselman v. Hitchcock*, supra.

But those and other authorities of similar import refer only to the attempted compulsion of a witness in a trial, either civil or criminal, a hearing or other lawful inquiry of a public nature. The compulsion secured against by the Constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law. Constitutional immunity has no application to a private examination arising out of a contractual relationship. The examination to which appellants demanded respondent should submit was an extrajudicial proceeding, not authorized by any con-

stitutional or statutory provision, but purely by virtue of a contract between the parties. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind. This being so, respondent's refusal to undergo examination and produce his books and papers acquires no sanctity because he urged his constitutional right not to be compelled to be a witness against himself. The demand was made upon him by virtue of the stipulation in the contract, and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent "as often as required," and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfil his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform; in other words, when he commenced this suit he was without a cause of action.

Witness—
constitutional
immunity—
application to
examination
under contract.

Insurance—
right to enforce
—refusal to
submit to
examination.

a cause of action.

Respondent cites certain cases holding that the right to demand the performance of the condition precedent must be exercised in a reasonable manner. Thus, in *Thomas v. Burlington Ins. Co.* 47 Mo. App. 169, and *Gordon v. St. Paul F. & M. Ins. Co.* 197 Mich. 226, L.R.A. 1918E, 402, 163 N. W. 956, it was held under a similar stipulation that the insured was justified in insisting that his counsel be present at his examination and in refusing to be

examined unless he were permitted to be present. In *Phillips v. Protection Ins. Co.* 14 Mo. 220, the court declared that the prevalence of a cholera epidemic at the place designated excused the nonattendance of the insured. Under a stipulation to submit to examination as often as required, and a special promise to reappear after the original examination, which the insured, after notice, failed to do, it was held in *Porter v. Trades' Ins. Co.* 164 N. Y. 504, 52 L.R.A. 424, 58 N. E. 641, that, because he was sufficiently examined at the first hearing, the insured was not in default. In all of these cases, however, the question was merely as to the reasonableness of the time, place, or mode of examination. No objection to the examination on any such ground was made here.

Respondent's offer of February 12, as we have seen, is twofold—an offer to comply with the demand after the charge of arson was dismissed, or at *any* time if appellants would cause such charge to be dismissed. The point is made that in view of this offer, which was a part of the respondent's refusal to submit to examination, the appellants, after the dismissal of the charge of arson, should have made a new demand upon the respondent for his examination, and that, such demand not having been made, he was not in default. But the respondent was already in default, as he had no right to refuse, on the ground stated, to submit to examination in the first instance. It may be that, if he himself had made an offer, after the criminal charge against him had been dismissed, to then and there submit to an examination, and such offer had been refused, his default would have been removed. But he did not so offer, and, since he was in default, the appellants were under no obligation themselves to reopen the matter.

It may be conceded that the position in which respondent found himself between February 12 and April

—demand after
dismissal of
indictment.

(184 Cal. 524, 195 Pac. 45.)

24 was one of difficulty, but it was a difficulty created by the contract he made. It has been said that "mere hardship or difficulty will not excuse a party from carrying out a contract; and, where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without his fault, making it difficult, or even impossible, for him to perform. Walker v. Tucker, 70 Ill. 527, 8 Mor. Min. Rep. 672; Ballance v. Vanuxem, 191 Ill. 319, 61 N. E. 85; Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773. The breach of this contract by appellants relieved the other parties from performance on their part. 7 Am. & Eng. Enc. Law, 2d ed. p. 150, and cases there cited." Ptacek v. Pisa, 231 Ill. 522, 14 L.R.A. (N.S.) 537, 83 N. E. 221.

And it was declared in Bastian v. British American Assur. Co. 143 Cal. 287, 66 L.R.A. 255, 77 Pac. 63: "If the insured cannot bring himself within the terms and conditions of the policy, he cannot recover. The terms of the policy constitute the measure of the insurer's liability. If it appears that the contract has been violated, and thus terminated by the assured, he cannot

recover. He seeks to recover by reason of a contract, and he must show that he has complied with such contract on his part."

See also Smoot's Case, 15 Wall. 36, 21 L. ed. 107. Also Roses's U. S. Notes.

It follows that the conclusion of law that respondent's refusal to submit to examination and produce his books and papers, on the ground of his constitutional immunity, was "justified, . . . proper, and right," is erroneous, and that upon the findings of fact as to his refusal judgment should have gone for the appellants. This renders it unnecessary to consider appellants' other contentions that the evidence is not sufficient to support either the finding that respondent was not implicated in causing the fire, or the finding that the gasoline was brought on the premises without his knowledge or consent, or to pass on their assignments of error to numerous rulings on evidence.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendants.

We concur: Angellotti, Ch. J.; Shaw, J.; Wilbur, J.; Lennon, J.; Olney, J.; Sloane, J.

ANNOTATION.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination.

The reported case (HICKMAN v. LONDON ASSUR. CORP. ante, 742), apparently, is the only one to have passed upon the question under consideration herein, but the holding to the effect that the constitutional immunity from being a witness against oneself does not absolve one who has suffered a loss under a fire insurance policy from complying with the provisions of the contract requiring him to submit to examination, although he is under indictment for arson for burning the property, based as it is upon the theory that the constitutional immunity only applies to hearings or

inquisitions of a public nature, and that he could not, in an extrajudicial proceeding, be excused from complying with his contract—seems to be in accord with the better reasoning.

A somewhat analogous situation as regards facts is found in Aachen & M. F. Ins. Co. v. Arabian Toilet Goods Co. (1914) 10 Ala. App. 395, 64 So. 635. This was an action on a fire insurance policy, in which the insurer claimed that the insured had burned the property, and also set up that he had refused to submit to examination, as required by the provisions of the policy. The case, however, does not

show the ground for refusal to submit to examination, but the conclusion of the court was that the refusal necessarily suspended any right of recovery until compliance with the terms of the policy.

And, as a matter of fact, there would seem to be no question that the holding in the *HICKMAN CASE*, to the effect that the insured cannot recover unless his constitutional immunity from giving incriminating evidence excused his refusal to be examined, is correct, since it is well settled that, as a general rule, such a requirement in a policy of insurance is valid, and that a refusal to comply with the condition precludes recovery. As illustrative of the class of cases which so hold, see *Gordon v. St. Paul F. & M. Ins. Co.* (1917) 197 Mich. 226, L.R.A. 1918E, 402, 163 N. W. 956 (especially if the refusal is without cause); *Connecticut F. Ins. Co. v. George* (1915) 52 Okla. 432, 153 Pac. 116 (refusal to answer was on the ground that the questions did not pertain to the matter under consideration);

Tucker v. Colonial F. Ins. Co. (1905) 58 W. Va. 30, 51 S. E. 86 (holding that compliance with the condition is a condition precedent to suit); and *Riley v. Aetna Ins. Co.* (1917) 80 W. Va. 236, L.R.A.1917E, 983, 92 S. E. 417 (holding same as precedent case). And see 19 Cyc. 853, and cases cited in the opinion in the reported case (*HICKMAN v. LONDON ASSUR. CORP.*).

A case which, perhaps, goes as far as any in extending the constitutional immunity from giving incriminating testimony, is *Kanter v. Clerk of Circuit Ct.* (1908) 108 Ill. App. 287, wherein the court said: "The constitutional exemption from compulsion in this regard extends to all proceedings sanctioned by law. Neither civil nor criminal courts, quasi judicial tribunals, grand juries, commissioners, courts-martial, or inquisitors of any kind, can compel a person to give evidence which may tend to convict him of a criminal offense." It will be noted, however, that even this decision does not reach the question presented in the *HICKMAN CASE*. G. J. C.

WALTER P. STORY

v.

FRIEND WILLIAM RICHARDSON, State Treasurer.

California Supreme Court (In Banc)—June 15, 1921.

(— Cal. —, 198 Pac. 1057.)

Public utility — what is — statutory definition.

1. The supplying by the owner of an office building of electric energy to his tenants and to a few occupants of neighboring buildings does not render his plant a public utility under a statute providing that anyone who generates and distributes electricity to the public, or any portion thereof, for any compensation or payment whatsoever, is a public utility.

[See note on this question beginning on page 764.]

Constitutional law — construction — meaning of terms.

2. Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption.

[See 6 R. C. L. 50; 2 R. C. L. Supp. 10.]

— matters to be considered.

3. In construing the provisions of a Constitution the court may consider conditions existing prior to and at the time of the adoption of the provision under consideration, the debates in the constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls.

[See 6 R. C. L. 51, 67; 2 R. C. L. Supp. 14, 15.]

Tax — gross receipts — public utility.

4. A constitutional provision for the taxation of the gross receipts of carriers, gas and electric companies, insurance companies, banks, and trust companies is limited to public utilities.

— public utility — electric plant in office building.

5. The owner of an office building

maintaining within it a plant to furnish electricity to its occupants, and selling a small surplus to occupants of neighboring property, is not operating a public utility within the meaning of a constitutional provision providing for taxation of the gross receipts of such utility.

CROSS APPEALS from a judgment of the Superior Court for Sacramento County (Shields, J.) in favor of plaintiff, in part only, in an action brought to have a certain assessment declared null and void, and to recover the amount of a tax paid by plaintiff under protest, pursuant to said assessment; plaintiff appealing from so much of the judgment as taxed him as a public utility, and defendant appealing from the judgment in favor of plaintiff. *Reversed in part.*

The facts are stated in the opinion of the court.

Messrs. Amend & Amend for plaintiff.

Messrs. U. S. Webb, Attorney General, and Frank L. Guereña for defendant.

Lennon, J., delivered the opinion of the court:

This action was brought for the purpose of having an assessment declared null and void, and to recover from the treasurer of the state of California the amount of tax paid by plaintiff pursuant to said assessment, and under protest.

The plaintiff, Walter P. Story, is the owner of a twelve-story office building in the city of Los Angeles, in the sub-basement of which are located three 125 horse-power boilers, pumping engines, lighting engines, vacuum-sweeper engines, a hot-water heater, filtering machinery, house pumps, etc. This machinery and equipment were placed in the building at the time of its construction, for the purpose of supplying the tenants occupying the building with light, heat, hot water, and elevator and cleaning service, and have ever since been so used. During the year 1916, in addition to furnishing such service to the tenants of the building, plaintiff supplied electrical energy and steam to certain individuals, some of whom were not tenants of the Walter P. Story building, but occupied property in the vicinity of that building.

The terms of these sales were arranged by private contract between plaintiff and purchasers; plaintiff possessed no franchise, and neither the operation of the plant nor the sales in question were regulated in any manner by any public utility commission or body. The state board of equalization levied a tax upon the said machinery and equipment in plaintiff's building equal to 5.6 per cent of the gross sums received from the special sales of electrical energy and steam for the year 1916, which gross returns amounted to \$6,040.13 and \$7,618.77, respectively. Plaintiff claims that this taxation was unauthorized, and that he is entitled to recover the amount thereof. The trial court held that plaintiff was not entitled to recover the tax based upon the gross sales of electrical energy, but that the tax based upon the gross sales of steam was without authority, and void. Plaintiff and defendant have each appealed from those portions of the judgment which are adverse to them.

Section 14 of article 13 of the Constitution of California provides: "Taxes levied, assessed and collected as hereinafter provided upon railroads, . . . car companies, . . . companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; tele-

phone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons. . . .

Subdivision "a" of this section of the Constitution provides that the railroads, car companies, express companies, telegraph companies, and gas and electric companies previously mentioned shall annually pay a tax upon the property used exclusively in the operation of their business in this state; the amount of which tax shall equal certain percentages of the gross receipts of said companies; and that "such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided."

Defendant claims that this section of the Constitution confers upon the state the power to levy upon plaintiff's property the tax assailed in the instant case. Controverting this contention, plaintiff asserts that the section permits the state to tax the property of only those companies or persons engaged in the transmission or sale of electricity, operating as public utilities, and that plaintiff is not a public utility, and therefore not taxable under the section.

Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption.

Accordingly it has been held, in aid of the interpretation of such terms, that the court may consider conditions existing prior to and at the

time of the adoption of the provision under consideration, the debates in a constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls. *Re Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; *Older v. Superior Ct.* 157 Cal. 770, 109 Pac. 478; *Pacific Gas & E. Co. v. Industrial Acci. Commission*, 180 Cal. 497, 501, 181 Pac. 788, 19 N. C. C. A. 298. The provision of the Constitution here under consideration was adopted by the people of the state at the election of November, 1910, as the result of a movement to separate state and local taxation. In 1905 a commission was authorized to investigate the system of revenue and taxation in force in this state, and recommended a revision thereof. Stat. 1905, p. 390. The commission appointed proposed an amendment to the Constitution. Report of the Commission on Revenue and Taxation of the State of California, 1906, vol. II., Appendix to Journals of Senate and Assembly of California, Session 1907. In 1910, after some alterations the Amendment was submitted to the people, and adopted by them. The Amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions. The commission recommended a separation of the sources of state and county revenue, and that the property of certain "public utilities" and certain "other corporations," namely, banks and insurance companies, be taxed solely for the benefit of the state.

The theory of the report was that an ad valorem system of taxation was unsatisfactory, in that it failed to distribute equally the burden of taxation, particularly in view of the fact that, in certain cases, such as public utilities, banks, and insurance companies, the greatest value lay in the extent and nature of opera-

Constitutional
law—construction—
meaning
of terms.

(— Cal. —, 198 Pac. 1057.)

tion rather than in the intrinsic worth of separate items of property. Accordingly, a uniform scheme was proposed for the taxation of certain enumerated public utilities, including electrical companies, and that system was that the tax should equal a certain percentage of gross receipts; special methods were prescribed for the taxation of banks and insurance companies. Throughout the report electrical companies were classified and discussed as one group of "public utilities" to be taxed upon gross receipts. In the printed arguments submitted to the voters in 1910, at the time the constitutional Amendment was voted upon, the "gross receipts" method of taxation was advocated solely for public utilities. It is clear, both from the report of the commission proposing the Amendment, and the arguments advanced to those voting upon the adoption of the Amendment, as well as from the nature of the Amendment, that the provision for taxation in proportion to gross receipts is applicable only to public utilities. In discussing the Amendment, the cases have generally assumed that the tax upon

Tax—gross receipts—public utility. gross receipts was limited to public utilities, although the precise question has never before been presented for decision. *San Francisco v. Pacific Teleph. & Teleg. Co.* 166 Cal. 244, 247, 135 Pac. 971; *Pacific Gas & E. Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700.

Plaintiff is also correct in his contention that he is not a public utility "engaged in the transmission or sale of . . . electricity," within the

—public utility—electric plant in office building. meaning of said § 14 of article 13 of the state Constitution.

He is not engaged in the sale and distribution of electricity to the public at large, or any portion thereof, as such. It appears that plaintiff furnished electrical energy under special contract to certain occupants of his own building, and to the occupants of an adjoining building.

18 A.L.R.—48.

This was the extent of his special sales of electrical energy.

"The test . . . is . . . whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." *Farmers' Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 990.

"The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." *Thayer v. California Development Co.* 164 Cal. 117, 127, 128 Pac. 25.

There was no such general offer on the part of plaintiff. Plaintiff's plant was designed primarily and pre-eminently for supplying service to the tenants of his own building, and the special sales of electrical energy and steam were wholly subsidiary and ancillary to this main purpose. The surplus electrical energy at plaintiff's disposal was therefore so limited as to restrict the sale thereof to exceptional cases, and prevent the indefinite offer of service essential to a public use.

Defendant claims that, notwithstanding plaintiff's restricted operation, he comes within the term "public utility" as defined by the "Public Utilities Act" of this state. That act provides that anyone who generates or distributes electricity to the public, or any portion thereof, for any compensation or payment whatsoever, is a public utility, subject to the provisions of that act. The same act defines "public, or any portion thereof," as "the public generally, or any limited portion of the public, including a person." Stat. 1915, pp. 115, 118, 119.

"Even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility, and thus take property for public use without condemnation and payment." *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 680, 140 Pac. 596.

Consequently, it has been held

that the definitions of public utilities contained in the Public Utilities Act must be construed as applying only to such properties as have, in fact, been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. *Allen v. Railroad Commission*, 179 Cal. 68, 88, 8 A.L.R. 249, P.U.R.1919A, 398, 175 Pac. 466. Inasmuch as plain-

**Public utility—
what is—statu-
tory definition.**

tiff's property was employed solely in a private enterprise, the consummation of the special sales did not bring him within the scope of the definition contained in the act.

Since § 14, article 13, of the Constitution, was designed to authorize state taxation in proportion to gross receipts only in the case of public utilities, and plaintiff is not operating as a "public utility," his property is not taxable thereunder. It follows that the tax based upon gross sales of electricity was without authority, and void. It therefore becomes unnecessary to pass upon the point raised by the state treasurer in his appeal, namely, that the sales of steam were taxable as a by-product of the business in electricity, and that the trial court erred in holding void the tax based upon gross receipts from sales of steam.

The trial court found that plaintiff was not furnishing the com-

modities of electricity and steam as a public service concern. Therefore, with the exception of the single conclusion of law to the effect that the tax based upon plaintiff's gross sales of electrical energy for the year 1916 was valid, the findings of the trial court are in accordance with the allegations of plaintiff's complaint, and will support the judgment wholly in his favor. That portion of the judgment which declares that plaintiff recover nothing from defendant on account of the tax based upon the sales of electrical energy is reversed, with directions to the trial court to enter a judgment declaring the said tax void, and that plaintiff recover the amount thereof. That portion of the judgment which grants plaintiff a recovery on account of the tax based upon the sales of steam is affirmed.

We concur: Angellotti, Ch. J.; Sloane, J.; Lawlor, J.; Olney, J.; Shaw, J.; Wilbur, J.

NOTE.

The effect of rendering incidental service to members of the public to render an individual or corporation, whose principal business is of a different nature, a public utility, is the subject of the annotation following *STATE EX REL. M. O. DANCINGER & Co. v. PUBLIC SERVICE COMMISSION*, post, 764.

STATE OF MISSOURI EX REL. M. O. DANCIGER & COMPANY,
Respt.,

v.

PUBLIC SERVICE COMMISSION of Missouri et al., Appts.

Missouri Supreme Court (Division No. 2)—July 10, 1918.

(275 Mo. 483, 205 S. W. 86.)

Public service corporation — what is — sale of by-product.

1. A president of a corporation which undertakes to furnish surplus electric current generated by the corporation for use in its plant, to the owners of neighboring property, who string their own wires, and to the

city for a few lights, is not, where the corporation has no charter authority or franchise to sell electricity, a public utility, subject to regulation by the public service commission.

[See note on this question beginning on page 764.]

— discontinuance of service — reason.

2. The reason for discontinuance of a supply of electricity to a customer is immaterial in a proceeding to compel its restoration because furnished by a public utility.

— absence of charter authority — effect.

3. Absence of charter authority to furnish public service is immaterial in a proceeding to enforce service by a corporation as a public utility.

APPEAL by the Public Service Commission and complainant from a judgment of the Circuit Court for Jackson County (Burney, J.) annulling an order of the Commission for restoration by relator of electrical current to complainant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. A. Z. Patterson, James D. Lindsay, and B. Denny Davis, for appellant Commission:

The nature and extent of the business done by relator constitute it a public service company.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Ratcliff v. Wichita Union Stock Yards Co. 6 L.R.A.(N.S.) 834, and note, 74 Kan. 1, 118 Am. St. Rep. 298, 86 Pac. 150, 10 Ann. Cas. 1016; VanDyke v. Geary, 244 U. S. 39, 61 L. ed. 978, 37 Sup. Ct. Rep. 483; Del Mar Water, Light & P. Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948; State ex rel. National Subway Co. v. St. Louis, 145 Mo. 575, 42 L.R.A. 113, 46 S. W. 981; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; 1 Wyman, Pub. Serv. Corp. § 50.

It is not necessary that a company should serve all of the public to give it the character of a public utility.

Terminal Taxicab Co. v. Kutz, 241 U. S. 255, 60 L. ed. 986, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 975; Peck v. Tribune Co. 214 U. S. 185, 190, 53 L. ed. 960, 963, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075; Cawker v. Meyer, 147 Wis. 320, 37 L.R.A.(N.S.) 510, 133 N. W. 157.

The business of furnishing electric current for light and power within a city is one of that large class of concerns which has always been held to

be a business clothed with a public interest, and to be subject to regulation by the public.

Ratcliff v. Wichita Union Stockyards Co. 6 L.R.A.(N.S.) 834, note.

Messrs. I. J. Ringolsky and M. L. Friedman, for respondent:

Under the facts and the law relator is not a public utility.

State ex rel. Public Service Commission v. Spokane & I. E. R. Co. 89 Wash. 599, L.R.A.1918C, 675, P.U.R.1916D, 469, 154 Pac. 1110; State Pub. Utilities Commission ex rel. Wabash R. Co. v. Illinois C. R. Co. 274 Ill. 36, 113 N. E. 162; Cawker v. Meyer, 147 Wis. 320, 37 L.R.A.(N.S.) 510, 133 N. W. 157; Delmar Water, Light & P. Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948.

Assuming, arguendo, that relator is a public utility, the Public Service Commission had no jurisdiction in instant cases.

Lusk v. Atkinson, 268 Mo. 109, 186 S. W. 703; Atchison, T. & S. F. R. Co. v. Public Service Commission, — Mo. —, P.U.R.1917C, 1005, 192 S. W. 460; Sessinghaus v. St. Louis Merchants Bridge Terminal Co. 2 Mo. P. S. C. 690, P.U.R.1916B, 1004; Missouri Valley Realty Co. v. Cupples Station Light, Heat & P. Co. 2 Mo. P. S. C. 1; State ex rel. Payne v. Kinloch Teleph. Co. 98 Mo. App. 349, 67 S. W. 684; State ex rel. Shewalter v. Jones, 141 Mo. App. 299, 125 S. W. 1169; State ex rel. Jacobs v. Water, Light & Transit Co. 249 Mo. 649, 155 S. W. 826, Ann. Cas. 1914D, 452; Public Service Electric Co. v. Public Utility Comrs. 88 N. J. L. 603, P.U.R.1916D, 107, 96 Atl. 1013.

Faris, J., delivered the opinion of the court:

This is an appeal by the Public

Service Commission and others from a judgment of the circuit court of Jackson county, annulling an order of the Public Service Commission (hereinafter called for brevity simply "Commission") in a case wherein one W. H. Roach was complainant. After the conventional motions, the Commission and the complainant appealed.

This case is one of three of similar character and bottomed upon identically similar facts. The relief severally sought was an order upon M. O. Danciger (trading as M. O. Danciger & Company), to compel him to restore electric service to the complainants, which service, it was alleged, had been by said Danciger cut off without any legal excuse therefor. The complaints filed before the Commission by the three several complainants were similar in all substantial respects, and wholly similar, except that the complaint filed in the instant case averred as a motive for the cutting off of the service that discontinuance was due to ill feeling engendered by the attitude of complainant in a local option election.

It was shown by the testimony adduced upon the hearing before the Commission that the Royal Brewing Company, situate at Weston, Missouri, is a corporation the stock of which is largely, if not wholly, owned by respondent, M. O. Danciger, and his brothers. The Royal Brewing Company is engaged in the brewing of beer and in the manufacture of so-called soft drinks. The town of Weston contained, according to the last census, a population of 1,019 persons, though the evidence adduced tends to show roughly that it now contains about 1,500 population. Some six years before the hearing, the Royal Brewing Company (hereinafter called for brevity the "Company") installed in its brewing plant the necessary machinery for producing electric light solely for its own use in lighting its property. During the last three or four years preceding the hearing before the Commission, the

Company has also been using the electric current so generated for the purpose of operating by electricity a large part of the machinery used in its brewing business. Shortly after the Company put in its private electric plant, it discovered that it was able to produce more electricity than was necessary for its own use in lighting and running its plant. It thereupon began to make special private contracts to furnish, under the conditions and circumstances below named, electricity for lighting and power purposes to certain private citizens of the town of Weston, located within a radius of three blocks of the Company's plant. Subsequently it began furnishing to the town of Weston lights for some of the streets and alleys thereof. At the time of the filing of this complaint, between twenty and thirty of the business houses and some ten residences, within the area mentioned, were being lighted, or partially lighted, by electricity from the Company's plant.

At this time the city was being furnished thirty or thirty-two lights, for which it paid, for only five or six of these, the sum of \$19.50 per month. The remainder of the lights were furnished gratuitously. All of the electrical energy sold is delivered to consumers at the Company's plant, for, says one of the complainants, "we were told if we would run the line we could have the service." The Company has no distribution system for supplying any of these private persons, nor is it incorporated for this purpose, nor is this purpose mentioned among the things which as a corporation it may do, nor has it a franchise from the town of Weston as an electric lighting company, or any other permission to enter or cross the streets and alleys thereof. It does not itself place or construct any poles or wires upon the streets, alleys, or public places of the city, nor does it own any poles or wires. The consumer desiring the surplus light or power furnishes his wire and poles, and bears all cost of constructing the line for trans-

mitting the electric current from the Company's plant to the place of consumption, or he "taps in" on some other private owner's wire. The actual work of construction and installation is usually done, if not always, by employees of the Company, in which case the Company is reimbursed by the private consumer. In some instances the contracts for this installation were made directly with the employees themselves, and the work was done after working hours. In some cases the amount of current consumed is measured by a meter, which meter belongs to the consumer; and in others—the greater number of cases—the amount paid is governed by a flat rate.

The sale of the surplus current, although it is generated by the Company and with the Company's machinery, is conducted with consumers by respondent, under the said tradename of "M. O. Danciger & Company." The reason for this arrangement was, upon the hearing, without any contradiction thereof, thus explained by respondent: "The brewery didn't have a right to go into the lighting business, and I took it up with my brothers, and they said, 'If you have got any friends you want to serve, you had better [not] serve them from the brewery company as a corporation; and that is how I happened to start this M. O. Danciger & Company. I got a little set of books at that time. I didn't really know what they were paying for their lights. Some of them were on flat rates, and every time a man would go around to collect, they would say their next door neighbor's bill wasn't as big as theirs, and you must not be charging him as much per kilowatt as you are me. Then I had this form printed they offered in evidence, and gave them around a time or two as receipts. That is how that form happened to be printed, to keep down arguments."

The complainant Roach is the owner of a weekly newspaper published in Weston, called the "Weston Herald." About a year or a year

and a half before the matters here in controversy arose, complainant bought this paper and printing plant from one Taylor. Power and lights were then being furnished by the Company through respondent, upon the arrangement above set out, to Taylor, and after complainant's purchase of the newspaper the service was continued until June 7, 1916, when the wires were suddenly cut by Danciger, without prior notice, and the service discontinued. Upon demand made for reinstatement of the service, and upon refusal thereof, this proceeding was brought.

The printed form of receipt, mentioned by respondent as having been given by him "*a time or two as receipts*" to his customers, contained on the reverse thereof a statement of the rates to be charged customers for current furnished for lights. No reference was made in definite kilowatts to rates for motor service, but the printed form of receipt contained on the back thereof the statement, "*Special rates for motors upon application.*" We mention this specifically, because much importance is attached to it by appellants. So far as the record shows, these rates were not contained on any receipt after October 15, 1915, and were given out only once or twice, *to customers only*, prior to that time. No receipt issued after October 15, 1915, contained mention anywhere of the rates charged, or of any special rate for motors.

The area of three blocks from the Company's plant is all of the town of Weston which was given any service, and not nearly all of the residences and businesses in this area have this service. The district within three blocks of the plant comprises only about one fifth of the town of Weston, since the Company's plant is situate on the extreme edge of the town. The record discloses that a number of persons, both within the area of three blocks, and without the same, made requests for service, and were re-

fused, because respondent was, he says, unable to furnish this service by reason of lack of surplus current.

There are no contracts in writing with any of the customers of respondent. The arrangement for furnishing the five or six lights to the city, for which the city pays, was made verbally, and is thus related by a witness who was a member of the board of aldermen when this arrangement was made: "I spoke to Mr. Danciger about it, and he said he had no franchise or anything, and I asked him, as a favor, if he would not permit us to put a few lights down town. Our lights were bad. He said, 'Well, if you stretch your own wires and be responsible for the upkeep'—that he was not to be responsible for any damage or anything—that he would furnish a few lights. . . . Said, 'Of course, sometimes they go out.' So we put in at that time about three lights, and then, after we got by the fire department, he put a light on the bridge. He wired the fire department gratis. . . . The final arrangement was just made between me and Mr. Danciger. Then I took it up with the council, and told him we were willing. . . . I asked him if he would come down to the council, and he did. . . . He said he could not guarantee us any service, any more than he would do the best he could. He could not guarantee us any service for any length of time, or anything. He said, and I knew it to be a fact, that his generator was there for his own use for lighting."

Fairly construed, the testimony of Danciger corroborates this witness, and no one contradicts him. Upon the trial, respondent, testifying for himself, was asked to state his reason for cutting off the service from the complainant. His answer was this: "The first reason was that I wasn't holding myself out as a light company; that I was ruining my machinery; that I was running at a loss at the plant. I have electric-driven machinery that I wasn't able to use, using steam machinery that cost twice or three times the amount

of money to operate; and another reason was that these men who were using the current were the last men that got the service. That was another reason. The third reason was that I was furnishing these people current at a loss, doing it as a favor, and they were abusing me personally, and trying to destroy the business I had,—all I had in the world,—and I didn't feel any too friendly. Those are the different reasons for cutting off that current."

The Commission, after taking voluminous testimony in the case, made a report in which it held that respondent was conducting a public utility, that he owed the duty of serving complainant, and that the discontinuance of the service was without reasonable excuse, and thereupon entered an order that the service be restored. From this order respondent herein took the case, by the statutory writ of review or certiorari, to the circuit court of Jackson county, wherein, upon a hearing de novo, the order of the Commission was annulled. Thereupon the Commission and the complainant, Roach, appealed.

Much of the record in the case is taken up in an effort to prove and disprove the wholly irrelevant matter of motive. It was strenuously contended at the hearing, in the briefs, and upon argument, that the cutting off of service to this complainant was wholly due to ill feeling, arising from the arid attitude of the complainant and his newspaper in a local option election. It is too plain for argument that we are not to determine this matter on a consideration of the antecedent reasons which brought about this proceeding. Whether the action complained of was brought about by reasons which, in morals, are just or unjust, good or bad, is no concern of the courts, and cannot in the remotest way affect the law of this case. This is so because, if complainant is entitled to service, he is entitled to it as a matter of

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law; and, if he is not under the law entitled to it, no motive, however reprehensible, for discontinuing the service, will serve as a reason for any court to compel the restoration thereof. It is but remotely apposite on the point whether the local option question, or a lack of facilities to furnish the service, constituted the dominating motive; for, if respondent is a "public utility," neither excuse will serve, because the Commission has power to compel him to provide reasonable and adequate facilities. If he is not such utility, no excuse is necessary. It is, therefore, but to pad the case with immaterial irrelevancies, to take up the time of counsel, and of this court, with such questions.

There is but one question in the case. That is a question of law, and is, to wit: Is M. O. Danciger, trading as M. O. Danciger & Company, engaged in doing such business as by law permits the regulation thereof by the Public Service Commission Act?

In this connection we may mention, in passing, respondent contends that M. O. Danciger & Company cannot be compelled to furnish the service in question, because, since the electric current used is obtained from the brewery company, which is a corporation, the result of such an order would be tantamount to, and result in, forcing the company to do an ultra vires act. Upon this contention, even if it were vital here, it is enough to say that, in determining whether a corporation is or is not a public utility, the important thing is not what its charter says it may do, but what it actually does. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765. In short, if the things done constitute the corporation a public service

company, it ought not to be, and will not be, heard to urge its own wrongful aggressions in order to escape regulation.

Moreover, the corporation is not a party to this proceeding. Com-

plainant saw fit to concede, in electing to sue M. O. Danciger & Company, that the latter, and not the brewery company, constitutes the alleged public service entity, and that the explanation of Danciger as to the relations between the Brewery Company and M. O. Danciger & Company is true.

It is contended by appellants that the whole question is settled by subdivisions 12 and 13 of § 2 of the Public Service Commission Act, which define an "electric plant" and an "electric corporation," over which plants and aggregations, as defined, other appropriate provisions of this act (subdivision 25, § 2, p. 560, Laws 1913), confer plenary powers of regulation. The above clauses read thus:

"The term 'electric plant,' when used in this act, includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power."

"The term 'electrical corporation,' when used in this act, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others."

While the definitions quoted supra

—absence of
charter
authority—effect.

express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words "for public use" are to be understood and to be read therein. State ex rel. Public Service Commission v. Spokane & I. E. R. Co. 89 Wash. 599, L.R.A. 1918C, 675, P.U.R.1916D, 469, 154 Pac. 1110. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. Since the sole right of regulation depends upon the public interest, the subdivisions quoted above, and which define an electric plant and an electric corporation, mean the same, whether the idea of a public use is expressly written therein or not; it is, nevertheless, of necessity, connoted and to be understood therein. We are not to be understood as saying that an electric plant constructed solely for private use could not, by professing public service, become by such profession, and by the furnishing of general public service, a public utility.

There is in this case no explicit professing of public service, or undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company's plant; for there is in the case neither existence nor assertion of the right of eminent domain. Nor does there exist any franchise or license, nor has there been obtained from the town of Weston any right or privilege to cross the streets, alleys, or other public places therein, nor are there any charter powers authorizing the Company, or the respondent, to engage in the public service. The fact of *professing public service*—that is, of holding himself or the Company out as ready and willing to serve the public—must, therefore, in

order to hold respondent, be deduced implicitly, if it is to be found in this record at all.

It is certainly fundamental that the business done by respondent either constitutes him a "public utility," or it does not. If he is a public utility, he is such within the whole purview, and for all inquisitorial and regulatory purposes of the Public Service Commission Act. If, therefore, what respondent did constitutes him a public utility, other apposite sections of the law confer upon the Commission the power of compelling him to furnish and provide such "instrumentalities and facilities as shall be safe and adequate to furnish service." Laws 1913, § 68, p. 602. Still other provisions would seem to confer upon the Commission the power to compel service as to all residences, businesses, and purposes within a radius of three blocks from the Company's plant. Certainly so much could be compelled by orders of the Commission. Absent the matter of franchise, it is possible, we suggest *arguendo*, that plenary authority exists, if respondent be a public utility, to compel the furnishing of the service to the entire town of Weston. The plant is now running at its full capacity, and if any considerable extension of the service thereof were ordered, extensive and expensive additions of machinery to the plant must likewise be ordered. In order to afford such service to the whole town, or even to all persons within the three-block area, the respondent would be compelled to obtain from the town of Weston a franchise permitting him to erect poles and wires along and across the public streets and alleys thereof. In an analogous case we have said that the Commission cannot compel a public utility to do a thing wherein the obtaining of a franchise is a condition precedent. State ex rel. United R. Co. v. Public Service Commission, 270 Mo. loc. cit. 442, P.U.R. 1917D, 752, 192 S. W. 958, 198 S. W. 872.

In the light of these considera-

tions, does the business of respondent constitute him a public utility, within the meaning of the Public Service Commission Act? We are of opinion that it does not; for, as forecast above, state regulation of private property can be had only

*—what is—sale of
by-product.*

pursuant to the police power, which power is bottomed on, and wholly dependent upon, the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use before it can be regulated, and before inquisitorial authority be exercised over it, *is not to be read into* the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation.

The precise question before us is one of first impression in this jurisdiction. It has been up before the courts but few times in any jurisdiction. It has been up recently before the public service commissions of the several states a number of times. The holdings of the courts thereon, while not absolutely unanimous, have been usually against the contentions of the appellants here (Cawker v. Meyer, 147 Wis. 320, 37 L.R.A.(N.S.) 510, 133 N. W. 157; Del Mar Water, Light & P. Co. v. Eshelman, 167 Cal. 666, 140 Pac. 591, 948; State ex rel. Public Service Commission v. Spokane & I. E. R. Co. 89 Wash. 599, L.R.A.1918C, 675, P.U.R.1916D, 469, 154 Pac. 1110; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; Minnesota Canal & P. Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A.(N.S.) 638, 107 N. W. 405, 7 Ann. Cas. 1182; Avery v. Vermont Electric Co. 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; 1 Wyman, Pub. Serv. Corp. § 243), while a very few of the courts, *and the public service commissions rather unanimously*, have held to the contrary (Wingrove v. Public Serv-

ice Commission, 74 W. Va. 190, 81 S. E. 734, and cases cited in L.R.A. 1918A, 210). After a careful examination of the cases, Mr. Wyman, in his excellent work on Public Service Corporations, at the section cited supra, says: "That the business of supplying gas is public in character is now universally recognized, provided that the company supplying is committed to supplying gas to the community in general. But the case can be imagined of an institution with a generating plant for its own supply, which might even supply one neighbor, without being obliged to sell to all others. In the same way the business of supplying electrical energy has generally been recognized as public in character. There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business."

In the late case of Cawker v. Meyer, supra, the supreme court of Wisconsin said: "The state claims that by furnishing heat, light, and power to the tenants of their own building the plaintiffs became a public utility; that the furnishing of such commodities to anyone else than to oneself is furnishing it to the public within the meaning of the statute. It is obvious that such a construction is too narrow, for it would constitute the owner of every building furnishing heat or light to tenants, as well as every householder who rents a heated or lighted room, a public utility. The legislature never contemplated such a construction to be given the words 'public utility.' They must receive a construction that will effectuate the evident intent of the legislature, and not one that will lead to a manifest absurdity. It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the legislature

sought to regulate, but the furnishing of those commodities to the public;" that is, to whoever might require the same. *Wisconsin River Improv. Co. v. Pier*, 137 Wis. 325, 21 L.R.A. (N.S.) 538, 118 N. W. 857.

In the case of *Del Mar Water, Light, & P. Co. v. Eshelman*, 167 Cal. 666, 140 Pac. 591, 948, it was held that even a water company, which was organized to furnish water to certain owners of town lots, which had been theretofore sold to such owners by a land company to which the Del Mar Company was an ancillary corporation, had the right to restrict its service to such lot owners, and to a few others of the public whose former water supply had been taken over by the Del Mar Company. Apposite to the facts and questions here it was said in the Del Mar Case: "The serving of water to the seventeen inhabitants of the 'old town' of Del Mar was not sufficient to make the water company a public utility, offering its water to the general public. When the land company bought all the unsold lots of the town site, its property surrounded the places of residence of these inhabitants of the 'old town.' It bought and abandoned the old wells from which these people derived their supply, and its arrangement with the water company to serve water to them no more constituted the latter a public service corporation, than did that contract by which the Santa Fé Land Improvement Company was to receive a certain quantity of the water which might be developed. The sales to contractors who were engaged in road building were no more significant than would be similar accommodations by a farmer from his wells, and the same thing may be said of the trifling amounts of water sometimes sold to neighbors, and by them hauled away in barrels. That the water company had refused to furnish persons who had not purchased land from the South Coast Land Company was shown without contradiction; and, while the reason assigned was some-

times the scarcity of water, the fact of refusal remains. The fact is highly significant. It is also significant that, under the arrangement which the water company had with the land company, the latter was furnished with a large amount of water through unmetered pipes for the use of its hotel and other buildings. All of these facts and circumstances indicate that the Del Mar Water, Light, & Power Company was merely the incorporated water department of the South Coast Land Company."

The case of *State ex rel. Public Service Commission v. Spokane & I. E. R. Co.* supra, which was decided by the supreme court of Washington, is practically on all fours with the case at bar upon the ultimate facts. Not only is this true, but the definitions in our own Public Service Commission Act (and largely the act itself) were obviously taken, with mere slight verbal changes, from the prior Washington enactment on the same subject. *Wash. Laws 1911*, pp. 538-612. Construing this act in 1916, in a case involving, as here, the question whether the acts done constituted the actor therein a public utility, within the purview of the Public Service Commission Law of that state, the Washington supreme court, in an able opinion by Mount, J., said: "We understand the law in this state to be that companies furnishing electrical energy may or may not be public service corporations, depending upon the objects for which they were organized and the business in which they are engaged; the logic of the cases being that we will judicially inquire whether the sale of power is a selling to the public generally, or is only an incident to the business in which the company is engaged. . . . The character of such companies and their relation to the public have been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business,

and gives such companies no right to assert the sovereignty of the state (citing authorities). . . . It is argued that the present act (Laws 1911, p. 538; 3 Rem. & Bal. Code, §§ 8626-1 et seq.) furnishes ample authority for holding that public necessity, as evidenced by the legislative declaration, now requires that such companies be held subject to regulation in their private affairs, and that the right of the public to the enjoyment and use of such property is regulated, guaranteed, and safeguarded by appropriate legislation. But we think the act does not go so far. . . . Granting for the sake of argument the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or to others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is, in character and extent of operation, such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, and *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612, rest. Until the legislature brings a business within the police power by clear intent, courts will not do so. . . . Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to anyone other than the immediate parties. It is not alleged that

it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant, it can sell at one price to one man, and at another price to another. . . . If either is not content with the offering of the other, he does not have to contract. He can go his way. But it is not so with appellant, when exercising its public function; that is, furnishing something—a necessity—that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions. *Beale & W. Rate Regulation*, § 1."

The case of *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 982, 37 Sup. Ct. Rep. 486, is strongly relied on by appellants as upholding their contentions. We do not regard it as doing so, and we have no quarrel with the law announced, upon the facts existing in that case. The facts, which in our view differentiate that case from this one, are, at page 48, thus stated by the court in the opinion: "Counsel contend that the use is not public, because water is furnished only to particular individuals in fulfillment of private contracts made with the purchasers of town-site lots. *But there is nothing in the record to indicate that such is the fact.*" (Italics ours.)

The rule by which profession of public employment is to be tested, where, as here, such profession arises, if at all, implicitly, is thus laid down by Mr. Wyman: "The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract.'

This regular course of public service without respect of persons makes out a plain case of public profession, by reason of the inevitable inference which the general public will put upon it. 'One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.'" 1 Wyman, Pub. Service Corp. § 227.

Testing the facts of the instant case by this rule, and by the rule announced by the majority of the

courts, as well as by the reason of the thing, and the far-reaching results of any other view, rather than by the view taken by a majority of the public service commissions of the several states, we are constrained to hold that, as to complainant, the respondent owed him no continuing public duty of service, and that the view taken nisi is correct.

It follows that the case ought to be affirmed. Let this be done.

All concur.

ANNOTATION.

Effect of rendering incidental service to members of the public to constitute an individual or corporation whose principal business is of a different nature a public utility.

The question whether an irrigation company is a public utility is treated in the annotations in 8 A.L.R. 268, and 15 A.L.R. 1227. In those notes cases are collected where, for example, a landowner supplied his neighbors with water for irrigation, from a spring owned by him, and the question arose whether in so doing he was rendering a public service. For purposes of convenience, reference is made in the present annotation to cases in the notes above referred to, which appear to be of value herein.

It is impossible to lay down any general rule on the present subject. The cases, as to results, are in conflict. Whether a manufacturing corporation, for example, which supplies electricity incidentally to others, is rendering, with respect to the latter, a public service, depends on such factors as the extent of the service, whether the company has held itself out as ready to serve the public generally,—at least, within a certain area,—and whether, perhaps, in other ways, it has conducted itself as a public utility. Of course, the incidental service only may become subject to public regulation on the ground that the company, in rendering it, is to that extent a public utility, without subjecting the company's main business to public supervision.

In several cases, some of which were decided by state utilities commissions, it has been held that the incidental service rendered to others was not of such a nature that the corporation or person rendering it was subject to public supervision as a public utility. *STORY v. RICHARDSON* (reported herewith) ante, 750; *Del Mar Water, Light & P. Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, 948; *Stoehr v. Natatorium Co.* (1921) — Idaho, —, 200 Pac. 132; *Washington Water Power Co. v. Montana Power Co.* (1916; Idaho) P.U.R.1916E, 144; *STATE EX REL. DANCIGER v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 754; *Union Electric Light & P. Co. v. Tibbe Power Co.* (1919; Mo.) P.U.R.1920B, 20; *Cawker v. Meyer* (1911) 147 Wis. 320, 37 L.R.A.(N.S.) 510, 133 N. W. 157. See also *Pastorino v. Lang* (1921; Cal.) P.U.R.1921C, 347; *Kennedy v. Abbott* (1921; Cal.) P.U.R.1921C, 354; and *Sandpoint Water & Light Co. v. Humbird Lumber Co.* (1918; Idaho) P.U.R. 1918B, 535.

It was held in *STATE EX REL. DANCIGER v. PUBLIC SERVICE COMMISSION* (reported herewith) ante, 754, in reversing an order of the Public Service Commission of Missouri, that a president of a brewing company, who undertook to furnish surplus electric

current generated by the corporation for use in its plant to the owners of neighboring property, who strung their own wires, and to the city for its new lights, was not, where the corporation had no charter authority or franchise to sell electricity, engaged in the business of a public utility subject to regulation by the Public Service Commission.

And in *STORY v. RICHARDSON* (reported herewith) ante, 750, it was held that the owner of an office building maintaining within it a plant to furnish electricity to its occupants, and selling a small surplus to occupants of neighboring property, was not operating a public utility, within the meaning of the constitutional provision providing for taxation of the gross receipts of such utilities.

In *Del Mar Water, Light & P. Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, 948, which is set out in the *DANCIGER CASE*, supra, it was held that the mere fact that a company organized to furnish water to certain lot owners also furnished water to seventeen other inhabitants of the town was not sufficient to render it a public utility.

Under the ruling in the court in the *DANCIGER CASE*, supra, the Missouri commission, in *Union Electric Light & P. Co. v. Tibbe Power Co.* (1919; Mo.) P.U.R.1920B, 20, held that the owner of a manufacturing business and power plant which supplied electricity from his plant to two other manufacturing companies, receiving from them their waste products for fuel, was not an electrical corporation, subject to the jurisdiction of the public service commission, there being no offer to supply electricity for sale to the public generally. It may be observed that in this case the commission regarded it as immaterial, or, at least, as not a controlling factor in the case, that the service to one of the industries was across a public street, permission to cross the street having been granted by the city.

There are several other decisions, also, in line with the above. Thus, in *Cawker v. Meyer* (1911) 147 Wis. 820, 37 L.R.A.(N.S.) 510, 133 N. W.

157, it was held that a building owner does not come within the meaning of a statute constituting a public utility everyone who furnishes heat, light, or power, either directly or indirectly, to or for the public, by furnishing heat, light, and power to its own tenants and selling a surplus to three neighbors.

And the Idaho commission, in *Washington Water Power Co. v. Montana Power Co.* (1916; Idaho) P.U.R.1916E, 144, held that electricity from mining companies' transmission lines, delivered to lighting companies under an agreement for the exchange of surplus current, and to a miners' boarding house, will not be held to be devoted to a public use other than mining, since the use by the lighting companies and the boarding house is incidental to the mining operation.

The question passed on in *Stoehr v. Natatorium Co.* (1921) — Idaho, —, 200 Pac. 132, was whether a natatorium company was a public utility, or had dedicated to the public use a natural hot water supply owned by it, so that it could be compelled to furnish hot water to the petitioner for the purpose of heating his dwelling. It was stipulated that the hot water was not developed and acquired for the purpose of sale to the general public; that neither the defendant nor any of its predecessors in interest had ever held it open to use or purchase by the general public, but at all times since the original discovery it had been, and then was, intended for use primarily for the defendant's natatorium, for sanitary and bathing purposes; that the surplus hot water had never been offered for sale to any person, and was only supplied to additional consumers after they had made application therefor, and were ready and willing to pay such compensation as was requested by the owner, who on many occasions had refused to supply hot water to various persons desiring it; and that the said owners had always taken the position that the hot water in question was strictly a private, and not a public, use; and that they never at any time held out that such water was for sale to the public

in general, and never at any time did or suffered anything to be done with the intention of dedicating the water to a public use. The court, in holding that on these stipulations the company was not a public utility, within the meaning of statutory provisions defining the term "public utility" as including every "water corporation"—defined by the statute as including every corporation "owning, controlling, operating or managing any water system or compensation within this state," said: "To hold that a water corporation is a public utility because it receives compensation for water owned by it and furnished to a limited number of the inhabitants of Boise, within a limited area, would be an unreasonable interpretation of the foregoing statutes. Such a construction may involve the question of the constitutionality of the statutes. . . . In determining whether a corporation is a public utility, we must not lose sight of the basic principles underlying governmental control of business, or fail to appreciate and respect constitutional limitations. . . . If the service is dedicated to the public or some portion thereof, or to persons within a given area, then any member of the public or of the given class, or any person within the given area, may demand such service without discrimination, and the public, or so much of it as has occasion to be served, is entitled to the service of the utility as a matter of right, and not of grace. . . . A corporation becomes a public service corporation, and therefore subject to regulation as a public utility, only when and to the extent that the business of such corporation becomes devoted to a public use. . . . In the present case the stipulation of facts clearly negatives any express or implied dedication by respondent of its hot-water service to the public, and justified the district court in finding that respondent was not a public utility."

The mere furnishing of water by a lumber company to a boarding house owned by it, but operated by a lessee in the interest of the lumber company, for the accommodation of its em-

ployees, no additional charge for water being made, was held in *Sandpoint Water & Light Co. v. Humbird Lumber Co.* (1918; Idaho) P.U.R. 1918B, 535, to be only incidental to the operation of the lumber company's mills and yards, and not to render the company a public utility so as to subject such service to the jurisdiction of the utilities commission.

In *Kennedy v. Abbott* (1921; Cal.) P.U.R. 1921C, 354 (cited in note in 15 A.L.R. 1230), it was held that an individual who sold surplus water to his neighbors, with the express understanding that the service should continue only so long as he had water to spare, and who never held himself out as a water utility, was not a public utility.

And the California commission in *Pastorino v. Lang* (1921; Cal.) P.U.R. 1921C, 347 (cited in note in 15 A.L.R. 1230), held that evidence that the owner of a reservoir permitted two individuals to obtain water from it, which they conducted therefrom in a small ditch sustained by them, was not sufficient to show a dedication of the water to a public use.

It was held in *Mound Water Co. v. Southern California Edison Co.* (1921) — Cal. —, 194 Pac. 1014 (cited in annotation in 15 A.L.R. 1232), that a company organized for the purpose of supplying water for irrigation to stockholders for their own lands, with water rights appurtenant to the land, did not become, as to such water, a public utility, even if it devoted the surplus water to a public use, in supplying others after the demand of the stockholders was satisfied.

There are, however, other decisions in which the incidental service has been held to be of such a nature that it was subject to public regulation and control. *Re Commonwealth Min. & Mill. Co.* (1915; Ariz.) P.U.R. 1915B, 536; *Nevada, C. & O. Teleg. & Teleph. Co. v. Red River Lumber Co.* (1920; Cal.) P.U.R. 1920E, 625; *Sandpoint Water & Light Co. v. Humbird Lumber Co.* (1918; Idaho) P.U.R. 1918B, 535; *Public Service Commission v. Valley Mercantile Co.* (1921; Mont.) P.U.R. 1921D, 803; *Public Serv-*

ice Commission v. J. J. Rogers Co. (1918) 184 App. Div. 705, P.U.R. 1919A, 876, 172 N. Y. Supp. 498; Wingrove v. Public Service Commission (1914) 74 W. Va. 190, L.R.A.1918A, 210, 81 S. E. 734; Chambers v. Spruce Lighting Co. (1918) 81 W. Va. 714, 95 S. E. 192. See also Hoff v. Montgomery (1916; Cal.) P.U.R.1916D, 880; Re Producers Warehouse (1919; Cal.) P.U.R.1920A, 919; Ticer v. Phillips (1920; Cal.) P.U.R.1920E, 582; Re Ontario Invest. Co. (1921; Cal.) P.U.R.1922A, 181; Bassett v. Frances-town Water Co. (1916; N. H.) P.U.R. 1916B, 815; Re Northern New York Power Co. (1915; N. Y. 2d Dist.) P.U.R.1915B, 70.

It was held in Wingrove v. Public Service Commission (1914) 74 W. Va. 190, L.R.A.1918A, 210, 81 S. E. 734, *supra*, that a corporation organized under a charter authorizing only the mining and sale of coal and the exercise of rights incidental to such a business, but nevertheless engaged in the task of supplying, from an electrical plant installed and maintained primarily for the operation by electric power of its mining machinery and the lighting of its stores, offices, and tenement houses, electricity for lighting purposes, to practically all such persons resident within the incorporated town in which its stores and offices were located, as applied for such service, at uniform rates of compensation, wiring their buildings for its use, and furnishing them fixtures therefor, was a public service corporation within the meaning of the West Virginia Public Service Corporation Act, and that so much of its business as was of such public nature was subject to control and regulation by the state public service commission.

The last case was approved and followed in Chambers v. Spruce Lighting Co. (1918) 81 W. Va. 714, 95 S. E. 192, where a lighting company, which, with a coal corporation, jointly owned coal lands and operated the same through lessees, to which the lighting company supplied light and power, furnished excess current to the plaintiff, a hotel owner, and others convenient to its lines. In an action against the light-

ing company for refusing to furnish service, the court held that, since it was shown that electric service had been rendered for compensation to six or eight private domestic consumers, the defendant was brought within the rule of the Wingrove Case; that whenever a corporation or natural person undertakes to render to others services which, by legislative enactment or judicial decision, have been declared to be of the nature of public service, such corporation or person thereby submits to be governed by the rules and principles applicable to a public service company; and so long as they continue to serve private consumers, they must submit to be governed by rules applicable to such public corporations.

And in Re Commonwealth Min. & Mill. Co. (1915; Ariz.) P.U.R.1915B, 536, it was held that a company, although primarily engaged in mining and milling, was nevertheless a public utility within the jurisdiction of the Arizona commission, where it carried on a water and electrical business for the purpose of serving its employees and other residents of the town.

So, a mercantile company which, it was alleged, had only one eighth of its capital invested in a heating plant, was nevertheless held by the Montana commission, in Public Service Commission v. Valley Mercantile Co. (1921; Mont.) P.U.R.1921D, 803, to be engaged as a public utility subject to regulation by the commission, where the company had acquired the mercantile business and the heating plant from a copper company at a time when the latter was supplying heat to several persons other than itself, and, in its articles of incorporation, included among its corporate powers that of supplying heat to the public; and it appeared that it had opened up a separate account for its steam heating plant, established a uniform rate basis, and from time to time had had added consumers until, although it billed only 12 or 13 consumers, approximately 150 persons, through them, received heat and were dependent for the same on the company, its service covering the most substantial

and important portion of the town's business district; also, that the company installed and owned the mains whereby it carried its products to consumers, that it enlarged its plant beyond its own need to supply such consumers, and that this had continued through a series of years, although there had been no explicit profession of public service. The court quoted with approval the doctrine that the test to be applied is whether or not a company has held itself out, expressly or impliedly, as engaged in supplying the public as a class,—not necessarily all of the public, but a limited portion of it; such portion, for example, as could be served by its system,—as distinguished from holding itself out as serving, or ready to serve, merely particular individuals either as a matter of accommodation, or for other reasons peculiar and particular to them. Attention is called to the provision of the statute, although the commission regarded the statutory provision as applicable only in case there was a profession, at least by conduct, of public service. The statute defined a public utility as embracing "every corporation, both public and private . . . that now or hereafter may own, operate, or control any plant or equipment or any part of a plant or equipment within the state for the production, delivery or furnishing for or to other persons, firms, associations or corporations, private or municipal, heat . . . whether within the limits of municipalities, towns, and villages, or elsewhere."

And where a lumber company built several hundred houses for its employees, also boarding houses, hotels, stores, etc., all being owned by the company, and for the purpose of carrying on the business at its plant, and as a means of communication between it and the various mills, stores, and residences of employees, installed a telephone system, and connected it with the line of a long-distance telephone company, so that employees and others could have long-distance service as well as communication between their own houses, monthly rates be-

ing charged employees for telephone service, it was held in *Nevada, C. & O. Teleg. & Teleph. Co. v. Red River Lumber Co.* (1920; Cal.) P.U.R.1920E, 625, that the lumber company carried on the business of a public utility as a telephone corporation, and was subject to the jurisdiction of the commission. The statute provided that the term "telephone corporation" should include every corporation or person owning, controlling, operating, or managing any telephone line for compensation within the state.

Where a cannery company which operated several warehouses in connection with its plants, organized a warehouse corporation, to which it leased its warehouses, the California commission in *Re Producers Warehouse* (1919; Cal.) P.U.R.1920A, 919, held that the warehouse corporation was a public utility, in view of the common practice to store in such warehouses, connected with canneries, goods for persons other than those of the canneries owning the warehouse facilities, and the evidence that the same practice would be indulged in in this instance.

A manufacturing company was held an "electrical corporation," in *Public Service Commission v. J. & J. Rogers Co.* (1918) 184 App. Div. 705, P.U.R. 1919A, 876, 172 N. Y. Supp. 498, within the meaning of the New York statute authorizing the public service commission, whenever it was of opinion that an electrical corporation was doing, or about to do, anything contrary to or in violation of law, to bring an action in the supreme court for the purpose of preventing such violation, where the company owned an electric plant, and was generating electricity not only for its own use, but was supplying the same to others for compensation, the statute defining an electrical corporation as including every company which owned, operated, or managed an electric plant, except where electricity was generated or distributed by the producer solely for its own use or the use of its tenants, and not for sale to others. From the opinion of the lower court in (1918) 103 Misc. 711, P.U.R.1918F, 832, 170

N. Y. Supp. 964, it appears that the company was supplying a small town and its inhabitants with electricity, and the court said the question was whether a manufacturing corporation, organized as such, and doing business as such in large volume, could assume in a small way to do an electrical business which was in violation, not only of the spirit, but of the terms of the statute.

In *Re Northern New York Power Co.* (1915; N. Y. 2d Dist.) P.U.R. 1915B, 70, it was held that a corporation generating electricity for its own manufacturing purposes, but distributing a limited amount of current for sale across a highway, under a franchise approved by the commission, was an "electrical corporation" within the definition of that term in the Public Service Commission Laws of New York, qualifying it, under § 70 of that act, to acquire and to hold the stock and bonds of any other electrical corporation.

And attention is called to *People ex rel. New York Edison Co. v. Public Service Commission* (1920) 191 App. Div. 237, 181 N. Y. Supp. 259, affirmed in (1920) 230 N. Y. 574, 130 N. E. 899, where a grocery company which owned a building and had a private electrical plant from which it supplied its own store and the tenants who occupied a part of its building, and also sold electricity to other customers in the same block, attempted, through petition to the public service commission, to compel an electric utility to supply it with "breakdown service," which is an emergency service used in case the service of the customer breaks down, and also used for auxiliary purposes when the maximum current is required, or when the demand is insufficient to make operation of the private plant profitable. The court held that it was unnecessary to decide whether such a company was an electrical corporation under the supervision of the public service commission, the decision being that it was, at least, a competitor of the electric utility which it was seeking to compel to furnish the emergency service, since it sold elec-

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tricity to customers other than its own tenants for 15 per cent less than the scheduled rates of the public utility company; and that the latter, therefore, should not be compelled, in the absence of express statutory requirements, to furnish such "breakdown service" to its competitor. The annotation does not, of course, cover the question as to what corporations may compel the furnishing of this emergency service.

It was held in *Sandpoint Water & Light Co. v. Humbird Lumber Co.* (1918; Idaho) P.U.R.1918B, 535, that under the Idaho statute requiring the securing of a certificate of public convenience and necessity from the utilities commission as a condition precedent to the furnishing of water to the public, or some portion thereof, for compensation, the furnishing of water by a lumber company to a railway company, for compensation, constituted such a public use as would bring the former within the definition of a public utility, where water was furnished by it to the railway company at two stations, not only for its locomotives, but for its roundhouse, stockyards, shops, and section house, and was used for drinking and domestic purposes.

And the fact that, in order to provide adequate fire protection, it was necessary for the lumber company to install pumps of greater capacity than would supply its ordinary needs, and that with this additional apparatus it was furnishing water to the railway company, it was held, would not enable it to avoid its responsibility as a public utility, on the theory that it was furnishing to others only the surplus water beyond its own needs, since its surplus was in the machinery merely, and to supply the railway company required special service, independent of any service or need of the lumber company. *Ibid.*

In *Baker City Mut. Irrig. Co. v. Baker City* (1910) 58 Or. 310, 110 Pac. 392, 113 Pac. 9 (cited in note in 8 A.L.R. 281), it was said that a mutual irrigation company, which furnished water generally for irrigation only when there was a surplus in its

ditches after supplying the needs of its stockholders, was impressed with a public character.

And in *Van Hoosear v. Railroad Commission* (1920) — Cal. —, 194 Pac. 1003 (cited in note in 15 A.L.R. 1228), the court held that one who built an irrigation plant to supply water for use on his own farm, and, as a matter of accommodation, supplied water to five of his neighbors, and finally attempted to discontinue the service because he had sold his farm, was a public utility, and could not discontinue the service without permission of the state railroad commission.

Also, in *Ticer v. Phillips* (1920; Cal.) P.U.R.1920E, 582 (cited in note in 15 A.L.R. 1229), where an owner of an orchard tract, irrigated from a well upon it, during the development period of the orchard, supplied surplus water to neighbors, but subsequently sought to discontinue the service, the court held that technically he was operating on a public utility basis, but under certain conditions should be allowed to discontinue the service.

In *Bassett v. Francestown Water Co.* (1916; N. H.) P.U.R.1916B, 815, a partnership which owned a spring and was formed for the purpose of furnishing water for domestic use to its own members only, but which later furnished water to neighbors who desired it, until nearly all the families in the vicinity received service, which laid its pipes in the highway, and made annual returns required of public utilities, was held to be a public utility and obliged to furnish water to a petitioner.

And it was held in *Hoff v. Montgomery* (1916; Cal.) P.U.R.1916D, 880, that individuals owning springs, and supplying water to neighbors for compensation, operated a water system, and such system constituted a public utility within the meaning of the California Public Utilities Act, although the original owners of the springs supplied the neighbors rather as an accommodation than anything else, and the practice was merely continued by the present owners.

A land company which, incidental to its land business, conducted a small water distribution system, obtaining its water supply through the ownership of stock in a mutual water company, was held to be engaged as a public utility by the California Commission, in *Re Ontario Invest. Co.* (1921; Cal.) P.U.R.1922A, 181. It appeared that the land company came into possession of the water system when it took over a certain tract of land from the mutual company, acquiring at the same time certain shares of stock in the latter company, and that the latter supplied water to a point on the tract where it was distributed by the land company to approximately twenty-eight consumers. The court said merely, in reply to the contention that the land company was not operating as a public utility, that the evidence clearly showed that for many years it had been, and was then, disposing of water for compensation, and in so doing was a public utility as defined by the Public Utilities Act.

Attention is called to several cases which have a bearing on the subject under annotation, although not strictly in point.

See, for instance, *Syracuse & M. R. Co. v. Cleveland, C. C. & St. L. R. Co.* (1917; Ind.) P.U.R.1917C, 962, where it appeared that a cement company was the owner of a railroad 7½ miles in length, having three locomotives and seventy or eighty cars of small capacity, the cement company being one of two industries located on the line, which together furnished the total business carried. The railroad was operated by a railroad company which was incorporated as such, held itself out as a common carrier, made reports to the public service commission, and was taxed by the state board of taxation as a carrier, and it was held that the railroad was not a mere plant facility, but was a common carrier.

Where a railroad company constructed a telephone line between two points for its own use in the operation of its railroad business, it was held in *Colorado River Teleph. Co. v. California Southern R. Co.* (1917;

Cal.) P.U.R.1918A, 375, that in contracting with the Western Union Telegraph Company to transmit telegraphic messages over such private telephone lines, the railroad company was conducting a public telephone business, which could not be carried on without the consent of the state railroad commission.

In *Citizens Electric Illuminating Co. v. Lackawanna & W. Valley R. Co.* (1916) 255 Pa. 176, 99 Atl. 465, an electric railroad company was enjoined from furnishing electricity for power purposes through the operation of excess generating machinery, at the suit of an electric company chartered to furnish such service in that territory, upon the ground that the railroad company was exceeding its corporate powers in furnishing electric power service. The court said that the right of a corporation to sell and dispose of surplus material on hand, not required in the conduct of its chartered business, was not questioned; that it was a mistake to speak of the electric current which the appellant proposed to sell as surplus current; that this current had never been developed, and could be developed only as the appellant employed its surplus machinery to that end, and that it was the machinery that constituted the surplus, and not the electric current.

A somewhat different question than that which the present note purports to cover is involved in *State ex rel. Public Service Commission v. Spokane & I. E. R. Co.* (1916) 89 Wash. 599, L.R.A.1918C, 675, P.U.R.1916D, 469, 154 Pac. 1110, which presents the question of the power of the public service commission to regulate the disposition by a public utility of surplus products. In this case a traction company operating a street railway system, and having a surplus of electrical energy, made a private contract with various customers, including a land company, several farmers, manufacturing plants, etc., for the use of its surplus electrical energy. The public service commission contended that it had jurisdiction over that part of the trac-

tion company's business which previously had been regarded as private, and that it could not make an adequate and intelligent survey of the rates charged by the company in its service to the public, unless it could compel a disclosure of these private contracts. The court, in overruling this contention, said: "We understand the law in this state to be that companies furnishing electrical energy may or may not be public service corporations depending upon the objects for which they were organized, and the business in which they are engaged, the logic of the cases being that we will judicially inquire whether the sale of power is a selling to the public generally, or is only an incident to the business in which the company is engaged; as, for instance, a sale pending a time when its surplus will be needed to accomplish its assumption of duty to the public; for it has been held that a public service corporation can anticipate its future needs, and develop energy reasonably in excess of present requirements. The character of such companies and their relation to the public have been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business, and gives such companies no right to assert the sovereignty of the state."

By way of illustration, attention is called, also, to *Brown v. Gerald* (1905) 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785, in which it was held that the furnishing of electric power for manufacturing purposes does not become a public use, so as to justify the exercise of the power of eminent domain in its behalf, on the theory that the one generating it may, because of his franchises, be regarded as a public servant; especially, since the capacity for service is, of necessity, limited, and cannot extend to the general public, and therefore the service is a matter of grace, and not of right.

The annotation does not deal with the question whether a branch or

spur railroad line owned by private companies, as a logging railroad owned by a lumber company, is a common carrier. See, for example, Tap

Line Cases (United States v. Louisiana & P. R. Co.) (1913) 234 U. S. 1, 58 L. ed. 1135, 34 Sup. Ct. Rep. 741.
R. E. H.

GLOBE FURNITURE COMPANY, Appt.,

v.

CHARLES T. WRIGHT.

District of Columbia Court of Appeals — April 5, 1920.

(49 App. D. C. 315, 265 Fed. 873.)

Libel — privileged communication — publication to employees of corporation.

The exhibition by the general manager of a corporation to its collector and bookkeeper, of a letter relating to a customer's account with respect to which each has a duty, is privileged, although libelous, and no action will lie therefor against the corporation.

[See note on this question beginning on page 776.]

APPEAL by defendant from a judgment of the Supreme Court in favor of plaintiff in an action brought to recover damages for an alleged libel. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Henry E. Davis and Edwin A. Swingle, for appellant:

The showing of the letter to, and the reading thereof by, its bookkeeper and collector, did not constitute publication thereof within the meaning of the law governing an action of libel.

Lawless v. Anglo-Egyptian Cotton & Oil Co. L. R. 4 Q. B. 262, 10 Best & S. 226, 38 L. J. Q. B. N. S. 129, 17 Week. Rep. 498; Boxsius v. Goblet Frères [1894] 1 Q. B. 842, 63 L. J. Q. B. N. S. 401, 9 Reports, 224, 70 L. T. N. S. 368, 42 Week. Rep. 392, 58 J. P. 670; Edmondson v. Birch & Co. [1907] 1 K. B. 371, 76 L. J. K. B. N. S. 346, 96 L. T. N. S. 415, 23 Times L. R. 234, 1 B. R. C. 444, 7 Ann. Cas. 192; Owen v. J. S. Ogilvie Pub. Co. 32 App. Div. 465, 53 N. Y. Supp. 1033; Puterbaugh v. Gold Medal Furniture Mfg. Co. 7 Ont. L. Rep. 582, 1 Ont. Week. Rep. 250, 24 Can. L. T. Occ. N. 205, 1 Ann. Cas. 100; Central of Georgia R. Co. v. Jones, 18 Ga. App. 414, 89 S. E. 429; Cartwright-Caps Co. v. Fischel, 113 Miss. 359, L.R.A.1918F, 566, 74 So. 278, Ann. Cas. 1917E, 985; Nichols v. Eaton, 110 Iowa, 509, 47 L.R.A. 488, 80 Am. St. Rep. 319, 81

N. W. 792; Bohlinger v. Germania L. Ins. Co. 100 Ark. 477, 36 L.R.A.(N.S.) 449, 140 S. W. 257, Ann. Cas. 1913C, 613; Western U. Teleg. Co. v. Casham, 9 L.R.A.(N.S.) 140, 81 C. C. A. 5, 149 Fed. 367, 9 Ann. Cas. 693.

Mr. Levi H. David, for appellee:

Corporations are allowed by law to transact practically every business that may be carried on by an individual, and it is no longer an open question that corporations may be responsible in an action of libel or slander.

Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; Washington Gaslight Co. v. Lansden, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296.

The dictation of a libelous letter by the defendant to his private and confidential stenographer, typist, or amanuensis, by whom a typewritten or other copy is made and transmitted to the plaintiff, after being signed by the defendant, is in law a publication of the libel, although there is no communication of the letter by the defendant to any other person.

Pullman v. Hill [1891] 1 Q. B. 529,

60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263; *Puterbaugh v. Gold Medal Furniture Mfg. Co.* 7 Ont. L. Rep. 582, 1 Ont. Week. Rep. 250, 24 Can. L. T. Occ. N. 205, 1 Ann. Cas. 100; *Gambrell v. Schooley*, 93 Md. 48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730; *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692; *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888; *Howard v. Wilson*, 195 Mo. App. 536, 192 S. W. 473; *Moran v. O'Regan*, 38 N. B. 189; *Wilson v. Noonan*, 27 Wis. 598; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596; *Williamson v. Freer*, L. R. 9 C. P. 393, 43 L. J. C. P. N. S. 161, 30 L. T. N. S. 332, 22 Week. Rep. 878; *Peterson v. Western U. Teleg. Co.* 75 Minn. 368, 43 L.R.A. 581, 74 Am. St. Rep. 502, 77 N. W. 985, 5 Am. Neg. Rep. 376, 72 Minn. 41, 40 L.R.A. 661, 71 Am. St. Rep. 461, 74 N. W. 1022, 65 Minn. 18, 33 L.R.A. 302, 67 N. W. 646; *Kiene v. Ruff*, 1 Iowa, 482; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Spence v. Burt*, 18 Lanc. L. Rev. 251; *Muetze v. Tuteur*, 77 Wis. 236, 9 L.R.A. 86, 20 Am. St. Rep. 115, 46 N. W. 123; *Bacon v. Michigan C. R. Co.* 55 Mich. 224, 54 Am. Rep. 372; *Ward v. Smith*, 6 Bing. 749, 130 Eng. Reprint, 1469, 4 Moore & P. 595, 4 Car. & P. 302, 8 L. J. C. P. 294.

Smyth, Ch. J., delivered the opinion of the court:

From a judgment in favor of Wright, who was the plaintiff below, the Globe Furniture Company, a corporation, prosecutes this appeal.

The company is engaged in the business of selling furniture on what is known as the instalment plan. On that plan it sold some furniture to Wright. The collector of the company called upon him to collect one of the instalments. A dispute arose with respect to the amount due. The collector, upon looking over Wright's receipts, came to the conclusion that some of them had been changed by raising the amounts for which they had been given. With Wright's permission he took possession of the questioned receipts, leaving copies in their place. Upon returning to the office of the company he made known his suspicions to the general manager. The bookkeeper of the company was

consulted for the purpose of ascertaining whether or not the receipts harmonized with the books. It was found that they did not. Thereupon a letter was prepared and mailed to Wright. The part embracing the alleged libel reads: "Beg to advise that our representative, Mr. Rogers, has turned over to the writer four receipts, which three of them do not correspond with our books, and show very plainly that they have been tampered with and raised from their original amounts, which is a serious offense on the part of someone."

There was testimony on the part of the plaintiff that the letter was written partly by the bookkeeper, and partly by the general manager, and, before being mailed, was shown to the bookkeeper and the collector. This was denied by the general manager, who said that he alone wrote it, and that it was mailed without having been shown to or read by anyone else. At the close of all the testimony the defendant moved for a directed verdict. The motion was overruled, and an exception taken. The action of the court in this regard is the only error assigned.

For the purpose of determining whether or not the defendant's motion for a peremptory instruction should have been granted, we must accept plaintiff's theory of the testimony as correct. The letter was written in the usual course of business. Each one of those who read it had a duty to perform for his employer in connection with it. By reading the letter he learned only what the three had talked about before the letter was drafted. The general manager had a right to advise with the bookkeeper and the collector touching the contents of the letter, for the purpose of ascertaining whether the statements therein were in conformity with the facts as they understood them. Under these circumstances, was the occasion privileged, and, if so, did the letter come within the priv-

Libel—privileged communication—publication to employees of corporation.

ilege? We think the answer must be in the affirmative.

Neither in this country nor in England are the authorities in harmony on the subject, but we think the better-reasoned cases approve the conclusion which we have reached. In *Pullman v. Hill* [1891] 1 Q. B. 524, 60 L. J. Q. B. N. S. 299, 46 L. T. N. S. 691, 39 Week. Rep. 263, it was held that the dictation of a libel by an officer of a mercantile company to a stenographer employed by it, and its delivery to an office boy to have letter-press copies made, were publications, and hence actionable. But Lord Esher, M. R., in *Boxsius v. Goblet Frères* [1894] 1 Q. B. 842, held that where a solicitor dictated to his stenographer a letter containing libelous statements, which was afterwards copied into a letter book by another clerk, the letter was not actionable, saying: "It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with due diligence and according to the necessary and reasonable method of conducting business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business of the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office and copied into the letter book." He distinguished *Pullman v. Hill* on the ground that it was not within the ordinary business of the merchant in that case to write the defamatory matter complained of. One of the judges thought that the disclosure of the letter to the clerks was a publication, but evidently did not regard this as destroying the privilege of the occasion. The doctrine of the *Boxsius* Case was approved and applied in *Edmondson v. Birch & Co.* [1907] 1 K. B. 371. Commenting on the *Boxsius* and

Pullman Cases, the court, speaking through Collins, M. R. held: "The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and, if so, it will not destroy the privilege." Again: "If the duty is such as to give rise to a privileged occasion, then the fact that it is only one of imperfect obligation cannot affect the mode in which the privilege may reasonably be exercised." Another one of the judges, concurring with the master of the rolls, said: "In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."

In *Nichols v. Eaton*, 110 Iowa, 509, 47 L.R.A. 483, 80 Am. St. Rep. 319, 81 N. W. 792, Judge Deemer, an experienced and learned jurist, speaking for the court, said that where the medical director of an insurance association wrote to an agent of the association that the plaintiff, a local medical examiner of the association, was guilty of forgery, the occasion was privileged. He said: "In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion, and to the relationship of the parties. One may make a publication to his servant or agent, without liability, which, if made to a stranger, would be actionable. In the protection of his own interests, one may make a communication to his agent or servant

without subjecting himself to liability, unless he exceeds the privilege and does more than his duty or interest demands. Again, when one has an interest in the subject-matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged by reason of the occasion. Generally this interest must be a pecuniary one, but it may arise out of the relationship or status of the parties. The statement must be such as the occasion warrants, and must be made in good faith to protect the interests of the publisher and the person to whom it was addressed."

In another case we find this language: "It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated." *Cartwright-Caps Co. v. Fischel*, 113 Miss. 359, L.R.A.1918F, 566, 74 So. 278, Ann. Cas. 1917E, 985.

It was said in *Phillips v. Bradshaw*, 167 Ala. 199, 52 So. 662, that the reason for the rule that a defamatory communication from an employer to an employee is held conditionally privileged, where it relates to matters pertaining to the employment, and is made in good faith, is that in such case the law is said to withdraw the legal inference of malice which ordinarily arises from the mere making of a defamatory statement.

We have not overlooked the decision of the court of appeals of Maryland in *Gambrill v. Schooley*, 93 Md.

48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730, which follows the doctrine of *Pullman v. Hill*, but, much as we respect the opinions of that court, we prefer the reasoning of the cases we have cited in support of our conclusion, as more in harmony with modern business requirements. What would be the effect of the unnecessary repetition of the libel by the stenographer or other person to whom the communication had been made, need not be determined now, although this observation is found in the *Cartwright-Caps Co. Case*, supra: "If the stenographer should, in violation of his or her duties, disclose such statement, there might be a liability because of the negligence of the person in employing an improper person as stenographer."

Some courts hold that communications such as the one we are considering are not actionable, because the stenographer or other employee, to whom the communication was made before it was mailed to the person for whom it was intended, is not a "third person," within the technical meaning of such term, but is merely an impersonal facility used in making and transmitting the communication. *Owen v. J. S. Ogilvie Pub. Co.* 32 App. Div. 465, 53 N. Y. Supp. 1033; *Central of Georgia R. Co. v. Jones*, 18 Ga. App. 414, 89 S. E. 429. But we prefer to put our decision upon the ground that the occasion was conditionally privileged, that the letter was within the privilege, that there was no malice, and, therefore, that the letter is not actionable.

In view of the law as we find it, the judgment of the lower court must be reversed, at the cost of the appellee, and cause remanded with directions to grant a new trial.

ANNOTATION.

Libel and slander: communication or exhibition to employee or business associate of defendant as publication or privilege.

- I. Scope and introduction, 776.
- II. View that communication of defamatory matter constitutes a publication, and is not privileged, 776.
- III. View that defamatory communication does not constitute actionable libel, 778.

I. Scope and introduction.

The question of libelous communications between different offices of a corporation is treated in the annotation in 5 A.L.R. 455.

The present annotation is confined in the main to a discussion of the question whether or not the communication or exhibition to an employee or business associate of the defendant, of a libelous communication concerning a third person who is not connected with the defendant's business, constitutes actionable libel. In other words, whether or not such a communication or exhibition constitutes a publication of the libel, and, if it does constitute a publication, whether or not the occasion is privileged.

There seems to be considerable difference of opinion upon the subject indicated in the title. The courts do not always distinguish between the logically distinct questions of publication and privilege; doubtless for the reason, that in this instance the same considerations that control the conclusion on one question will determine the decision of the other.

II. View that communication of defamatory matter constitutes a publication, and is not privileged.

The rule laid down by some courts is that a communication or exhibition of a libelous communication to an employee—such for instance as a stenographer or copyist, in the usual course of conducting a correspondence—constitutes a publication which is not privileged, and therefore that in such a case there is sufficient to support an action for libel. The following cases support this rule:

United States.—*Nelson v. Whitten* (1921) 272 Fed. 135.

Alabama.—*Ferdon v. Dickens* (1909) 161 Ala. 181, 49 So. 888.

Iowa.—*Kiene v. Ruff* (1855) 1 Iowa, 482.

Maryland.—*Gambrill v. Schooley* (1901) 93 Md. 48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730.

Virginia.—*Sun Life Assur. Co. v. Bailey* (1903) 101 Va. 443, 44 S. E. 692 (dictum).

England.—*Pullman v. Hill* [1891] 1 Q. B. 524, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263.

Canada.—*Moran v. O'Regan* (1907) 38 N. B. 189, on subsequent appeal in (1908) 38 N. B. 399; *Puterbaugh v. Gold Medal Furniture Mfg. Co.* (1904) 7 Ont. L. Rep. 582, 1 Ont. Week. Rep. 250, 24 Can. L. T. Occ. N. 205, 1 Ann. Cas. 100, reversing (1903) 5 Ont. L. Rep. 680, 23 Can. L. T. Occ. N. 193.

And this rule, it has been held, is especially applicable where the libelous communication relates to a matter independent of the business in which the servant was employed. *Quillinan v. Stuart* (1917) 38 Ont. L. Rep. 623, 35 D. L. R. 35, holding that, where the manager of a bank gave a letter to a stenographer to be copied, there was a publication thereof within the meaning of that term as used in the law of libel, it appearing that the letter in question did not relate to the bank's business, but was a personal and individual concern of the manager.

The rule that a defamatory communication to a stenographer or copyist is a publication thereof, and not privileged, based on the ground that such communications refer to business unconnected with the communicator's ordinary business, in that the writing of libelous matter is not ordinary business, seems to have been first laid down by the Queen's bench in *Pullman v. Hill* [1891] 1 Q. B. (Eng.) 524, wherein it was held that both the dictation of a libel by an officer of a

mercantile firm, to a stenographer employed by it, and its delivery to an office boy to have letter-press copies made, were publications. And it was further held that the communication was not privileged, not only upon the ground above stated, but on the additional ground that, as the stenographer had no interest in hearing or seeing the communication, he did not fall within the rule that an occasion is privileged where the person who makes a communication has a duty to make it to the person to whom he does make it, and such person has an interest in hearing it. In rendering this decision, Lord Esher, M. R., said that he did not think that the necessities or the luxuries of business could alter the law of England, and that if a merchant wished to write a letter containing defamatory matter, and keep a copy of the letter, he had better make it himself. Lopes, L. J., said: "It is said that business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchants' business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and make a copy of it himself, or he must take the consequences;" and Kay, L. J., said: "The consequence of such an alteration in the law of libel would be this—that any merchant or any solicitor who desires to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent." It is also worthy of note that Lord Esher, M. R., also said: "If there was no publication, the question whether the occasion was privileged does not arise;" but some cases, as is subsequently shown, seem to have regarded the question of privilege independently of any question of publication; and still other cases have treated the ques-

tion as one whether the dictation was such a publication as prevented the communication from being a privileged one.

And *Pullman v. Hill* (Eng.) *supra*, was followed in *Moran v. O'Regan* (1907) 38 N. B. 189, on subsequent appeal in (1908) 38 N. B. 399, it having been held that the giving by a merchant of a draft of a letter containing defamatory matter, to a confidential clerk and typewriter to copy, was a publication of the libel, and not privileged. In reaching this conclusion the majority of the court adopted the reasoning that it does not fall within the ordinary business of a merchant to write defamatory statements, so that it is not reasonably necessary that he should have it copied by a clerk, and this although the letter related to property which the plaintiff, while acting as a clerk for the defendant, was alleged to have appropriated to his own use. Here a part of the court regarded *Pullman v. Hill* as not controlling, basing such conclusion on the ground that the decision in the latter case had been so limited by a subsequent decision of the same court as to render it inapplicable.

And in *Nelson v. Whitten* (1921) 272 Fed. 135, in holding that the dictation to a stenographer of a libelous business letter constituted a publication of the libel, the court refuted the contention that inasmuch as the libel was communicated to defendant's stenographer only, there was no publication, because a stenographer has become such a common, if not necessary, part of the methods of communication in writing that the letter would be expected to be dictated, if written at all, and expressly adopted as convincing the reasoning of Lopes, J., in *Pullman v. Hill* (Eng.) *supra*, to the effect that it is not in the usual course of a merchant's business to write libelous letters, and that, if he does so, he must write them himself or take the consequences.

And the *Pullman* Case was followed in *Puterbaugh v. Gold Medal Furniture Mfg. Co.* (1904) 7 Ont. L. Rep. 582, 1 Ont. Week. Rep. 250, 24 Can.

L. T. Occ. N. 205, 1 Ann. Cas. 100, reversing (1903) 5 Ont. L. Rep. 680, 23 Can. L. T. Occ. N. 193, where it was held that a foreman of a company published a libelous letter, written in the interest of the company, but unconnected with its ordinary business, by giving a draft of same to a clerk to copy on a typewriter, and that such publication was not a privileged one. However, in this case a part of the court were seemingly reluctant so to hold, and did so only because they considered themselves bound by the Queen's bench decision.

And the narrow English view of *Pullman v. Hill* (Eng.) supra, to the effect that the dictating by the managing director of a firm to a stenographer employed by it, of a libelous letter, is a publication thereof, was again adopted in *Gambrill v. Schooley* (1901) 93 Md. 48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730, wherein it was held that the dictation of a libelous letter, apparently in the due course of business, to a private and confidential stenographer, is in law a publication of the libel, the court expressly refusing to draw a distinction between cases where the libel is dictated in the ordinary course of business, and those where the communication is unreasonable because clearly outside of the usual course of business of the dictator. And, following the *Gambrill* Case, it was held in *Ferdon v. Dickens* (1909) 161 Ala. 181, 49 So. 888, that the dictation of a libelous letter to a stenographer, who transcribed his notes on a typewriter, and the subsequent signing thereof by the person who dictated it, is a publication of the contents of the letter sufficient to support libel, although there was no communication of its contents to any other person.

So, in *Sun Life Assur. Co. v. Bailey* (1903) 101 Va. 443, 44 S. E. 692, the court seems to have been of the opinion that publication may be made by dictating a libelous business letter to a stenographer.

In Iowa it has been held that where a libelous letter, written in a foreign language, was given by the writer to a third person to transcribe, and the

copy was forwarded to a foreign country, a publication was made in this country. *Kiene v. Ruff* (1855) 1 Iowa, 482.

In *Adams v. Lawson* (1867) 17 Gratt. (Va.) 250, 94 Am. Dec. 455, where it appeared that defendant had a third person write a libelous letter for him, which defendant signed and sent to plaintiff, it was held that there was a publication of the libel.

But that the mere delivery of a libelous message to an office boy for the purpose of having a letter-press copy made does not constitute a publication, at least, where there is no evidence that the boy read the message, see *Western U. Teleg. Co. v. Cashman* (1906) 9 L.R.A. (N.S.) 140, 81 C. C. A. 5, 149 Fed. 367, 9 Ann. Cas. 693. And that there is no proof of publication of a libelous letter by dictation to a third person, where it does not appear whether the sender wrote it himself, or dictated it, see *Roberts v. English Mfg. Co.* (1908) 155 Ala. 414, 46 So. 752.

In connection with the above-cited English and Canadian cases, see the qualifying decisions from those jurisdictions which are set out *infra*, III.

III.—View that defamatory communication does not constitute actionable libel.

The more liberal rule, and the one which seemingly has the support of the weight of modern authority, is that, where the communication is made to a servant or business associate in the ordinary and natural course of business, there is no actionable libel. This rule finds support in the following cases: *GLOBE FURNITURE Co. v. WRIGHT* (reported herewith) ante, 772; *Central of Georgia R. Co. v. Jones* (1916) 18 Ga. App. 414, 89 S. E. 429; *Cartwright-Caps Co. v. Fischel* (1917) 118 Miss. 359, L.R.A. 1918F, 566, 74 So. 278, Ann. Cas. 1917E, 985; *Owen v. J. S. Ogilvie Pub. Co.* (1898) 32 App. Div. 465, 53 N. Y. Supp. 1033; *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. (Eng.) 262, 10 Best & S. 226, 38 L. J. Q. B. N. S. 129, 17 Week. Rep. 498; *Boxsius v. Goblet Frères* [1894] 1 Q. B. (Eng.)

842, 63 L. J. Q. B. N. S. 401, 9 Reports, 224, 70 L. T. N. S. 368, 42 Week. Rep. 392, 58 J. P. 670; Edmondson v. Birch & Co. [1907] 1 K. B. (Eng.) 371, 76 L. J. K. B. N. S. 346, 96 L. T. N. S. 415, 23 Times L. R. 234, 1 B. R. C. 444, 7 Ann. Cas. 192; Morgan v. Wallis (1917) 33 Times L. R. (Eng.) 495; Harper v. Hamilton Retail Grocers' Asso. (1900) 37 Can. L. J. 31, 32 Ont. Rep. 295. And see Roff v. British & French Chemical Mfg. Co. [1918] 2 K. B. (Eng.) 677, 9 B. R. C. 353, 87 L. J. K. B. N. S. 996, 119 L. T. N. S. 436, 34 Times L. R. 485, 62 Sol. Jo. 620. See also Quillinan v. Stuart (1917) 38 Ont. L. Rep. 623, 35 D. L. R. 35, as set out *supra*, II.

Seemingly the first case to lay down the principle that the communication of libelous matter, in the course of the discharge of an ordinary business duty, to a stenographer or copyist, is not a publication of such matter which will in itself render the communicator liable in libel, and that such communication does not destroy any privilege, is *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. (Eng.) 262, 10 Best & S. 226, 38 L. J. Q. B. N. S. 129, 17 Week. Rep. 498, it having been held in that case that the delivery of a report of the directors of a stock company, which contained a libelous reference to the company's manager, to a printer, to make copies for distribution among stockholders, was not such a publication as prevented the communication from being privileged, it not appearing that the directors had departed from the usual course employed in distributing such information, which it was their duty to furnish the stockholders.

And in *Boxsius v. Goblet Frères* [1894] 1 Q. B. (Eng.) 842, the court of Queen's bench applied the rule that libelous matter is privileged when dictated to a stenographer in the course of the discharge of an ordinary business duty, holding that where a solicitor dictated to his stenographer a letter containing libelous statements, which letter was also copied into a letter book by another clerk, it was upon a privileged occasion, since the client would himself have been privi-

leged in sending the letter direct, and this privilege extended to the solicitor, he having been directed to send it. Lord Esher, M. R., said: "It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with due diligence and according to the necessary and reasonable method of conducting business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business of the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office and copied into the letter book." In reaching this conclusion, the court distinguished *Pullman v. Hill* (Eng.) *supra*, II., on the ground that in that case it was not within the ordinary business of the merchant to write the defamatory matter complained of. It is also of interest, in connection with the *Boxsius* Case, that at least one judge (Lopes, L. J.) was clearly of the opinion that there was evidence of publication by communicating the letter to the clerks, but the court evidently did not regard this as affecting the question of privilege, or, at least, as destroying the privilege of the occasion.

And following *Boxsius v. Goblet Frères* (Eng.) *supra*, the rule of *Pullman v. Hill* (Eng.) *supra*, II., was again limited in *Edmondson v. Birch & Co.* [1907] 1 K. B. (Eng.) 371, 1 B. R. C. 444, 7 Ann. Cas. 192, and the rule of privilege extended to dictation and delivery of defamatory matter for copying, where the duty is only one of imperfect obligation, and not absolute, as in the *Boxsius* Case. And, applying this more liberal rule, it was held that where business communications containing defamatory statements were dictated to a stenographer, and copied in a copy letter book by another clerk on a privileged occasion, the privileged occasion covered such a publication, so that the statements were not

actionable. In reaching this conclusion, Collins, M. R., expressly stated that the decision in the Pullman Case was explained and qualified in the Boxsius Case, and summed up the result of the two cases as follows: "The result of the two cases to which I have alluded, taken together, appears to me to be that where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business, and if so, it will not destroy the privilege. In the case of a solicitor, his duty in conducting the business of his client may be absolute, whereas in this case it may be said that the duty was only one of imperfect obligation; but the nature of the obligation which gives rise to the privilege cannot, I think, alter its effect in this respect. If the duty is such as to give rise to a privileged occasion, then the fact that it is only one of imperfect obligation cannot affect the mode in which the privilege may reasonably be exercised." And Cozens-Hardy, L. J., in expressing a concurring opinion, added this: "I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defense of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business, such a document must be copied and find its way into the copy-letter book or telegram book of the company or firm. The authorities appear to me to show that the privilege is not lost, so long as the occasion is used in a reasonable manner and in the ordinary course of business."

And *Boxsius v. Goblet Frères* (Eng.) supra, was again followed in

Morgan v. Wallis (1917) 33 Times L. R. (Eng.) 495, where, in holding that the mere dictation by a solicitor to a typist, as a matter of office routine, of a bill of costs, in which he inserted, without malice, defamatory matter which was relevant and reasonably necessary for the information of the person to whom the bill was sent, was not actionable, the court said: "I think that this doctrine of publication of a libel by putting the thing before a typist verges on the absurd. . . . Publication of a libel may be a criminal offense for which a man may receive a very heavy sentence, and to say that submitting a draft to a typist, who will simply rattle it over on a typewriter, hardly comprehending what the thing says, is a publication which may involve a man in a criminal charge, is to my mind verging on the absurd. I do not say that it is absurd, because other judges have said that it is a publication, but I think that in the past the rule has been several times too widely stated, and that the court of appeal in the case of *Boxsius v. Goblet Frères* (Eng.) supra, and other cases, has seen that, and has limited it by such decisions as in that case and the other cases which Mr. Lewis Thomas mentioned; and that really there must be something much more substantial than publication to a typist in order to constitute publication—something much more substantial than is to be found in the mere fact that a business man, a solicitor, employs a typist to make out his bills of costs. It might easily be that a man who had written a libel and desired to make it known to somebody would put it before a typist, merely in order that somebody should see it. In that case it would be intentional publication; but, where it is done as a mere matter of routine, I cannot see that it is publication." And in discussing the question of privilege, the court further said: "Mr. Lewis Thomas contended that the occasion was absolutely privileged, which means that it is like the reports of what passes in these courts, or what is in a legal document issued by authority. I cannot see any reason to suppose that a solicitor is endowed

with the right to publish whatever he likes about everybody, provided that it is in a bill of costs. Then, it is said that, if it is only privileged in the sense in which other documents are privileged, that is sufficient. It is said that communications must be made in order to carry on business, and I agree that there is a privilege in that sense. I think that a solicitor has a right, perfectly plainly, to put into his bill of costs matter which is derogatory to persons other than his client. . . . But I do not think that that gives him a right to say whatever he chooses about everybody concerned in the litigation, and I cannot agree that he has a right to do that, whether he is malicious or whether he is not. . . . I do not myself feel inclined to say that whatever a solicitor says in a bill of costs about somebody else is necessarily privileged, even although there may be malice. All statements in a bill of costs are not necessarily privileged. They must not only be relevant to the matter in hand—relevant in the widest sense—but they must be reasonably necessary for the information of the client to whom the bill of costs is sent, in order that he may know for what he is paying. And if there is evidence of malice, if a solicitor puts into his bill of costs matters not necessary for the information of the client in order that he may know for what he is paying, or that he may get the bill properly taxed,—if there is evidence that he puts them in out of malice,—then the privilege would be destroyed. . . . Here the statements were reasonably necessary for the information of the client."

And in *Harper v. Hamilton Retail Grocers' Asso.* (1900) 37 Can. L. J. 31, 32 Ont. Rep. 295, where the secretary of a grocers' association gave the alleged libelous matter, which apparently related to the defendant's business, to a typewriter not in the regular employment of the defendants, but occasionally employed and paid by the secretary, to copy, it was held that there was no publication to the typewriter such as would render the association liable for libel.

In *Cartwright-Caps Co. v. Fischel*

(1917) 113 Miss. 359, L.R.A. 1918F, 566, 74 So. 278, Ann. Cas. 1917E, 985, in holding that the dictation of a libelous letter by the president of a corporation to its stenographer, in the course of its business, did not constitute a publication of the libel, in the absence of any repetition by the stenographer to other persons, the court said: "We think that the letters were privileged, and that there was not, in a legal sense, a publication of the letters in question. The appellant in this case is a corporation, and, of course, can act only through agents, and the acts both of the president and the stenographer to whom the letter was dictated are the acts of the corporation. In our opinion, under the present conditions, the dictation of a letter to a stenographer, when employed by the person or corporation as a stenographer in the business, is not a sufficient publication, in the absence of any repetition by the person or stenographer to other persons."

And in *Owen v. J. S. Ogilvie Pub. Co.* (1898) 32 App. Div. 465, 53 N. Y. Supp. 1033, 6 N. Y. Ann. Cas. 76, the court again laid down the rule that the dictation by the manager of a corporation to a stenographer of the firm, of a libelous letter concerning firm business, does not constitute a publication of the letter, but much stress was laid upon the fact that the manager and the stenographer were servants of a common master, engaged in their respective employments; and the case was seemingly regarded as distinct from one where the person giving the dictation and the stenographer bore the relation of master and servant, rather than coemployees of a common master. For instance, in this connection, it was said: "It may be that the dictation to the stenographer, and her reading of the letter, would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged

in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person, in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writing and the copying were but parts of one act, i. e., the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivering to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be

regarded as third parties, but as common servants engaged in the act."

And expressly following the rule laid down in *Owen v. J. S. Ogilvie Pub. Co.* (N. Y.) supra, it was again held in *Central of Georgia R. Co. v. Jones* (1916) 18 Ga. App. 414, 89 S. E. 429, that the dictation by an officer of a corporation to his stenographer, in the prosecution of its business, of a libelous letter, does not constitute a publication, since in such a case the stenographer cannot be regarded as a third person for the purposes of publication.

And in the reported case (*GLOBE FURNITURE CO. v. WRIGHT*, ante, 772), the court takes the view that communications made in the usual course of business, to an employee who has a duty to perform with regard to it, is conditionally privileged so as not to be actionable in the absence of malice, it having been held that the exhibition by a general manager of a corporation to its collector and bookkeeper, of a letter relating to a customer's account, with respect to which each has a duty, is privileged, although libelous, and that no action would lie therefor against the corporation. It will be noted that this case, because of the fact that the communication was made to a business associate who, by reason of his duties, had an interest in the subject-matter thereof, is somewhat stronger than those where the communication was to an employee, such as a stenographer or copyist, who in a sense has a mere mechanical part in the conducting of a correspondence.

G. J. C.

MERRILL DAVIS

v.

JOHN L. WHITING & SON COMPANY.

SAME

v.

ABRAM F. GRANT.

Massachusetts Supreme Judicial Court — February 24, 1909.

(201 Mass. 91, 87 N. E. 199.)

Master — independent contractor — work over sidewalk.

1. That there is such risk of injury to pedestrians from the negligence

or want of skill of workmen engaged in painting a building abutting thereon, as necessarily to involve an appreciable danger to them, does not render the occupant of the building who employs an independent contractor to do the painting liable for an injury to a passer-by through such negligence.

[See note on this question beginning on page 801.]

— moving staging.

2. The occupant of a building abutting on a public street does not assume liability for injury to pedestrians through a fall of a shutter, by contracting to have the shutters painted on the building, which requires the raising and lowering of staging, carelessness in doing which may cause shutters to fall, if it is not impossible to move the staging without serious danger of interfering with the shutters.

[See 14 R. C. L. 87, 88.]

Negligence — highway — pedestrian.

3. A pedestrian on a sidewalk is not negligent per se in attempting to pass under a light staging suspended from the front of a building which workmen are engaged in painting, at a time when the workmen are standing in the street with the ropes in their hands engaged in shifting the position of the staging, so as to preclude his recovering for injuries caused by the fall of a shutter unhinged by the moving staging, where there is nothing to show that he knew or appreciated the risk of such an accident.

— violation of ordinance.

4. Upon the question of the negligence of a painter whose act in moving a staging on the front of a building abutting on a public street causes an injury to a pedestrian, it is admissible to show that he was acting in violation of an ordinance.

[See 20 R. C. L. 45.]

— proximate cause.

5. That one in using a staging on the front of a building is violating a municipal ordinance does not necessarily render him liable for injuries to a pedestrian through the fall of a shutter from the building, due to use of staging, since such use may not be the proximate cause of the accident.

[See 20 R. C. L. 43, 44; 22 R. C. L. 206, 207.]

Joint verdict — setting aside.

6. A verdict against a building owner and a contractor in an action for damages for negligent injuries to a passer-by must be set aside as to the latter, when the ground upon which the finding against the former was based was improper, where the court instructed the jury that if they found against the owner they must also find against the contractor.

EXCEPTIONS by defendants to instructions of the Superior Court for Suffolk County (Aiken, J.) given in the trial of an action for damages for personal injuries alleged to have been caused by defendants' negligence which resulted in a verdict for plaintiff in both cases. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. Romney Spring and Woodbury Rand, with Messrs. Matthews, Thompson, & Spring, for defendant John L. Whiting & Son Company:

The test of the relation of master and servant is the right to control.

Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; Linton v. Smith, 8 Gray, 147; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; Forsyth v. Hooper, 11 Allen, 419; Wood v. Cobb, 13 Allen, 58; Coomes v. Houghton, 102 Mass. 211; Connors v. Hennessey, 112 Mass. 96; Clapp v. Kemp, 122 Mass. 481; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Huff v.

Ford, 126 Mass. 24, 30 Am. Rep. 645; Sturges v. Theological Edu. Soc. 130 Mass. 414, 39 Am. Rep. 463; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Patnoudé v. New York, N. H. & H. R. Co. 180 Mass. 119, 61 N. E. 813; Dutton v. Amesbury Nat. Bank, 181 Mass. 154, 63 N. E. 405; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Delory v. Blodgett, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078, 15 Am. Neg. Rep. 581; Hooe v. Boston & N. Street R. Co. 187 Mass. 70, 72 N. E. 341; Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726.

The contractor is not responsible

for the acts of the contractee or of his men.

Boomer v. Wilbur, 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246; *Cork v. Blossom*, 162 Mass. 330, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495; *Patnoudé v. New York, N. H. & H. R. Co.* 180 Mass. 119, 61 N. E. 813; *Dutton v. Amesbury Nat. Bank*, 181 Mass. 154, 63 N. E. 405; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Connors v. Hennessey*, 112 Mass. 96; *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411; *Quinn v. Crimmings*, 171 Mass. 255, 42 L.R.A. 101, 68 Am. St. Rep. 420, 50 N. E. 624; *Allen v. Hayward*, 7 Q. B. 960, 115 Eng. Reprint, 749, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92; *Reedie v. London & N. W. R. Co.* 4 Exch. 244, 154 Eng. Reprint, 1201, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, 19 Eng. Rul. Cas. 168; *Knight v. Fox*, 5 Exch. 721, 155 Eng. Reprint, 316, 20 L. J. Exch. N. S. 9, 14 Jur. 963; *Overton v. Freeman*, 11 C. B. 867, 138 Eng. Reprint, 717, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65; *Peachey v. Rowland*, 13 C. B. 182, 138 Eng. Reprint, 1167, 22 L. J. C. P. N. S. 81, 17 Jur. 764; *Ellis v. Sheffield Gas Consumers Co.* 2 El. & Bl. 767, 118 Eng. Reprint, 955, 2 C. L. R. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, 19 Eng. Rul. Cas. 180; *Cuthbertson v. Parsons*, 12 C. B. 304, 138 Eng. Reprint, 924, 21 L. J. C. P. N. S. 165, 16 Jur. 860; *Innocent v. Peto*, 4 Fost. & F. 8; *Brown v. Accrington Cotton Co.* 13 L. T. N. S. 94, 3 Hurlst. & C. 511, 159 Eng. Reprint, 631, 34 L. J. Exch. N. S. 208; *Pearson v. Cox*, L. R. 2 C. P. Div. 369, 36 L. T. N. S. 495; *Butler v. Hunter*, 7 Hurlst. & N. 826, 158 Eng. Reprint, 702, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. Div. 693, 38 L. J. Q. B. N. S. 241, 20 L. T. N. S. 743, 17 Week. Rep. 1065; *Goslin v. Agricultural Hall Co.* L. R. 1 C. P. Div. 482, 45 L. J. C. P. N. S. 354n, 35 L. T. N. S. 92; *Pickard v. Smith*, 10 C. B. N. S. 470, 142 Eng. Reprint, 535, 4 L. T. N. S. 470; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; *Hughes v. Percival*, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772; *Penny v. Wimbledon*

Urban Dist. Council [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 62 J. P. 582, 78 L. T. N. S. 748, 14 Times L. R. 477; *McCarthy v. Second Parish*, 71 Me. 318, 36 Am. Rep. 320; *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052; *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *Robinson v. Webb*, 11 Bush. 464; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. ed. 485; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163; *Knowlton v. Hoit*, 67 N. H. 155, 30 Atl. 346; *DuPratt v. Lick*, 38 Cal. 691; *DeForest v. Wright*, 2 Mich. 368; *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352; *Deford v. State*, 30 Md. 179; *Edmundson v. Pittsburgh, M. & Y. R. Co.* 111 Pa. 316, 2 Atl. 404; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Bailey v. Troy & B. R. Co.* 57 Vt. 252, 52 Am. Rep. 129; 1 Thomp. Neg. 2d ed. § 621; *Mechem, Agency*, §§ 747, 748.

Mr. Robert B. Stone for defendant Grant.

Messrs. C. W. Bartlett, E. R. Anderson, and F. E. Jennings for plaintiff.

Knowlton, Ch. J., delivered the opinion of the court:

These are two actions tried together in the superior court, brought to recover for an injury received by the plaintiff from the fall of a shutter from a building occupied and kept in repair by the defendant in the first action, the shutters of which were being painted by the defendant in the second action. The plaintiff contended that he was walking through Belcher lane, a public highway in the city of Boston, in the exercise of due care, and that the defendant Grant and his servants negligently suffered the shutter to fall upon him from the fifth story of the building, while they were drawing up a ladder used as a staging, with ropes and pulleys along the face of the wall, in such a way that the ladder lifted up the shutter from its hinges as it was open against the wall, and left it without support. He also contended that the defendant in the first case made a contract with the defendant in the second case for the painting

of the shutters, the performance of which contract necessarily involved such danger to travelers upon the street below that it was legally bound to protect them from the danger. The jury found against both defendants, and the cases are here upon exceptions. We will consider first the case against the occupant of the building.

The jury were instructed to answer this question: "Was the work of painting the shutters on the building necessarily attended with danger to persons passing along Belcher lane?" They answered it in the affirmative. If the question meant, "Was there such risk of accident from the probable negligence or want of skill of some of the workmen as necessarily to involve an appreciable danger of injury to persons passing below?" there was evidence to warrant the finding. But

Master—
independent
contractor—
work over
sidewalk.

the finding of this fact would not create a liability on the part of the defendant in the first

action. The evidence was undisputed that Grant made a contract to paint the shutters for an agreed price, and that the other defendant had no right of control over him in doing the work. There was no evidence of any attempt to exercise supervision or control of him in the performance of the contract, otherwise than to see that what he did and furnished was in accordance with the requirements of the contract. There was, therefore, no liability on the part of the defendant in the first action for the negligence of Grant or of his servants. The attempt to hold the corporation liable is on the ground recognized in *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L.R.A. 213, 14 Am. St. Rep. 427, 21 N. E. 482, 12 Am. Neg. Cas. 80; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421, and *Wetherbee v. Partridge*, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894. The cases in which this liability exists are generally where the defendant contracts for the creation of a condition of his property, or for a

use of his property, which condition or use necessarily causes danger to others, unless precautions are taken to protect them from the consequences of such condition or use. One who brings into existence such a danger, even if he does it through an independent contractor, ought to guard against the probable effect of it. But the principle does not apply to cases where the danger does not come from the condition of the property or the use of it with proper skill and care, but comes only from an unskilful or negligent act of the contractor or his servants, even if a lack of skill or care on the part of some of the persons engaged in the business reasonably may be expected. The distinction is well stated in *Boomer v. Wilbur*, 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246, in which such instructions as were given in the present case were held to be erroneous, as applied to the facts then before the court. Mr. Justice Hammond said in the opinion: "The accident was caused by the act of the contractor in doing what it was not necessary for him to do and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable. But as this was not necessary or intended, the work could not be classed with work which, if properly done, was ordinarily attended with danger to the public." This may be said with equal truth in the present case. In the performance of the contract it was not necessary for the contractor to drop a shutter upon the walk below. It was not expected or intended that he should do it. His contract was to paint all the shutters on the building. The evidence tended to show that such shutters were always painted on the building, and that they would be expected to be painted there. The jury might well find that this contract was intended to

—moving
staging.

be performed without a removal of the shutters. But painting the shutters upon the building did not necessarily make the building a nuisance, or put it into a dangerous condition, such as to make it an object of peril to travelers on the street.

The only danger referred to in the testimony was connected with the movement of the staging on the side of the building, and the only particular in which the testimony tended to show that this was dangerous was in lifting the ladder when it was suffered to be so near the wall as to come under the shutters that were open on the side of the building. But the undisputed testimony was that the ropes by which the ladder was raised descended from pulleys near the eaves, and that these ropes came down behind the ladder, between it and the wall, and that it was easy, by pulling the ropes away from the building, to hold the ladder away from the shutters, so that it would not lift the shutter from its hinges. There was evidence not only that this building had been painted before with the shutters on it, but that buildings with such fire shutters were always so painted, and there was nothing to show that a shutter ever fell from such a cause before or afterwards. There was no evidence that the shutter was out of repair or improperly constructed. The only evidence as to the cause of the accident tended to show that there was a lack of skill, or a lack of care in moving the staging.

Even if there had been evidence that the moving of the staging in this way would have been a use of the building that made it dangerous to passers-by, there was no evidence that other methods might not have been adopted without taking the shutters from the building, which would not have been necessarily dangerous if proper skill and care were used. It is not to be assumed without evidence that it was impossible to move the staging without serious danger of dropping the shutters. The method of doing this

was within the control of the contractor, and under his contract he had a right to do it in any reasonable way that safety demanded. If to do this safely and properly it was necessary temporarily to close the shutters at the point where the ladder was being lifted, while the staging passed by, he had a right, upon the evidence, to do it, and there is no reason to suppose that the company would have objected to his doing it. It seems that the danger which the jury were permitted to find sufficient to create a liability on the part of this defendant was that which is incident to doing difficult work, where an injury may result from the lack of the exercise of skill and care, or even from pure accident. This is a different kind of danger from that which was made a ground of recovery in the cases above cited. See also *Ainsworth v. Lakin*, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746; *Cabot v. Kingman*, 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730; *Bower v. Peate*, L. R. 1 Q. B. Div. 321, 326, 327, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; *Hughes v. Percival*, L. R. 8 App. Cas. 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772; *Penny v. Wimbledon Urban Dist. Council* [1898] 2 Q. B. 212, 67 L. J. Q. B. N. S. 754, 62 J. P. 582, 78 L. T. N. S. 748, 14 Times L. R. 477, *id.* [1899] 2 Q. B. 72, 68 L. J. Q. B. N. S. 704, 63 J. P. 406, 47 Week. Rep. 565, 80 L. T. N. S. 615, 15 Times L. R. 348; *Engel v. Eureka Club*, 137 N. Y. 100-104, 33 Am. St. Rep. 692, 32 N. E. 1052; *St. Paul Water Co. v. Ware*, 16 Wall. 566-576, 21 L. ed. 485-488; *Bibb v. Norfolk & W. R. Co.* 87 Va. 711, 14 S. E. 163. There was no evidence to show inherent danger to travelers on the street in painting shutters on the building.

This view of the case makes it unnecessary to consider other questions raised by the bill of exceptions. In the first case the defendant's first request should have been given.

In the second case an important question was whether there was evidence that the plaintiff was in the exercise of due care. He was walking in a narrow street where there was no barrier or warning to indicate the presence of danger. By reason of obstructions upon the walk, on one side, he crossed to the other side where the walk was clear. All that was above him was a ladder staging of but little weight, sustained by ropes and pulleys, with men then holding the ropes in their hands as they stood in the street. He had no reason to expect the fall of the shutter, and there was no evidence that he knew or appreciated the risk of such an accident as befell him. The cases of *Kilroy v. Foss*, 161 Mass. 138, 36 N. E. 746; *Slade v. Beattie*, 186 Mass. 267, 71 N. E. 540, and *Nye v. Dutton*, 187 Mass. 549, 73 N. E. 654, relied on

Negligence—
highway—
pedestrian.

by the defendant,
are very different
in their facts, and

not conclusive against a recovery by the present plaintiff. We are of opinion that there was no error in the judge's rulings and refusals to rule on this part of the case. That a person is acting in violation of a statute or ordinance is held some evidence of his negligence, and it was competent to show that the de-

—violation of
ordinance.

fendant's permit
did not authorize
the use of the street

where the accident happened, and that he was occupying the street in violation of an ordinance. Whether this evidence would be of much importance, in connection with the other facts in the case was not apparent in the beginning. When the evidence was closed, we think it was

—proximate
cause.

plain that the vio-
lation of the ordi-
nance was not the

direct and proximate cause of the accident, and we think that, upon the defendant's request, the jury should have been so instructed. The violation of a statute, although ordinarily evidence of negligence, is not conclusive evidence. It has been

held that it may be so remote as not to be material, and not to require a submission of the case to the jury. *Glasse v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199, 16 Am. Neg. Rep. 86; *Farrell v. B. F. Sturtevant Co.* 194 Mass. 431-434, 80 N. E. 469; *Belleveau v. S. C. Low Supply Co.* 200 Mass. 237, 86 N. E. 301. So, too, where a violation of a statute or ordinance is relied upon as evidence of negligence, the circumstances may be shown, if they have a tendency to explain the unlawful conduct and to diminish the effect that otherwise would be given to it as evidence of negligence. *Hanlon v. South Boston Horse R. Co.* 129 Mass. 310.

The judge gave the jury the following instructions: "If you find against the Whiting Company you must also find against the defendant Grant. If the Whiting Company is liable, Grant is also liable. . . . If the Whiting Company is found negligent, it follows that Grant is also negligent."

As we have already seen, the jury were permitted to find against the Whiting Company on the ground that the contract for painting the shutters was one which involved a necessary danger to the public passing on the street, and which, therefore, made it the legal duty of the Whiting Company to take measures for the protection of the public from the danger which was necessarily incident to the proper performance of the contract. The verdict of the plaintiff against the Whiting Company on this ground was erroneous, as there was no evidence to support it. On finding such a verdict the jury was obliged, under the instructions, to find against

Joint verdict—
setting aside.

the defendant Grant, irrespective of the question whether they could find against him on any proper ground. The verdict against the Whiting Company being unfounded, it seems probable—at least, it is not impossible—that the same error entered into the verdict against Grant. On

both cases the entry must be exceptions sustained.

NOTE.

The general rule of nonliability of employer in respect of injuries caused by an independent contractor

is the subject of the annotation following *PRESS v. PENNY*, post, 801. As to the application of the doctrine to acts of the contractor productive of transitory occurrences, injurious to persons on adjacent highway, in connection with work performed with respect to a building, see subd, IV. c, 13 (b).

**MRS. NELL SMITH, Plff. in Certiorari,
v.
BANK OF COMMERCE & TRUST COMPANY.**

Tennessee Supreme Court—June 3, 1916.

(135 Tenn. 398, 186 S. W. 465.)

Master and servant — independent contractor — liability of owner — incidents of work.

1. The owner of a building in process of construction by an independent contractor is not liable for injury to a pedestrian on the adjoining street by a hot rivet which falls when thrown from one workman to another as a method of doing the work, where a protective cover had been placed over the sidewalk, since the workman's act was not a necessary detail of the work so as to render it inherently dangerous and charge the owner with liability.

[See note on this question beginning on page 801.]

— taking bond from contractor — effect.

2. The taking of a bond by the building owner from one contracting for its construction, to protect him from liability for injuries to strangers

during the progress of the work, is not sufficient to charge the owner with liability for such injuries on the ground that he knew that the work was inherently dangerous.

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Shelby County (Young, J.) in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. H. H. Bonner and Bell, Terry, & Bell for plaintiff in certiorari.

Messrs. R. P. Cary and William M. Hall, for defendant in certiorari:

The work of riveting steel beams, if properly done, does not create a peril, and the negligence of the contractor, if any, is a mere detail of the work, not contemplated by the contract.

Boomer v. Wilbur, 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246; *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep.

879, 43 S. E. 562, 13 Am. Neg. Rep. 616; *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378.

The owner is not liable for the negligence of an independent contractor, unless the work contracted for is intrinsically dangerous, or involves a duty to the public incumbent upon the owner, and the injury is a direct result of a violation of that duty.

McHarge v. Newcomer, 117 Tenn. 595, 9 L.R.A.(N.S.) 298, 100 S. W. 700; *Straus v. Louisville*, 108 Ky. 155,

55 S. W. 1075; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Smith v. Milwaukee Builders' & T. Exch.* 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041.

Gholson, Sp. J., delivered the opinion of the court:

This suit was brought by the plaintiff, Mrs. Nell Smith, against the Consolidated Engineering Company, the E. W. Minter Company, and the Bank of Commerce & Trust Company, hereinafter called the bank, for damages sustained by her on May 9, 1913, while on the street in front of a building that was being erected for the bank. On March 20, 1913, a contract was made between the said engineering company and the bank, as owner, by which the former agreed to construct an annex for the latter, and to repair and remodel the old building, on the lot of said bank in the city of Memphis. The defendant engineering company sublet to the defendant E. W. Minter Company a portion of the construction work. The new building was to be fifteen stories high, and to be erected on the north side of and adjoining the large bank and office building then owned and occupied by the defendant bank. It was on the most-traveled business street in the city of Memphis. Section 9 of said contract is as follows:

"The contractor will, at his own expense, protect, in a suitable manner, the work and ground, so as to avoid any injury to the property of adjacent owners or of others and damage to their persons or employees or any other persons. The contractor will be responsible for all damage of every nature whatsoever done to persons or property during the progress of the work, and occasioned by its own acts or neglect, or that of any of its subcontractors, foremen, laborers, or other employees, or agents, and shall have executed and maintained in force bonds as provided in the specifications.

"Should there be any unsatisfied claims for damages to persons or property at the time when final estimate for doing the work is made and

returned, the owner shall have the right to retain an amount sufficient to cover any such claims for its own indemnity until the same has been fully disposed of or adjusted by the contractor."

Another provision of the contract was that the work should be done under the personal supervision of the contractor, and the contract should not be assigned without the written consent of the owner; and should any portion of the work be let to subcontractors the contractor covenanted that such subcontractors should be responsible, capable, and reputable persons, and the contractor should remain responsible for the performance of the work, notwithstanding any subcontract.

It was agreed that the defendant, E. W. Minter Company, did all the steel framework under said contract. Therefore the act which caused the injury to plaintiff was that of the said E. W. Minter Company, or some of its employees.

A shed, 10 or 15 feet wide, covered with heavy solid timber, was erected extending entirely over the sidewalk, all the way in front of the building that was in process of erection. The plaintiff had previously passed under this shed nearly every day. On May 9, 1913, while she was walking on the street in front of the building, and not under the shed, she was struck on the head by a red-hot bolt or rivet, severely, and apparently permanently, injured, from which she has suffered great pain.

The declaration, among other things, averred that while said engineering company and said Minter company were engaged in erecting the steel framework of the building, it was their habit and custom to have the bolts or rivets heated to a red or white heat, and thrown by one employee of said defendants to another employee, who was expected to catch them in a bucket or receptacle, and then to be used. That said work, and the manner in which it was done, was unusual, extremely and intrinsically dangerous to pe-

destrians on the street below; that the defendants failed to take necessary and reasonable precautions to prevent accidents; that the manner of doing the work was exceedingly dangerous; and that it was the duty of the bank as owner to protect the traveling public from injury by reason thereof. The declaration does not contain any specific averment that the bank knew of the alleged dangerous manner in which this work was being conducted, or wherein or how it had failed to take the necessary precautions, or was derelict, or what could have been done that was not actually done.

Said engineering company and the Bank filed a joint plea of the general issue, and the E. W. Minter Company filed two pleas consisting of the general issue and contributory negligence.

On February 20, 1914, the action was dismissed as to the Minter company. It seems that plaintiff settled with the latter under a contract with covenants not to sue. On February 25, 1914, a verdict was rendered in favor of the Consolidated Engineering Company upon its motion for peremptory instructions. There was no exception taken by the plaintiff to this. There was a mistrial as to the defendant bank. Upon the second trial peremptory instructions were given by the court in favor of the Bank, to which the plaintiff excepted, prayed, and was granted an appeal to the court of civil appeals. That court, in a well-considered and able opinion by Mr. Justice Moore, affirmed the action of the circuit judge. The petition for certiorari was heretofore granted. It was argued, and able and elaborate briefs have been filed for both sides.

It is seriously and earnestly insisted by counsel for the plaintiff that the Bank as owner of the property is liable, and that it was error in the court of civil appeals in not reversing and remanding the case. The several assignments of error, in substance, are that the erection of this high building upon the most populous, most used, and most im-

portant business street in the city of Memphis, immediately abutting and adjoining the sidewalk, was intrinsically dangerous to users of the highway unless due care to prevent injury was used, and that it was the duty of the Bank to the public, as the owner of the property, to have the work done in a cautious, careful, and prudent manner, to minimize as much as possible the inconvenience, annoyance, and danger, and this duty it could not delegate to an independent contractor so as to relieve itself of liability.

It appears that on the day plaintiff was injured, the steel framework of the new building was up to the eleventh or twelfth floor; that two or three men at a little forge would heat the rivets to a red or white heat, and by means of a pair of tongs would throw them to a man with an air hammer, and the latter would catch them in a bucket; they would throw rivets from 5 to possibly 25 feet. The rivets were then being heated on the eighth floor and the man catching them was on the sixth or seventh floor at the northwest corner. The forge was situated back from the front about 25 feet, near the middle of the building, which was 25 or 30 feet wide. They would use an ordinary tin bucket in catching the rivets, putting a piece of wood in the bottom of the bucket about 3 inches wide to stop the rivets and to keep the bottom of the bucket from being knocked out. Sometimes a rivet would strike the tin in the bottom of the bucket and bounce out. Sometimes the bucket would be old and the rivets would go through it, and sometimes the man with the bucket would miss the rivets. The witness who detailed this method of handling the rivets stated that on the afternoon plaintiff was hurt he noticed that the man who was catching the rivets in the bucket missed one of them, and that it fell down in the street; that he afterwards looked out of the front window and saw a great crowd gathering in the street; that before he got down there, the lady, who was evidently the plaintiff, was car-

ried to the elevator and taken to a doctor's office. While this witness did not state that this method of handling the rivets was usual and customary, yet it is fairly inferable from his testimony. It is not shown that at any other time had a rivet gone into the street, or had even fallen outside the walls of the building in front and upon the covering over the sidewalk. It is not controverted that the instance detailed above, when the man failed to catch the rivet and it went out into the street, was the occasion when the plaintiff was injured.

It is not disputed that the E. W. Minter Company was an independent contractor at the time the injury to plaintiff occurred. But it is insisted that the rule to be applied comes within one of the exceptions, and therefore the employer is liable.

While the general rule of law is that the proprietor or employer is not liable for the negligence of his contractor and the servants and assistants of the latter, yet there are well-established exceptions and limitations to it.

In the case of *McHarge v. Newcomer*, 117 Tenn. at page 604, 9 L.R.A.(N.S.) 298, 100 S. W. 702, these exceptions in general are "where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the proprietor or employer; when the work contracted for is intrinsically dangerous, and the performance of the contract will probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work."

We think Mr. Justice Moore of the court of civil appeals, in his opinion in this case, stated the rule to be applied in this case correctly, as follows:

"If an injury might have been anticipated as a direct or probable

consequence of the performance of the work contracted for, if reasonable care is omitted in the course of the employment, then in every such case the owner, or the person having the work performed, is liable for an injury sustained during its execution or performance.

"That is, if the owner of a lot contracts with another to erect a building upon it, and if such owner at the time of the execution or the making of such contract might have anticipated, or foreseen, that an injury would result to third persons properly and lawfully upon the streets or sidewalks adjacent to the building, as a direct and probable consequence of the performance of work on the building, if reasonable care was not taken to avoid such injury, then the owner in such case is liable for such injury, and he must see that reasonable and proper care is used to prevent an injury to persons lawfully upon the streets adjacent to the building being erected."

We find in the case of *Anderson v. Fleming*, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 443, a quotation approving the text of *Dillon on Municipal Corporations*, in discussing the duty of such a corporation to maintain its streets in a safe condition for public travel, the following: "But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor, subcontractor, or his servants. In such a case the immediate author of the injury is alone liable."

In the case of *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246, the injury was caused by a brick which a mason employed to repair a chimney, let fall in the street, and the plaintiff was injured thereby. The defendant owner employed a contractor to repair chimneys on his building adjoining a highway. The contractor was an independent one, but the plaintiff invoked the same exception

to the general rule of nonliability in such cases as is relied upon by the plaintiff here. Judge Hammond in delivering the opinion in that case, among other things, said: "The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. It is plain that unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveler. . . . This is not a case where the work, even if properly done, creates a peril unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held."

In the case of *Smith v. Milwaukee Builders' & T. Exch.* 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041, where the work was being done by an independent contractor, the plaintiff was hit on the head by a falling brick and severely injured. The court said: "It is evident that the falling of the brick was collateral to the contract, and was, if negligence at all, the result of negligent acts on the part of some of the workmen employed by the contractors, and was not the necessary or natural result of any act which the contractors were employed to do. In this situation the

owner is not liable, at least in the absence of some other distinct ground of liability—citing *Hundhausen v. Bond*, 36 Wis. 29; *Hackett v. Western U. Teleg. Co.* 80 Wis. 187, 49 N. W. 822."

In the last case cited, however, the owner was held liable because of the violation of an ordinance which required the owner or contractor, before erecting any building abutting on a public sidewalk, to cause a roof passageway to be built in front of the building upon the sidewalk, under pain of a certain fine or imprisonment.

It clearly appears that in the instant case a roofed passageway had been erected to protect the traveling public, just as required by the municipal ordinance, referred to in the *Wisconsin* case, *supra*. This is pertinent to show that such precautions had been taken as were deemed reasonable by the city authorities who passed that ordinance, notwithstanding none is shown to have been required by the city of Memphis.

In the case of *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562, 13 Am. Neg. Rep. 616, it was said: "It cannot be successfully maintained that building a house on a lot abutting upon a street is inherently and necessarily dangerous, or that danger and hazard must necessarily attend its erection. It is a lawful work, and of necessity engaged in by thousands every day, and if carefully and properly done involves no danger to anyone. The negligence of the employees of the brick contractor in leaving their plank walkway extended upon the sidewalk after night was not a necessary incident of the work, or even to be anticipated by anyone. . . . The erection of buildings adjacent to a highway, with the usual and necessary excavations, and the consequent obstructions to the sidewalk and street, is held not to be within the exception to the general rule which attaches liability to employers where the work in hand is inherently dangerous, or

(135 Tenn. 398, 186 S. W. 465.)

will necessarily create a nuisance."

The case under consideration is different from that of *McHarge v. Newcomer*, 117 Tenn. 595, 9 L.R.A. (N.S.) 298, 100 S. W. 700, for in that case an awning over a public street in front of the building owned by the defendant was being repaired, and no precautions were taken to prevent portions of the awning, material, or tools from falling on those below. The work being done for the Bank in this case was on its own lot. Anything that would have fallen within the walls of the building would necessarily have been upon the property of the defendant Bank, where none but those employed in the construction of the building had the right to be, and, as heretofore shown, the public were protected by a shed all the way over the sidewalk, and this shed was covered over with heavy solid timber. It was argued, and we think successfully, that the city authorities would not have permitted the entire street to have been covered. Indeed, it appears not to have been necessary at any other time than on the occasion when plaintiff was injured.

There is an exhaustive note on the subject of the liability of the employer of an independent contractor, under the case of *Salliotte v. King Bridge Co.* 65 L.R.A. 620, at pages 643 and 644, under the head of "Work on buildings," where a number of cases that are pertinent are collated. Among them we quote: "The right to maintain an action was also denied, where a person walking along the street was injured by the negligence of a servant of a contractor, who threw a piece of lime into a mortar bed in the street. *Strauss v. Louisville* (1900) 108 Ky. 155, 55 S. W. 1075. . . .

"A jury is properly charged that one for whom a brick wall is being erected is not liable for damages sustained by the adjoining owner by the dropping of brick and mortar on his premises, if such occurrences were not necessarily involved in the

building of the wall, but were due to the negligence of the contractor or his servants." *Pye v. Faxon* (1892) 156 Mass. 471, 31 N. E. 640."

There was a concurrent finding of the trial judge and the court of civil appeals that the defendant Bank did not know of the alleged dangerous method of handling the rivets. The plaintiff neither alleged nor proved what precautions could have been taken that would have prevented the injury. It is urged that the rivets should not have been thrown and caught in the manner shown; that they were liable to be missed in catching, and fall into the street. Yet plaintiff has failed to prove that a single rivet had ever previously fallen into the street, or in such a manner as would likely endanger one using the street. How could the owner be held to have anticipated what had never happened before? The negligence complained of

Master and servant—
independent contractor—
liability of owner—incidents of work.

was but a mere detail of the work that could not have been foreseen or forestalled by the owner. It did not necessarily follow the execution of the work contracted for. It was not a necessary detail of the work.

We think Judge Moore has been done an injustice in the copying of his opinion, where he is purported to have said that this was merely one of the details necessary to be performed in the execution of this contract. We think that he intended to say not necessary, because this statement is not in accord with the remainder of his opinion.

It was insisted by learned counsel for the plaintiff that the Bank realized that the work was intrinsically dangerous because it took a bond from the engineering company for the faithful performance of the work and to protect it from the results of injuries to other persons, and for that reason it

—taking bond from contractor—
—effect.

should be held liable. This does not in any way affect the liability. We

quote the following, appearing on page 506 of 65 L.R.A., under the annotated case of *Central Coal & I. Co. v. Grider*: "It is well settled that the fact of the contractor's having undertaken, as between himself and the employer, to be responsible for injuries occasioned by any tortious conduct, on the part of himself and his servants, does not in any way affect or qualify the position of third parties in regard to the recovery of damages from the employer. Such a stipulation inures to the benefit of the employer alone, and confers no right of action upon anyone else. *French v. Vix* (1894) 143 N. Y. 90, 37 N. E. 612; *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N. Y. Supp. 236."

See also *Salliotte v. King Bridge Co.* 65 L.R.A. 620, 58 C. C. A. 466,

122 Fed. 378,—an opinion by Judge Lurton.

We are clearly of opinion that the circuit judge and the Court of Civil Appeals were correct, and, the writ of certiorari having heretofore been granted, the action of said courts is in all things affirmed.

NOTE.

The general rule which relieves an employer from liability for injuries caused by the torts of an independent contractor is the subject of the annotation following *PRESS v. PENNY*, post, 801.

As to acts productive of transitory occurrences, in connection with work performed with respect to a building, injuring a person on the adjacent highway, see subd. IV. c, 13 (b).

OTTO PRESS, Respt.,

v.

ALEXANDER PENNY et al., Appts.

Missouri Supreme Court — February 29, 1912.

(242 Mo. 98, 145 S. W. 458.)

Master — removal of sign — independent contractor — injury to pedestrian — liability.

1. The removal of a sign from a building standing flush with the sidewalk is not so inherently dangerous that the property owner cannot relieve himself from liability for injury negligently inflicted by workmen upon persons passing along the street, by letting the work to an independent contractor.

[See note on this question beginning on page 801.]

Highway — placing ladder on sidewalk — nuisance.

2. The placing by an abutting owner of a ladder upon the sidewalk, to enable him to reach a sign on the

front of the building, is not a nuisance which will render him liable for injury which may thereby result to a person passing along the walk.

[See 13 R. C. L. 211.]

CERTIFICATION by the St. Louis Court of Appeals for the opinion of the Supreme Court after reversing a judgment of the Circuit Court of the City of St. Louis (Allen, J.), of questions which arose upon appeal by defendants from a judgment of that court in plaintiff's favor, in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

Statement by Brown, C.:

This cause is certified to this court from the St. Louis court of appeals, because one of the judges of that court, sitting therein, deems its decision contrary to the decision of this court in the case of *Loth v. Columbia Theater Co.* 197 Mo. 328, 94 S. W. 847. The opinion of the St. Louis court of appeals, as well as the dissenting opinion of Norton, J., in *Press v. Penny & Gentles*, is found in 134 Mo. App. 121, 114 S. W. 74, and following. The judgment at the trial was for the plaintiff. It was reversed by the decision of the court of appeals.

The action is for damages suffered by plaintiff on account of personal injuries. The defendants were partners, doing a large retail dry goods business in a building of which they were tenants in possession, situated at the southwest corner of Washington avenue and Broadway, two of the most traveled streets in the city of St. Louis. Scott & Wolff Painting Company had a contract to paint, put up, and remove all signs used by them. At the time of the accident, January 12, 1907, there was a muslin sign, stretched on a wooden frame, about 12 feet long and 5 feet wide, tacked over the water table above the first story of the defendants' building, on which was painted some advertisement relating to their business. It having served its purpose, they had telephoned the Scott & Wolff Painting Company to take it down. The company sent two men for that purpose with two ladders, one of them 14 feet and the other 16 feet in length, which they set up against the building, so that they stood on the sidewalk about 5 feet from the wall, and went up to draw the nails from the sign, so that it could be handed down. One of the men, in extracting a nail, misjudged the amount of force necessary for that purpose, and the nail unexpectedly gave way, causing him to lose his balance, and he fell upon the plaintiff, who was then passing along the sidewalk, near the foot of the lad-

der, inflicting the injuries for which this suit is brought. The method adopted for removing the sign, by the use of the ladder resting upon the sidewalk, was a usual one.

The petition upon which the case was tried contains two counts upon the same injury. The first alleges that the ladder was, by the men working upon it, negligently permitted to fall, and that either the ladder or the man who was working on it fell onto and against the plaintiff. The second count charges that the "use of said street and sidewalk by the defendants, under the circumstances mentioned, was negligent and wrongful, and constituted a nuisance, and that it was defendants' duty to have protected plaintiff in his rightful use of said public sidewalk at the time in question, and that by reason of such negligent and wrongful use of the public sidewalk and street, and the breach of said duty by the defendants at the time and place in question, plaintiff sustained the injuries mentioned." The trial court, being very properly of the opinion that, upon the facts stated, there was no question to submit to the jury other than the assessment of damages, peremptorily instructed them that their finding must be for the plaintiff and against the defendants. The propriety of this instruction and the refusal of a peremptory instruction in their favor, asked by defendants, fully present the only questions in the case.

Messrs. Watts, Williams, & Dines, William R. Gentry, and James P. McBaine, for appellants:

The defendants are not liable for the acts of Rule, even if the court should find that Rule's negligence injured the plaintiff. Rule was employed by an independent contractor, and the defendants had no control whatever over him.

Independence v. Slack, 134 Mo. 66, 34 S. W. 1094; *Loth v. Columbia Theater Co.* 197 Mo. 354, 94 S. W. 847; *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562, 13 Am. Neg. Rep. 616; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W.

1077; *Williamson v. Fischer*, 50 Mo. 198; *Horner v. Nicholson*, 56 Mo. 220; *Benjamin v. Metropolitan Street R. Co.* 133 Mo. 274, 34 S. W. 590; *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *Strauss v. Louisville*, 108 Ky. 155, 55 S. W. 1075; *McCarthy v. Second Parish*, 71 Me. 318, 36 Am. Rep. 320; *Reedie v. London & N. W. R. Co.* 4 Exch. 244, 154 Eng. Reprint, 1201, 6 Eng. Ry. & C. Cas. 184, 20 L. J. Exch. N. S. 65, 19 Eng. Rul. Cas. 168; *Forstyth v. Hooper*, 11 Allen, 419; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Johnson v. Helbing*, 6 Cal. App. 424, 92 Pac. 360; *Geist v. Rothschild*, 90 Ill. App. 324; *Boomer v. Wilbur*, 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246; *Smith v. Milwaukee Builders' & T. Exch.* 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; *Symons v. Allegany County*, 105 Md. 254, 65 Atl. 1067; *DeForrest v. Wright*, 2 Mich. 368; *McNulty v. Ludwig*, 125 App. Div. 291, 109 N. Y. Supp. 703; *Massey v. Oates*, 143 Ala. 248, 39 So. 142; *Neumeister v. Eggers*, 29 App. Div. 385, 51 N. Y. Supp. 481; *Francis v. Johnson*, 127 Iowa, 391, 101 N. W. 878, 17 Am. Neg. Rep. 507; *Sanford v. Pawtucket Street R. Co.* 19 R. I. 537, 33 L.R.A. 564, 35 Atl. 67; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334.

Mr. Percy Werner and A. C. Dobie, for respondent:

The rule that one employing an independent contractor is not himself liable for an injury to a third person is subject to the qualification that the work which the independent contractor is to do is neither unlawful in itself nor dangerous to others.

Independence v. Slack, 134 Mo. 75, 34 S. W. 1094; *Peters v. St. Louis & S. F. R. Co.* 150 Mo. App. 721, 131 S. W. 921; *Thomp. Neg. § 621*; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421.

Defendant was liable for injuries caused by the servants of the Scott & Wolf Painting Company in removing the sign from in front of the building in question.

Loth v. Columbia Theater Co. 197 Mo. 328, 94 S. W. 847; *O'Hara v. Laclede Gaslight Co.* 131 Mo. App. 428, 110 S. W. 644; *French v. Boston Coal Co.* 195 Mass. 334, 11 L.R.A.(N.S.) 993, 122 Am. St. Rep. 257, 81 N. E. 265; *McHarge v. Newcomer*, 117 Tenn. 595, 9 L.R.A.(N.S.) 298, 100 S. W.

700; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 76 Am. St. Rep. 375, 55 N. E. 618, 7 Am. Neg. Rep. 154.

It being necessary to place the ladders on a public sidewalk in the busiest part of the city, defendants' contract with the painting company was to do that which was not only dangerous to the public, but also unlawful.

Pollock, Torts, Webb's Am. ed. 624; *Ellis v. Sheffield Gas Consumers Co.* 2 El. & Bl. 767, 118 Eng. Reprint, 955, 2 C. L. R. 249, 23 L. J. Q. B. N. S. 42, 18 Jur. 146, 2 Week. Rep. 19, 19 Eng. Rul. Cas. 180; 2 *Cooley, Torts*, 3d ed. 1088-93; 16 Am. & Eng. Enc. Law, 2d ed. 196, 197; *Houghton v. Loma Prieta Lumber Co.* 152 Cal. 500, 14 L.R.A. (N.S.) 913, 93 Pac. 82, 14 Ann. Cas. 1159; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 574, 21 L. ed. 485, 488.

Setting up two ladders on a sidewalk in midday on a busy thoroughfare, and allowing two men to mount these ladders and attempt to handle a large, cumbersome, unwieldy, muslin sign, in windy weather, constituted a nuisance.

Waller v. Ross, 100 Minn. 7, 12 L.R.A.(N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 10 Ann. Cas. 715, 21 Am. Neg. Rep. 166.

Brown, C., filed the following opinion:

The plaintiff, in the two counts of his petition, presents two separate phases, upon either of which he might predicate his right to recover: (1) Negligence of the workman who fell upon him in causing the ladder to fall; and (2) negligence of the defendants in causing or permitting the work in question to be done in the time and manner indicated in the statement. We will for convenience present these questions in inverse order to that in which we have stated them.

1. It being admitted that "the work of removing the sign necessitated the occupancy of the sidewalk with ladders," the question is presented whether or not the defendants, in directing the work to be done, violated or infringed upon any right of the plaintiff as a traveler upon the street. The abutting proprietor has a right in the use of

the street entirely distinct from that of the public. This is usually denominated "the easement of access," and constitutes the real foundation and consideration for those special burdens imposed upon them for the construction and improvement of such highways. This right is as much property as the land to which it pertains, and the legislature can no more deprive a man of one than the other without compensation. *Lackland v. North Missouri R. Co.* 31 Mo. 180. It has its foundation in a universal necessity; for of what public benefit would highways be, unless in connection with the right of ingress and egress for the purpose of the traffic for which they are designed? It is true that the exercise of this right is, like the exercise of the right of the public to travel on the same highways, subject to the reasonable control of the legislature, applied either directly or through its municipal agencies; but each of these rights is subject to those modifications and restrictions necessary to the exercise of the other. Judge Dillon, in his excellent work on *Municipal Corporations*, 4th ed. § 730, says: "But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. . . . Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no absolute necessity; it suffices that the necessity is a reasonable one." This passage is quoted with approval by this court in *Gerdes v. Christopher*

& S. Architectural Iron & Foundry Co. 124 Mo. 347, 354, 25 S. W. 557, 27 S. W. 615, and *Corby v. Chicago, R. I. & P. R. Co.* 150 Mo. 457, 467, 52 S. W. 282.

There is no more useful purpose to which a street may be put, in behalf of the abutting proprietor, than that which contributes to the growth and material development of the communities which it serves. While the public requires and demands the best facilities for travel, the necessity for these facilities is founded largely in the material growth and prosperity of the communities which maintain them. For this reason, it has always been considered that the abutting proprietor was of right entitled not only to transfer his materials for improving his premises from the street, but to hold it on the street or sidewalk for a reasonable time to enable it to be transferred directly to his structures. *John A. Tolman & Co. v. Chicago*, 240 Ill. 275, 24 L.R.A. (N.S.) 97, 88 N. E. 488, 16 Ann. Cas. 142, and cases cited. The two classes of rights being co-existent, each must be exercised with reference to the existence of the other. In this case, the use in question was one directly arising from the prudent and profitable use of the premises. The evidence does not show that any special or peculiar danger was connected with it. That an accident resulted in this case is perfectly true; but if that alone constitutes evidence of the dangerous character of the work, that question would cease to be an element in any judicial controversy of this character, because the happening of the accident would furnish the rule for its determination. We must hold, then, that there was nothing in the character of the work out of which this accident grew, or in the character of the place in which it was being done, that fixed upon the defendants liability on account of any accident growing out of its proper performance.

Highway—
placing ladder
on sidewalk—
nuisance.

2. It is stipulated by the parties, for the purposes of the trial and determination of this case, that the muslin sign, which was being removed from the front of the defendants' store at the time and place of the accident, belonged to them, and was being removed on their behalf by the Scott & Wolff Painting Company, which had a contract to paint, put up, and remove all signs used by the defendants. This evidently means that with reference to this work the painting company was an independent contractor, employing its own servants and doing the work in its own way, being bound to the defendants only for the result, and that the servants engaged in the work were not the servants of defendants, and that therefore the rule respondeat superior does not apply between them, unless there is something in the circumstances of this case to take it out of the general and well-established rule. We have seen that in contracting to have this work done the defendants were clearly within their rights, because the use to which the street would be put in the proper performance of the contract was one to which it was lawfully subject, and was not particularly dangerous in its character.

The plaintiff, however, insists that there is something in its nature which calls for the personal supervision of the owner for whose benefit it is being done, so that he cannot relieve himself of personal responsibility for the acts of workmen with whom he has no contract relation whatever. This principle, carried to its logical conclusion, would probably extend to all classes of work involving the use of the streets, and we should be slow to adopt it, unless under the compelling influence of a settled judicial policy of our own state.

It is true that an owner who contracts for the creation of a condition on his own property which is dangerous to third persons will be liable for injuries resulting therefrom; for it is evident that one has

no more right by contract to set traps for his neighbors, than to set them with his own hand. Therefore one who digs or causes to be dug upon his own premises a pitfall, so near to the street that travelers, in the exercise of their right to pass along it, are liable to fall in and be injured, must take care at his own peril to see that it is protected. This he may do personally or by contract, as best suits his convenience; if by contract, however, he is still responsible for the result. But if the contractor, while building a fence to protect it, should carelessly throw a stick or board upon a passer-by, or negligently fall upon him himself, the owner would not be liable for a resulting injury, because it would not be caused by the pitfall, nor by the contract to protect it, but by a collateral act, done in performance of a contract which does not contemplate, and gives no sanction to, carelessness.

This principle, with its limitations, is well illustrated by the late Massachusetts case of *Davis v. John L. Whiting & Son Co.* 201 Mass. 91, ante, 782, 87 N. E. 199. In that case the defendant, who, like these defendants, was the owner of a large store, contracted with a painter to paint the iron shutters. In the doing of this job, a light ladder scaffold was used, and while this was being raised by tackle, hung from the cornice, it came in contact with the bottom of a shutter, which had been carelessly left open, and raised it off its hinges, so that it fell upon the plaintiff, a passer-by in the street. This case, in its facts, as well as in the principles involved, bore a striking resemblance to the one we are considering. On the trial, the following question was asked the jury and answered by them affirmatively in the verdict: "Was the work of painting the shutters . . . necessarily attended with danger to persons passing along Belcher lane?" There was a verdict for the plaintiff, and in its opinion reversing it the supreme judicial court said: "If the question

meant, 'Was there such risk of accident from the probable negligence or want of skill of some of the workmen as necessarily to involve an appreciable danger of injury to persons passing below?' there was evidence to warrant the finding. But the finding of this fact would not create a liability on the part of the defendant." Referring to the same line of Massachusetts cases cited in the plaintiff's brief in this case, the court said: "It seems that the danger which the jury were permitted to find sufficient to create a liability on the part of this defendant was that which is incident to doing difficult work, where an injury may result from the lack of the exercise of skill and care, or even from pure accident. This is a different kind of danger from that which was made a ground of recovery in the cases above cited." The light shed by this opinion upon the very question we are now considering will have to be our excuse for quoting a synopsis of the decision upon this point, from the syllabus, as follows: "Where the owner of a building, who employed an independent contractor to paint the shutters thereon, had no right to, and did not, exercise control over the contractor, the mere fact that the probable negligence or want of skill of the workmen might result in injury to persons passing below, by the falling of the shutters, did not render the owner liable for injuries so received, as the danger did not come from the condition of the property, or the use to which it must necessarily be put in doing the work, but from the unskilful and negligent act of the contractor and his servants."

One phase of this question is illustrated by the decision of this court in *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528. A traveler fell into an unprotected excavation along the margin of the street, which had been dug as a cellar by a contractor, in the performance of a contract to erect a building for the owner. This court reversed a judgment, founded on a directed

verdict for the owner, on the sole ground that her contract required the contractor to dig a cellar in that place, and that, having caused the dangerous condition, the duty was upon her to protect it. In *Independence v. Slack*, 134 Mo. 66, 34 S. W. 1094, the other phase of the same question is illustrated. In that case, also, there was a directed verdict for the owners, the judgment upon which was sustained by this court. They were engaged in the construction of buildings abutting on the street, and of a stone sidewalk on the street in front of the building, and had made an excavation and prepared the street for laying the sidewalk. The excavation was guarded, so as to prevent persons from falling therein, and large stones were brought for use in the construction of the sidewalk. For the purpose of fitting and dressing these stones, they were placed upon the street, leaving a passway 3 or 4 feet wide between them and the curbing, where they remained for two weeks or more. The owners had contracts with one Stewart to furnish the stones and construct the sidewalks in front of their respective buildings. In holding that the owners were not liable, this court said: "There are some old English cases which hold generally and broadly that 'the person from whom the whole authority is originally derived is the person who ought to be answerable,' whether the person who did the work was the servant or an independent contractor of the employer. *Bush v. Steinman*, 1 Bos. & P. 404, 126 Eng. Reprint, 978. This rule was followed for a time in Massachusetts. *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33. But it is now well settled in this country, as well as in England, as a general rule, that one person is only liable for the act or negligence of another when the relation of master and servant exists between them. 1 Beven, Neg. 2d ed. pp. 718 et seq. The facts bring this case within no recognized exception to this rule."

The general rule, together with exceptions to its universal application, is well illustrated by the three cases from which we have already quoted. These so-called exceptions, it will be noted, refer to cases in which a primary duty rests upon the owner which he fails to perform. The foundation of *his* liability is his own failure to perform this duty, and not the negligence of the independent contractor or his servants. Different aspects of the same question are also interestingly discussed in the following cases: *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Benjamin v. Metropolitan Street R. Co.* 133 Mo. 274, 34 S. W. 590; *Williamson v. Fischer*, 50 Mo. 198; *Richmond v. Sitterding*, 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562, 13 Am. Neg. Rep. 616; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755.

Holding, then, as we do, that the use to which the street was being put in removing the sign in question was a lawful one, founded upon the easement of access incident to the

Master—
removal of sign
—independent
contractor—
injury to
pedestrian—
liability.

abutting property, it necessarily follows that such use and the general use of the public are mutual and interdependent. Had the plaintiff negligently knocked down the ladder and thus injured the man working on it, he would have been liable to respond in damages for the injury; and we can see no reason why a distinction should be made with respect to such liability, other than that arising from the applicability in this case of the doctrine respondent superior, because the injury arose from the act of a servant of the Scott & Wolff Painting Company in the performance of the work for his master. If the doctrine contended for by plaintiff is to be followed in this case, it will logically lead to the liability of the tenant for any accident that may happen through the negligence of the

driver in delivering a load of coal into his premises, although it may have been purchased for delivery at that place.

We do not think *Loth v. Columbia Theater Company*, 197 Mo. 328, 94 S. W. 847, is an authority against the view we have taken. The judgment against the defendant in that case was reversed, and the case remanded by this court, on the sole ground that it had been submitted upon the theory that the electric sign there in question was a nuisance per se, when in fact and in law it was not. It is true that the court, in its opinion, stated that under the pleadings and evidence the defendant would, had the case been properly submitted upon that issue, have been liable; but this statement was founded upon the record in that case, and should be disregarded in this.

It follows that upon the stipulation in this case the finding and judgment of the trial court should have been for the defendants; and its judgment for the plaintiff is accordingly reversed, and the decision of the St. Louis Court of Appeals affirmed.

Bond, C., concurs in the result for the sole reason that the work in question is not such as is ordinarily "attended with danger;" and hence the owner incurred no liability by letting it to a competent contractor.

Per Curiam:

The foregoing opinion of **Brown, C.**, is adopted as the opinion of the court.

All the Judges concur.

Woodson, J., concurring:

I concur with the opinion in this case for two additional reasons to those stated therein: First, because the record fails to show that the respondent was injured in consequence of negligence on the part of anyone. His injuries were the result of an accident, pure and simple (*Zeis v. St. Louis Brewing Asso.* 205 Mo. 638, 104 S. W. 99); and, second, even though it be conceded

that his injury was the result of negligently pulling the nail, yet it cannot be said that the appellants or the contractors could have reasonably foreseen the result thereof; namely, that the employee pulling the nail would fall from the ladder

and upon the respondent. If the result could not have been reasonably foreseen, then there is no liability. *Ibid.*; *Dean v. Kansas City, St. L. & C. R. Co.* 199 Mo. 386, 97 S. W. 910. Petition for rehearing denied March 29, 1912.

ANNOTATION.

Nonliability of an employer in respect of injuries caused by the torts of an independent contractor.

I. Doctrine applied in common-law jurisdictions:

- § 1. Various forms in which the doctrine has been enunciated, 802.
- § 2. Same subject further considered, 804.
- § 3. Rationale of the doctrine, 806.
- § 4. Qualifications of the doctrine, 810.
- § 5. Applicability of doctrine as regards torts of sub-contractors, 810.
- § 6. Extent of the employer's duty with respect to the supervision and control of work intrusted to an independent contractor, 811.
- § 7. Extent of employer's duty to guard against possible accidents, 816.
- § 8. Invalidity of contract, effect of, 818.
- § 9. Stipulation obligating the contractor to indemnify the employer, 820.
- § 10. Stipulation forbidding the use of the employer's name by the contractor, 820.
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II. Evolution of the common-law doctrine:

- § 12. Effect of the English case, *Bush v. Steinman*, 821.
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III.—continued.

- § 17. Scotland, 838.
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IV. Torts of contractors for which employers are not answerable:

- § 20. Introductory, 839.

a. Acts productive of more or less permanent conditions injurious to persons:

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IV. b—continued.

- § 27. Work performed with respect to a building, 851
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- c. Acts productive of transitory occurrences injurious to persons or property:
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 - (a) Injuries to persons in the building, 857.
 - (b) Injuries to persons on adjacent highway, 857.

I. *Doctrine applied in common-law jurisdictions.*§ 1. *Various forms in which the doctrine has been enunciated.*

In some of the judicial statements embodying the doctrine as to the nonliability of an employer for injuries resulting from the tortious acts of an independent contractor, it is

¹ "If, in rendering the service, the person whose negligence caused the injury was in the course of accomplishing a given end for his employer, by means and methods over which the latter had no control, but which were subject to the exclusive control of the person employed, then such person was exercising an independent employment, and the employer is not liable." *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296.

"It seems to be settled law that where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." *Vincennes Water Supply Co. v. White* (1890) 124 Ind. 376, 24 N. E. 747,

IV. c—continued.

- (c) Injuries to property on adjacent premises, 858.
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- d. Acts constituting a trespass as regards the property of third persons:
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 - § 36. Work with respect to a building, 863.
 - § 37. Work performed on a highway:
 - (a) Employer a private party, 863.
 - (b) Employer a municipal corporation, 863.

enunciated in the general form exemplified in the passages quoted below.¹

The particular conception reflected in other statements is that, in any case in which the injury complained of is shown to have been occasioned by the act of an independent contractor, a situation is presented which excludes the application both of the principle

quoted in *Marion Shoe Co. v. Eppley* (1914) 181 Ind. 219, 104 N. E. 65, Ann. Cas. 1916D, 220.

"Where the agreement provides for a result to be accomplished by the employee, and leaves to the employee the means and methods by which the result is to be accomplished, then the relation is that of employer and contractor, and not that of master and servant. Where the arrangement is that some person, representing the owner or architect, is simply to give directions as to the work to be done, and is not to give, or has no authority to give, directions as to the manner in which it should be performed, or as to the means to be used in performing it, then the owner would not be liable for injury resulting from the method of its performance, as there would be no relation of master and servant." *Prest-O-Lite Co. v. Skeel* (1914) 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724.

which is embodied in the maxim, "qui facit per alium facit per se,"² and of the principle which is embodied in the maxim "respondeat superior."³

The rule is "that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former." *De Forrest v. Wright* (1852) 2 Mich. 368, adopted in *Pickens v. Diecker* (1871) 21 Ohio St. 212, 8 Am. Rep. 53.

"The general principle to be extracted from them [i. e., the authorities] is that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exists between them; that, when an injury is done by a party exercising an independent employment, the party employing him is not responsible to the person injured." *Painter v. Pittsburgh* (1863) 46 Pa. 213.

² *Quarman v. Burnett* (1840) 6 Mees. & W. 509, 151 Eng. Reprint, 513, 9 L. J. Exch. N. S. 308, 4 Jur. 969, per Parke, B.; *Wiswall v. Brinson* (1849) 32 N. C. (10 Ired. L.) 554.

The following remarks in a Scotch case are noteworthy in this connection: "The most general rule is 'culpa tenet suos auctores,' which is a rule deeply founded in justice, that he who is in fault should alone be liable for the consequences. But then there has been clearly established an exception to this general rule, indicated by the maxims 'qui facit per alium facit per se,' and 'respondeat superior,' . . . In order to the application of the exception, there must be such a dependence of the one party on the other as amounts to such a control as a master has over his servant. No such control exists between a contractor and his employer. This comparative independence, whilst it excludes the exception, by relieving the employer, brings into play the general rule. The contractor has an independent character, and is answerable for his own or his own servant's fault. There is a limitation on the exception thus established,—a limitation of a very artificial kind,—namely, that the master shall not be answerable when the party injured is a fellow servant engaged in common employment with

The phraseology of other statements directs attention to the fact that the employer's immunity is predicated only in respect of these acts of an in-

the party in fault." Lord Glenholme in *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282.

³ "The rule of respondeat superior does not apply where the party employed to do the work in the course of which the injury occurs is a contractor, pursuing an independent employment, and by the terms of the contract is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done." *Deford v. State* (1868) 30 Md. 179.

"The only principle upon which one man can be made liable for the wrongful acts of another is that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is 'respondeat superior.' It is only applicable in cases where the party sought to be charged stands in the relation of superior to the person whose wrongful act is the ground of complaint." *Blackwell v. Wiswall* (1855) 24 Barb. (N. Y.) 355.

"This rule [i. e., 'respondeat superior'] does not apply, and the liability does not exist, where it can be shown that those engaged in executing the work, and by whose carelessness or want of skill the injury was occasioned, are not the servants or subordinates of him for whose use and benefit the work is being performed, but are acting under a contract or employment which leaves the contractor or employee free to exercise his own judgment as to the means and assistants to be employed in accomplishing the work, without being subject to control in these respects by the party for whom the work is being done." *McCamus v. Citizens' Gas-light Co.* (1863) 40 Barb. (N. Y.) 380.

Similar phraseology is found in *Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 542; *Bibb v. Norfolk & W. R. Co.* (1891) 87 Va. 711, 14 S. E. 163; *Cincinnati v. Stone* (1855) 5 Ohio St. 38; *Du Pratt v. Lick* (1869) 38 Cal. 691, and *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

dependent contractor which are "collateral" or "casual" in their nature.⁴

Other statements include a specific reference to one or more of the various exceptions to which the doctrine is subject.⁵

The common-law doctrine has been embodied in Georgia Civil Code 1911, § 4414 (3818) by which it is provided: The employer generally is not re-

sponsible for torts committed by his employee when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer.

§ 2. Same subject further considered.

The doctrine is ordinarily enunciated in one or other of the forms specified in the preceding section. But

⁴ "No one can be made liable for an act or breach of duty, unless it be traceable to himself, or his servant or servants, in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable." *Pickard v. Smith* (1861) 10 C. B. N. S. 470, 142 Eng. Reprint, 535.

⁵ In *Bower v. Peate* (1876) L. R. 1 Q. B. Div. (Eng.) 321, Cockburn, Ch. J., referred to the general rule "that when a person employs a contractor to do a work lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor, and not the employer, is liable."

"It is now settled in that country [i. e., England] that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal." *Painter v. Pittsburgh* (1863) 46 Pa. 213; *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

The doctrine as to the nonliability of an employer for the acts of an independent contractor "has regard to cases where the contract is entirely lawful, and where the owner of the property upon which the contract is to be executed, can lawfully commit its performance to others." *Allen v. Willard* (1868) 57 Pa. 374.

"Where work which does not necessarily create a nuisance, but is in itself harmless and lawful when carefully conducted, is let by an employer who merely prescribes the end, to another who undertakes to accomplish

the end prescribed by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If, during the progress of the work, a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answerable." *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296.

"When a contractor takes entire control of a work, the employer having no right of supervision or interference, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it." *Lancaster Ave. Improv. Co. v. Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

"If damage result from the manner in which a contractor chooses to execute a perfectly valid contract, without the proprietor's interference or direction, the latter is not responsible." *Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

"It is well settled that where the independent contractor and the contractee contract for the performance of work that is lawful in itself, and the work is performed in an unlawful manner, either by the wrongful or negligent execution of the work, and resulting in injury to others, the contractee is not liable in damages to such persons for the injury." *James v. McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435.

"The great weight of the modern decisions upon this question establishes the rule that where the relation of independent contractor exists as to the use of real property, and the party employed is skilled in the performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting, not from the fact that the

for the purpose of further elucidating the subject, it will be advisable to draw attention to some others, viz.:

1. Those in which the broad principle that a person is "liable for the act which he ultimately originates" is viewed as being subject to an exception in respect of cases in which "the person by whom the act is done is an independent contractor."¹

2. Those which reflect the notion

work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages." *Robinson v. Webb* (1875) 11 Bush (Ky.) 464.

"If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work." *Bailey v. Troy & B. R. Co.* (1883) 57 Vt. 252, 52 Am. Rep. 129.

"The employer is not liable either for the fault or for the negligence of the independent contractor, unless he expressly directed the wrongful or improper act." *Lord Gifford in Stephens v. Thurso Police Comrs.* (1876) 3 Sc. Sess. Cas. 4th series, 535.

Where parties enter into a contract which is in itself lawful, and the contractor, in carrying on his work, does anything injurious to another, he alone is responsible. *Woodhill v. Great Western R. Co.* (1855) 4 U. C. C. P. 449.

"The general rule is that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods and without his being subject to control except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work." 1 *Thomp. Neg.* 1st ed. § 22, p. 899, 2d ed. § 621, quoted or cited with approval in several cases, e. g., *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376.

"Where the contract is for something that may lawfully be done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in

that the doctrine constitutes one phase of a broader principle, the essence of which is that, where a person procures work to be done for his own benefit, his duty with regard to protecting other persons against injury from conditions supervening by reason of the performance of the work is restricted to the exercise of reasonable care in selecting the persons to whom he intrusts it."

respect to it, and no general control reserved, either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence." *Cooley, Torts*, 2d ed. p. 646, 3d ed. p. 1092—quoted in *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663, and in *Craft v. Albemarle Timber Co.* (1903) 132 N. C. 158, 43 S. E. 597.

Under the plea of the general issue alone, there is no error in charging to the effect that "where one has a lawful work to do, and employs another, who has an independent business of his own including work of that class, to do it, and where the employer does not himself exercise any direction as to how it shall be done, he is not responsible for any wrongs that the employee may commit in the course of the work." *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320.

¹ See remarks of *Williams, J.*, in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 113 Eng. Reprint, 993, 4 *Perry & D.* 714, 10 L. J. Q. B. N. S. 19.

² In *Walton v. Bryn Mawr Hotel Co.* (1894) 160 Pa. 3, 28 Atl. 438, where the plaintiff was injured while working as a carpenter on a building then in course of erection, his claim for compensation was disallowed on the ground that "the case comes clearly within the principle, settled in many cases, that one who is erecting a building or other structure is not liable for accidents happening in the course of the erection, if he exercises ordinary care in selecting competent persons to do the work." Three of the cases cited in support of this statement pro-

3. Those in which the phraseology is expressive of the proposition that the servants of an independent contractor are not the servants of the principal employer in such a sense as to render him responsible for their acts.³ The practical importance of this form of statement is apparent from the fact that, in nearly all the cases in which the doctrine under discussion has been invoked as a defense, the actual tortfeasors were servants of the party alleged to be an independent contractor. The liability of the principal employer becomes, of course, a necessary conclusion whenever the evidence shows that the injury complained of

was occasioned by the negligence of his own servant or agent,⁴ or that the relationship of master and servant existed between him and the tortfeasor at the time when the tort was committed.⁵ On the other hand, the contractee cannot be held liable for a tort committed by his servant while temporarily under the control and direction of the contractor.⁶

§ 3. Rationale of the doctrine.

The doctrine enunciated in the preceding sections is frequently put upon the ground that the characteristic incident of the relation created by an

ceeded upon the doctrine concerning the nonliability of an employer for the negligence of an independent contractor: *Mansfield Coal Co. v. McEnery* (1879) 91 Pa. 185, 36 Am. Rep. 662; *Walden v. Finch* (1872) 70 Pa. 460; *Ardesco Oil Co. v. Gilson* (1869) 63 Pa. 146, 10 Mor. Min. Rep. 669.

³"If the general employer enters into a contract to do the work of another as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence." *Hartell v. T. H. Simonson & Son Co.* (1916) 218 N. Y. 345, 113 N. E. 255, reversing (1914) 164 App. Div. 873, 148 N. Y. Supp. 433.

"A master is liable for the negligence of his servant engaged in his business, because he selects his servant and controls him. He should not be answerable for acts done by the servant of another, or by that other, who is not subject to his control." *Abbott v. Sumter Lumber Co.* (1912) 93 S. C. 131, 76 S. E. 146.

For other authorities illustrative of the same point of view, see *Burke v. Norwich & W. R. Co.* (1867) 34 Conn. 474, 13 Am. Neg. Cas. 662 (the rationale of which was that the plaintiff, a servant of an independent contractor employed by the defendant, was not a fellow servant of the defendant's servants); *Hooe v. Boston & N. Street R. Co.* (1904) 187 Mass. 67, 72 N. E. 341; *Healey v. American Tool & Mach. Co.* (1915) 220 Mass. 238, 107 N. E. 977; and the cases cited *passim* in *Labatt's Master & Servant*, §§ 34 & 39.

⁴See, for example, *Philadelphia & H. DeG. Steam Tow-Boat Co. v. Philadelphia, W. & B. R. Co.* (1857) Fed.

Cas. No. 11,085 (ship collided with "sight pile" placed in river by engineers of principal employer); *Flori v. Dolph* (1917) — Mo. —, 192 S. W. 949 (servant of company engaged to repair elevator injured by negligence of operator in employ of owner of building).

⁵*Harmon v. Ferguson Contracting Co.* (1912) 159 N. C. 22, 74 S. E. 632 (where the liability of the defendant for an injury occasioned to one servant of the contractor by the negligence of another was predicated—with reference to a statute abolishing the fellow-servant rule—on the ground that the contractor had been engaged on terms which rendered him a servant of the defendant); *Nelson v. American Cement Plaster Co.* (1911) 84 Kan. 797, 115 Pac. 578 (where it was laid down that "the mere fact of nominal employment by an independent contractor will not relieve the master [i. e., principal employer] of liability, where the servant is in fact in his employ"). The Kansas case was cited in *Dibert v. Giebisch* (1914) 74 Or. 64, 144 Pac. 1184.

The situation adverted to in the text would clearly exist, also, in any case in which the tortfeasor was a person normally in the service of the contractor, but who was working under the control of the principal employer at the time when the act which caused the injury was done.

⁶*Arkansas Natural Gas Co. v. Gallagher* (1914) 111 Ark. 247, 163 S. W. 791, former appeal in (1912) 105 Ark. 477, 152 S. W. 147. For earlier cases involving this situation, see *Labatt, Mast. & S.* § 40.

independent contract is that the employer has not the power of controlling the person employed, in respect of the details of the stipulated work, and that it is a necessary juridical consequence of this situation that the former should not be answerable for an injury resulting from the manner in which those details may be carried out by the latter.¹

The doctrine has also been said to rest upon "the ground that a contractor, as between him and his employer, is responsible only for the fulfilment of his agreement, and pending the performance of the work is, to a certain extent, substituted for the party for whom the work is to be performed."² In this point of view, any mischief which may have resulted from the performance of the work

may be regarded as having been "done in the course, not of the employer's, but of the contractor's, business."³

The doctrine has also been referred to as an application of the general principle that, where an independent responsible cause is interposed between an alleged cause and the injury, the juridical connection between that alleged cause and the injury is broken.⁴

None of these explanations, however, is adequate for the purposes of a fundamental inquiry, since they presuppose that an affirmative answer should be given to what is really the ultimate question to be decided, viz., the permissibility of allowing one person to depute to another a particular piece of work, on terms which will have the effect of relieving the former

¹ The employer is not liable, "because he has employed an independent person, and has not retained any control over processes or details, or even interfered in any way with the work at any stage." Wills, J., in *Holliday v. National Teleph. Co.* [1899] 1 Q. B. (Eng.) 227.

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others, is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and if a principal cannot control his agent, he is not an agent, but holds some other or additional relation." *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352.

"The liability of one person for the negligent acts and omissions of another rests upon the relation of superior and subordinate as master and servant, and the consequent control which the superior has over the acts of the subordinate in the performance of his duties. There can be no liability, therefore, unless such relation and such right of control exist, either by force of the contract between the parties, or the duty to assume control is imposed, as a matter of law, by reason of some peculiar relation the person for whom the work is being performed bears to third persons, with respect to the time, place, and manner

of performance." *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N. W. 741.

"The liability of one person for damages arising from the negligence or misfeasance of another, on the principle of respondeat superior, is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract." *Cincinnati v. Stone* (1855) 5 Ohio St. 38.

"It seems to us that the doctrine would be productive of great wrong to hold that when owners of real estate, who contract with reliable, competent, and skilful builders, and deliver the premises into the actual exclusive possession of the contractors for a definite period, and when neither the contractors nor their servants are under the control of the owners, that they must be liable for all of the negligent acts of the contractors and their servants." *Scammon v. Chicago* (1861) 25 Ill. 424, 79 Am. Dec. 334.

² *Reynolds v. Braithwaite* (1889) 131 Pa. 416, 18 Atl. 1110.

³ See the remarks of Lord Denman in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 113 Eng. Reprint, 993, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19.

⁴ *Wharton, Neg.* § 482.

from the obligation of seeing that that work is executed with reasonable care and skill. It seems clear from the not very numerous authorities which bear directly upon this question that the real, and in fact only available, basis for the doctrine which declares such a delegation of functions to be, under

certain circumstances, allowable, is public policy.⁵ The juridical situation, therefore, would seem to be simply this: that the considerations of expediency which, according to what appears to be the most satisfactory theory, constitute the foundation of the rule which declares a master to be

⁵ In the opinion delivered by Parke, B., for the whole court in *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 151 Eng. Reprint, 509, we find this passage: "The liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person, entering into a contract with the master which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable recourse must be had to a different and more extended principle—namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Eyre, Ld. Ch. J., says in the case of *Bush v. Steinman* (1799) 1 Bos. & P. 404, 126 Eng. Reprint, 978, and cannot be maintained to its full extent without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common sense of all men:' not merely would the hirer of a post chaise, hackney coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street." The remark of Lord Tenterden here referred to was made in his judgment in *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 108 Eng. Reprint, 204, 8 Dowl. & R. 550, 4 L. J. K. B. 309.

In *Daniel v. Metropolitan R. Co.*

(1871) L. R. 5 H. L. 61, 18 Eng. Rul. Cas. 669, Lord Westbury made the following remarks: "It would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation . . . to interpose from time to time, in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons."

In *Wiswall v. Brinson* (1849) 32 N. C. (10 Ired. L.) 554, the nonliability of an employer for the torts of an independent contractor was said to constitute "an exception to the generality of the rule [i. e., 'qui facit per alium facit per se'] made necessary by public convenience and general usage, and when the reason of the rule does not so fully apply." The opinion then proceeds as follows: "When one enters a railroad car, the engineer and hands serve him, do work for him, carry him and his goods. But he is not liable for their negligence or want of skill. So far from it, the company is liable to him. This is an exception to the rule, for two reasons; he did not make the selection, and although in a large sense they are his servants, yet they are the servants of the company. It carries on a distinct, independent business, and is liable for their negligence or want of skill. The reason of the rule fails; and public convenience demands that the party injured should be content with his remedy against the company or the individual whose fault caused the injury. If passengers were liable, no one would travel upon railroads. This is the principle upon which the exception is based. It extends to an infinite variety of cases. The one given is 'ex grege'—it includes all who carry on independent trades or callings recog-

liable for the torts of his servant,⁶ are deemed to be inoperative, or to be superseded and overridden by other and antagonistic considerations of expediency, in some classes of cases where the person employed is exercising an independent business.⁷

It has been strongly intimated in a recent New York case that if a person is not competent to plan or carry out a piece of work, and yet attempts to do one of these things, he should be held responsible for an injury result-

nized as such by law or by common usage."

"To hold that a person is liable for all the damages resulting from the carelessness or negligence of all the servants or employees engaged in working for his benefit, although employed by contractors without his knowledge or consent, and without any right or ability on his part to control or discharge them, might ruin any man in the world." *Kellogg v. Payne* (1866) 21 Iowa, 575.

In *Painter v. Pittsburgh* (1863) 46 Pa. 213, the court reasoned thus: "The verdict determines that the fault was all that of the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither servants nor agents. They were in an independent employment. And sound policy demands that in such a case the contractor alone should be held liable. In making a sewer he has, necessarily, the temporary occupancy of the street in which the work is done, and it must be exclusive. His servants and agents are upon the ground, and he can more conveniently and certainly protect the public against injury from the work than can the officers of the municipal corporation. The public will be better protected if it be held that the contractor alone is responsible for his negligence, and that the city does not stand between him and any person injured. Thus he will be taught caution, while a sufferer by the negligence of his servants will not be compelled to resort for compensation to the insolvent servants." It must be admitted, however, that the presumption, entertained in this passage, that the protection of that part of the public which will be exposed to danger by the progress of a given piece of work will be more effectively secured by

ing from his having undertaken the charge of the work, and that it is his duty to devolve the planning and execution of the work upon persons possessing sufficient knowledge and skill to accomplish what is contemplated, without endangering the workmen and the public.⁸ Such a doctrine is doubtless in harmony with the general conception of legal negligence, as being "the absence of care according to the circumstances."⁹ But it cannot be said to supply an

casting the responsibility on the contractor, is far from being axiomatic in its nature. If the maximum of protection is the object to be considered, it is, to say the least, probable that this end will be better attained by imposing liability both upon the employer and the contractor. It seems clear, however, that the rule as to the nonliability of employers has been formulated rather with reference to their interests than with reference to those of possible sufferers from the torts of the contractors.

⁶See *Labatt, Mast. & S.* §§ 2248, 2249; *Gregory v. Hill* (1869) 8 Sc. Sess. Cas. 3d series, 282; *Farwell v. Boston & W. R. Corp.* (1842) 4 Met. (Mass.) 55, 38 Am. Dec. 339; *Chicago & N. W. R. Co. v. Moranda* (1879) 93 Ill. 314, 34 Am. Rep. 168; *Camp v. Church of St. Louis* (1852) 7 La. Ann. 321; *Coon v. Syracuse & U. R. Co.* (1849) 6 Barb. (N. Y.) 231; *Carman v. Steubenville & I. R. Co.* (1854) 4 Ohio St. 399; *Pollock's Essays in Jurisprudence*, p. 116.

⁷There would seem to be plausible grounds for arguing that the exemption of an employer from liability for the torts of a contractor should not be conceded without some restrictions, in a case where the contractor himself is domiciled in a foreign jurisdiction. The inconvenience which is sometimes caused by compelling injured persons to obtain redress by following the contractor into another state is a serious evil. But the matter is one which can be dealt with only by the legislature. See the remarks of the court in *Sanford v. Pawtucket Street R. Co.* (1896) 19 R. I. 537, 33 L.R.A. 564, 35 Atl. 67.

⁸*Burke v. Ireland* (1901) 166 N. Y. 305, 59 N. E. 914.

⁹*Vaughan v. Taff Vale R. Co.* (1860) 5 Hurlst. & N. 688, 157 Eng. Reprint, 355, 6 Jur. N. S. 899, 2 L. T. N. S. 394, 1 Eng. Rul. Cas. 296, 8 Week. Rep. 549, 29 L. J. Exch. N. S. 247, per Willes, J.

adequate reason for exempting the employer from liability for the torts of the person whom he engages to perform the work. The existence of an obligation to appoint a substitute under the supposed circumstances is by no means incompatible with the existence of an obligation to answer for the acts and omissions of that substitute.

§ 4. Qualifications of the doctrine.

The general doctrine manifestly affords no protection to the contractee, if it appears that the plaintiff's injury was sustained before the contract in question had been duly executed, and at a time when the work to which that contract had reference was being performed under the direction of the contractee.¹

In one case it was urged that the general doctrine is inapplicable where the employer is a corporation invested with the right of eminent domain. But this contention did not prevail.²

¹ *Hepburn v. Philadelphia* (1892) 149 Pa. 335, 24 Atl. 279.

² *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 320, 2 Atl. 404. The argument of counsel that the 8th section of the 16th article of the Pennsylvania Constitution of 1874 operated so as to create the alleged distinction between natural and artificial persons was held to be unsound, for the reason that the words "injured or destroyed," as found in that section, were not designed to change, alter, or limit the nature or effect of corporate contracts, but to impose upon those having the right of eminent domain a liability for consequential damages from which they had been previously exempt.

³ In *Planters' Oil Mill v. Monroe Waterworks & Light Co.* (1899) 52 La. Ann. 1243, 27 So. 684, it was held that where a city "has undertaken to provide a water supply . . . by a contract with a private company, and there is a failure on the part of the company to meet in full its obligations in this respect, and, because of this, loss by fire results to citizens, the city is not liable. And this is so, even though an annual tax be levied for the purpose."

In *Kilts v. Kent County* (1910) 162 Mich. 646, — A.L.R. —, 127 N. W.

The rule under which a municipal corporation is exempted from liability in respect of injuries resulting from tortious acts incidental to the performance of work which involves the exercise of its governmental functions has sometimes been relied upon as a ground for disallowing a claim founded on the negligence of an independent contractor intrusted with the execution of such work.³ In any case to which that rule is applicable, the question whether recovery could have been had, if it were not a determinative factor, is plainly immaterial.

§ 5. Applicability of doctrine as regards torts of subcontractors.

The doctrine explained in the preceding sections protects a principal contractor in any case where the sole cause of the injury complained of was the negligent or otherwise wrongful act of a subcontractor.¹ A fortiori is the employer of the principal con-

821, the board of supervisors of a county was held not to be liable for the negligence of a contractor engaged to construct a water tower on the county farm.

In *Sedalia Gaslight Co. v. Mercer* (1892) 48 Mo. App. 644 (construction of sewer), the authority cited was *Blumb v. Kansas City* (1884) 84 Mo. 112, 54 Am. Rep. 87, where the distinction between governmental and ministerial functions was recognized, *arguendo*.

¹ *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, 152 Eng. Reprint, 301, Car. & M. 64, 11 L. J. Exch. N. S. 271, 6 Jur. 606; *Overton v. Freeman* (1852) 11 C. B. 867, 138 Eng. Reprint, 717, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65; *Pearson v. Cox* (1877) L. R. 2 C. P. Div. (Eng.) 369, 36 L. T. N. S. 495; *Salliotte v. King Bridge Co.* (1903) 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378, certiorari denied in (1903) 191 U. S. 569, 48 L. ed. 306, 24 Sup. Ct. Rep. 841; *Carey v. Baxter* (1909) 201 Mass. 522, 87 N. E. 901; *Kettleman v. Atkins* (1918) 229 Mass. 89, 118 N. E. 249; *Wray v. Evans* (1876) 80 Pa. 102; *Slater v. Mersereau* (1876) 64 N. Y. 138; *Powell v. Virginia Constr. Co.* (1890) 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; *Schutte v. United Electric Co.* (1902) 68 N. J. L. 435, 53 Atl. 204, 12 Am. Neg. Rep. 522; Ken-

tractor not liable for the torts of a subcontractor.²

§ 6. Extent of the employer's duty with respect to the supervision and control of work intrusted to an independent contractor.

That an employer is not bound to

dall v. Johnson (1907) 51 Wash. 477, 99 Pac. 310.

² M'Lean v. Russell (1850) 12 Sc. Sess. Cas. 2d series, 887, 22 Scot. Jur. 394; Cuff v. Newark & N. Y. R. Co. (1870) 35 N. J. L. 17, 10 Am. Rep. 205 (opinion of Depue, J., adopted in (1871) 35 N. J. L. 574); Aldritt v. Gillette-Herzog Mfg. Co. (1902) 85 Minn. 206, 88 N. W. 741; St. Louis, A. & T. R. Co. v. Knott (1891) 54 Ark. 424, 16 S. W. 9; Moore v. Sanborne (1853) 2 Mich. 519, 59 Am. Dec. 209.

¹ Where the owner of a building contracts with a stair builder for the reconstruction of his stairway therein, and such stair builder has entire control of the stairway for the purpose of the work, it is not the duty of the owner to see that cleats placed on the stairs, to protect them from injury before being painted, are properly placed there by the contractor's servant. Louthan v. Hewes (1902) 138 Cal. 116, 70 Pac. 1065.

A church society engaging a contractor to repair its church tower is not under the positive duty to see that such contractor leaves a shutter in the tower in an apparently safe condition, where he has loosened and rendered it insecure in the erection or removal of a scaffold erected for such repairs. Woods v. Trinity Parish (1893) 21 D. C. 540.

In Smith v. Wilkes & M. Counties (1887) 79 Ga. 125, 4 S. E. 20, the doctrine stated in the text was invoked as a reason for denying recovery, in a case where a person whose property had been damaged by the faulty execution of a contract for the building of a bridge, let out to a contractor in the manner prescribed by statute, based his claim upon a constitutional provision to the effect that property could not be damaged for public use without compensation to the owner. The court took the position that, under such circumstances, the defendants did not "cause" the plaintiff's damage, since "it was neither the duty nor the right of the counties in their corporate capacity to dictate to the contractor how he

supervise the progress of contract work, for the purpose of preventing the commission of collateral torts by the contractor, is well settled.¹ This doctrine may be regarded as one which is deducible directly from the legal conception of an independent contrac-

should execute his work, provided he obtained the results called for by the plan of the bridge." A second ground assigned for the decision was that there was no statutory provision for any such action as the one brought by the plaintiff.

A railway company which contracts for the erection of a train shed is not under a duty to see that the workmen in the employ of the contractor and subcontractors handle their tools with reasonable care. Fitzpatrick v. Chicago & W. I. R. Co. (1888) 31 Ill. App. 649, writ of error dismissed for want of jurisdiction in (1891) 139 Ill. 248, 28 N. E. 837 (tool fell on trainman).

In a case where water flowed into plaintiff's cellar in consequence of the manner in which a subcontractor constructed a vault and sidewalk in front of a building, the court concurred with the finding of a referee that the principal contractor was not liable for the resulting damage, as he was under no obligation by his contract to give any direction as to this portion of the work, and had no control or authority over the mode or manner of its performance, but only a right to insist generally that the work be done according to the terms of the contract. Slater v. Mersereau (1876) 64 N. Y. 138.

In Hawke v. Brown (1898) 28 App. Div. 37, 50 N. Y. Supp. 1032, the court said: "There is no authority for the proposition that the employment of an architect to make plans and specifications for work of this character, and to supervise the work in its progress to completion, is a legal duty owing by the employer either to the contractor or to third persons. We are not aware of any such rule of law. An architect is usually retained for the protection of the proprietor. If there was no negligence imputable to the proprietor in the employment of the contractor, or negligence in other respects, the failure to employ an architect does not constitute a breach of duty owing to the public, and is no evidence of negligence in the execution of the work." The following passage from 2 Thomp-

tor as being essentially a person who, ex hypothesi, is entitled to exercise his own discretion with regard to the manner in which the results which he has undertaken to produce shall be

son, *Negligence* § 41, was quoted with approval: "The proprietor usually retains control by a skilled architect, not for the purpose of controlling the contractor in his methods, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor, step by step, as the work progresses."

In *Burke v. Ireland* (1901) 166 N. Y. 305, 39 N. E. 914, reversing (1900) 47 App. Div. 428, 62 N. Y. Supp. 453, it was shown that the defendant employed a competent architect to draw the plans and specifications for a building, which were approved by that department of the city government which had charge of the matter, and there was no ground for affirming that he interfered with the plans, or reserved or exercised any right to change them. The work of constructing the building, including the foundations, he also committed to a competent contractor. But the foreman made the mistake of placing the central column, which supported the upper part of the building, upon an insecure foundation, not constructed in accordance with the specifications, the result being that the building collapsed and the plaintiff's intestate lost his life. The court explained as follows its reasons for denying the liability of the defendant: "If it be true that the owner was bound at his peril to see to it that the foundation of the iron column was laid upon solid ground, then it would be difficult to avoid the conclusion that the result of the accident could be attributed to the omission of the defendant in that respect. But we think that this was an obligation which the owner could devolve upon an independent contractor, and it requires only a fair construction of the contract to show that it was placed upon the builder, for whose omissions or mistakes the defendant is not responsible. There is no proof in the case from which the jury could find that the accident resulted from any defect in the plan. The death of the plaintiff's intestate was caused by a defective execution of the plan which the contractor agreed to carry out.

achieved. Or it may be put upon the ground that the employer is entitled to act upon the presumption that a contractor who has been carefully selected will exercise reasonable skill

The central column, which was intended to support the building, was placed upon an unsafe foundation, and this was the direct or proximate cause of the calamity. If the architect, who had general supervision, had insisted upon a careful inspection of every detail of the work and had been present when the concrete was about to be laid upon the disturbed ground outside the old cistern wall, he might have discovered the departure from the terms of the contract in that respect, and prevented it. But the architect was not the agent or servant of the owner. He was in the exercise of an independent calling, and held the same legal relations to the defendant that the builder did, and, for the omissions of either in the execution of the plans, personal negligence cannot be imputed to the defendant." The view thus taken of the evidence was radically different from that which was adopted by the supreme court, which proceeded upon the theory that the architect was the defendant's agent, and that, as one of the two contracts which it was necessary to consider in relation to the incidence of the liability did not require anything further than not to lay the concrete in the trenches until they had been inspected by the architect; while the other contract made no provision with respect to the depth of any excavation required to procure a good bottom, if further excavation was necessary beyond that for which the plans called, the duty of determining the depth to which the excavation should extend devolved upon the defendant, or his agents. First appeal (1898) 26 App. Div. 487, 50 N. Y. Supp. 369; second appeal (1900) 47 App. Div. 428, 62 N. Y. Supp. 453. The following passage contains the gist of the opinion delivered on the second appeal: "Behrens [the architect] not only prepared the plans, but he superintended the construction. When a point was reached where it became necessary to determine what should be the proper depth of the excavation for a secure foundation, such question must be held to have been work within the owner's control, for the performance of which, by the agent selected

and prudence in executing the stipulated work.²

In those classes of cases which exemplify the theory of an absolute re-

sponsibility on the employer's part in respect of injuries resulting from the torts of the contractor, the former is in effect regarded as being bound, at

by him, he was responsible. *Vogel v. New York* (1883) 92 N. Y. 10, 44 Am. Rep. 349. The primary duty resting upon the defendant, Ireland, was to secure a sure foundation for his building, and he ought to have known—at least, he is chargeable with the knowledge essential for him to perform the duty properly [sic]. As he did not contract with any contractor for a specific depth to which the foundation should be carried, and as the architect had no power or authority to change or modify his plans, the duty of determining what should be done on account of the infirmity of the soil was one which devolved directly upon the defendant, Ireland, and the architect in this respect occupied the relation to Ireland of an ordinary agent. For his failure to properly perform his duty in that regard, the defendant, Ireland, is chargeable.³

A complaint which shows by its averments that the tortious act which was the immediate cause of the injury was collateral in its nature, and was committed by a person who bore to the defendant the relation of an independent contractor, cannot be made proof against a demurrer by inserting an allegation that it was the legal duty of the defendant to examine from time to time the condition of the place where the work was being done, and to provide suitable material for making that examination. *Boardman v. Creighton* (1901) 95 Me. 154, 49 Atl. 663, affirming (1899) 93 Me. 17, 44 Atl. 121.

In *Giaconi v. Astoria* (1911) 60 Or. 12, 37 L.R.A. (N.S.) 1150, 118 Pac. 855, 118 Pac. 180, where the plaintiff's premises were injured by a landslide from an embankment in a street which a contractor was grading, the evidence showed that, before the accident occurred, the city surveyor and other municipal officers knew that injury might result from a continuance of the work, but no effort was made to suspend operations until it was too late to be of any service. It was held that, "as no power to superintend the making of the improvement was reserved, the defendant was not liable on the ground of estoppel." But it is submitted that the general power always reserved, either expressly or by

implication, to see that the work is done in such a manner as to secure the results contemplated, would have warranted interference by the city under such circumstances. If this right existed, there was plainly a correlative duty on its part to take steps to prevent the dangerous conditions from eventuating in injury.

See also *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643, § 7, note 1, *infra*, 816.

In *Braidwoods v. Bonnington Sugar Ref. Co.* (1866; Ct. of Sess.) 2 Scot. L. R. 152, where a factory building fell, owing to the weakness of the foundations which supported the iron columns, and killed an engineer who was engaged in installing machinery, it was argued, as a ground for imputing liability to the defenders, that "they did not so far separate themselves from those whom they employed, and that they had an inspector looking after their interests." The reply made to this contention was as follows: "That makes no difference; the inspector failed in no duty which he was bound, as the defenders' representative, to discharge to the deceased. He was not there to attend to the interests of the deceased, or to any duty of the defenders to the deceased. The company was not bound to have an inspector there, and it did not send him there to protect his interests. Anything he failed to do he was answerable for to the company, and to no one else. He might be liable personally, no doubt, for his own delinquency, but he could not bind the defenders." This decision, it is apprehended, would not be approved at the present day by any English or American court. It seems to have been clearly a case which at common law would be deemed to be governed by the doctrine regarding the absolute duty which the owner of fixed property owes to invitees.

² The justifiability of this presumption is adverted to by Lord Westbury in the passage quoted in § 3, note 5, *supra*, 808, from his judgment in *Daniel v. Metropolitan R. Co.* (1871) L. R. 5 H. L. 61, 40 L. J. C. P. N. S. 121, 24 L. T. N. S. 815, 20 Week. Rep., 37, 18 Eng. Rul. Cas. 659.

his peril, to see that the stipulated work is performed by the latter with reasonable care. This aspect of the theory has sometimes been adverted to by the courts.³

Whether the remedial rights of the injured person should be determined

with reference to the notion of a non-delegable duty, or to the general rule stated at the beginning of this section, is often a difficult question. The cases reviewed below, in which the non-liability of the defendants was explicitly based upon the ground that they

In *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 158 Eng. Reprint, 702, plaintiff's counsel argued, in substance, that, where a person employs a tradesman to do work which may be dangerous to another (here, the making of an excavation on land adjacent to a house), he is bound to show that he directed all care to be taken, and specifically pointed out what the danger was to be guarded against, or, at all events, to show that he did enough to exempt himself from responsibility. But Pollock, Ch. B., rejected this contention, saying: "It must be assumed that directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief." Wilde, B., also observed: "It is said that the defendant ought to have given orders to do the work in a tradesman-like way, or ought to have pointed out what was requisite. But it seems to me that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, as a matter of fact, if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way." This case is referred to as an illustration of the general principle embodied in the above quotation. The decision itself has been virtually overruled.

"When the contract is to do an act in itself lawful, it is presumed that it is to be done in a lawful manner." *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430; *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572.

³ In *Hole v. Sittingbourne & S. R. Co.* (1861) 6 Hurlst. & N. 488, 158 Eng. Reprint, 201, which was decided on the ground of personal fault, Pollock, C. B., in the following passage, noticed an alternative conception to which the liability of the defendant might be referred: "I suggested, in the course of the argument, that where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the

remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done, to know what is the plan, to see that the materials are good, and to take care that no mischief ensues. So, here, it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do,—what materials he would use,—and to have seen that the specifications and the materials were such as would insure the construction of a proper and efficient bridge."

In *Dalton v. Angus* (1881) L. R. 6 App. Cas. 829, 14 Eng. Rul. Cas. 769, Lord Blackburn said in the course of his opinion: "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

According to Lindley, L. J., in *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. (Eng.) 342, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week Rep. 323, 60 J. P. 196, the effect of what was said by Lords Blackburn and Watson in *Hughes v. Percival* (1883) L. R. 8 App. Cas. (Eng.) 446, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week Rep. 725, 47 J. P. 772, was that, where the work is of a dangerous character, the employer's duty is to see that the contractor does his work properly.

For other cases in which the duty of exercising supervision is predicated specifically with respect to work which involved the performance of absolute duties which were incumbent on the employer, see *O'Brien v. Board of Land & Works* (1880) 6 Vict. L. Rep. (L.) 204, 2 Australian Law Times, 22; *Williams v. Tripp* (1878) 11 R. L. 447; *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166.

were not subject to any duty of supervision, would, it is apprehended, be disapproved by many courts.⁴

⁴In *PRESS v. PENNY* (reported herewith) ante, 794, where a contractor's servant fell, while working on a building, and struck a traveler, it was urged by his counsel that there was something in the nature of the work "which called for the personal supervision of the owner for whose benefit it was being done, so that he could not relieve himself of personal responsibility for the acts of workmen with whom he had no contract relation whatever." But this contention did not prevail. The court said: "This principle, carried to its logical conclusion, would probably extend to all classes of work involving the use of the streets, and we should be slow to adopt it unless under the compelling influence of a settled judicial policy of our own state."

That a person for whom a building is being erected by a contractor is not under any duty or obligation to see that a subcontractor does not deposit materials in the public street was laid down in *Aldritt v. Gillette-Herzog Mfg. Co.* (1902) 85 Minn. 206, 88 N. W. 741.

In *Independence v. Slack* (1895) 134 Mo. 66, 34 S. W. 1094, where it was held that landowners who make a contract with another person to provide the materials and construct a sidewalk in front of their premises are not liable for an injury caused by stones and other obstructions negligently left in the street by the contractor, the court reasoned thus: "We know of no principle of law that imposes a legal obligation upon the owner of property adjacent to a public street to see that no obstructions to travel are placed or suffered to remain thereon, nor is there evidence of a contract with, or license from, the city which placed defendants under any peculiar obligation to keep the street secure while they were improving their property. Defendants were, of course, responsible for what they did themselves, or directed others to do, but the contract in question did not necessarily, or probably, involve the commission of a nuisance, and cannot, therefore, be construed as a direction by defendants to commit the negligent acts of which complaint is made. They had the right to make the contract, and to believe that the work would be done

The existence of a duty of supervision is occasionally inferred from the terms of some statutory provision

carefully in all respects, and after they had committed it to Stewart, duty did not require them to interpose, and see that the methods adopted were careful and proper."

In *Reisman v. Public Service Corp.* (1911) 82 N. J. L. 466, 38 L.R.A.(N.S.) 922, 81 Atl. 838, where a misdirected rocket struck one of the spectators at an exhibition of fireworks, the court refused to accept the theory that "it should have been left to the jury to say whether defendants were not negligent in so fixing the place for the exhibition and to place for the spectators, with reference to each other, as that a rocket set off in the former could injure a spectator in the latter."

In *Von Langerke v. New York* (1912) 150 App. Div. 98, 134 N. Y. Supp. 832, affirmed without opinion in (1914) 211 N. Y. 558, 105 N. E. 1101, where the plaintiff's premises were damaged by water from a main which burst, owing to the negligence of a subcontractor engaged to construct a tunnel for the sewer connection with a building, the liability of the defendant city was denied for reasons thus stated: "There was no duty resting upon the city to supervise the work. It is true the city, through the bureau of sewers, issued a permit to make the excavation, but the permit was to construct a tunnel running parallel to and about 4 feet westerly from the easterly curb of the avenue, and that the work was to be done under the direction of the chief engineer of sewers. But this did not obligate the city to see to it that due care was used in the prosecution of the work itself, or render it liable for the negligence of the contractor. The thing authorized by the city was not a nuisance, nor was it dangerous per se. Had the plan been followed, the pipe would not have been broken, and the damages which resulted were by reason of the contractor's failure to follow it, of which the city had no notice. Had the city issued a permit for a nuisance, or for the doing of a thing eminently dangerous in itself, such as an obstruction in the street, or setting of fireworks in a public place where a large number of people were assembled, then it might be held liable by reason of damages resulting therefrom. . . . But the rule fixing

which regulates the performance of the work in question,⁵ or from some explicit stipulation in the contract.⁶

§ 7. Extent of employer's duty to guard against possible accidents.

It is sufficiently manifest that the virtual abrogation of the doctrine under discussion in the present mono-

liability in such cases has no application where the act for which the city gives a permit is, in itself, entirely proper and safe, and from which no injury could result except for the negligence of the person doing it."

⁵ Where the charter of a city requires the board of public works to take charge of the erection of public buildings, it is their duty to see, through their architect or otherwise, that the work on every building of that description is performed according to the plans and specifications adopted by the common council. *Chicago v. Dermody* (1871) 61 Ill. 431. The court said: "If those having charge of the construction or repair of streets, bridges, etc., permit obstructions, pits, or other dangerous places, to be made in the streets by the contractor, without being properly guarded, the city is liable for injury that may ensue, because the work is in the charge of the proper city officer, and is being done by authority of the city. Nor is it an answer in such a case to say the contractor departed from his contract or violated the city ordinances in performing the work, as it is the duty of the officer having charge of the improvement to see that the plans are pursued and the proper precautions taken to secure the safety of the public; and it is negligence on the part of such officers in failing to see that they are adopted. And the same rule must prevail where the city or its officers have charge of the erection of a public building for the use of the city." It should be noted that, under such circumstances as those, which were involved in this case the work is assumed to be under the employer's control while it is in progress, and the liability which he incurs by reason of a failure to perform the duty of supervision might equally well be referred to the conception that the contractor is, in point of law, his servant, or to the conception that he is constructively, if not actually, directing the operations.

graph would result, if the law were to predicate, under all circumstances, the existence of an absolute duty on the employer's part to guard against all accidents, probable as well as improbable, that may happen to the damage of third persons, while the stipulated work is being performed by an independent contractor.¹ If, there-

⁶ In *Slater v. Mersereau* (1876) 64 N. Y. 138, a referee had found that the water which flowed into the cellar of a building, and injured the plaintiffs, came from the roof, by reason of the failure of the defendant to direct the subcontractors to make the necessary cuttings in the wall for a waste pipe which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain water. Discussing the effect of this finding, in connection with a clause in the contract with the subcontractors which provided that they should do all the cutting away for repairing after plumbing, etc., as "they should be directed," the court said: "It necessarily follows from the terms of the contract that the defendant was bound to give such directions as were required to prepare the same, and, upon a failure to do so, that he should be held responsible for the damages which ensued by reason of his neglect in this respect. According to this condition, the defendant exercised a supervisory control over the progress of the work, and it was a part of his duty to see that it was conducted properly and with the exercise of ordinary care and skill, so as to prevent injuries to other parties."

In a case where it was provided in a contract for the erection of a building that partitions, etc., were to be taken down or filled up as might be required, and anchored where directed, it was held that the directions were to be given by the owners. *Lancaster v. Connecticut Mut. L. Ins. Co.* (1887) 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23.

¹ In *City & Suburban R. Co. v. Moores* (1894) 80 Md. 348, 43 Am. St. Rep. 345, 30 Atl. 643, where a horse was frightened by the whistle of a steam engine, used for the purpose of hauling along the defendant's track cars belonging to a contractor, and loaded with materials which were to be used by him for the repair of a

fore, recovery is sought on the ground that the employer ought to have adopted certain precautionary measures for the purpose of preventing the injury complained of, the action will fail, unless the plaintiff can at least show that, in view of the nature of the

work and the conditions under which it was to be executed, the defendant should have foreseen that the actual catastrophe which occurred was likely to happen, if those precautionary measures were omitted.²

An employer cannot be charged with

turnpike road, the court reasoned as follows: "It would be carrying the obligation of the turnpike company beyond that required or authorized by the authorities, to hold that its duty to the public required it to see that the servants of White [the contractor] were not thus negligent, although the use of the steam engine was not a nuisance per se and could be operated so as not likely to do any injury to anyone using the road. It would be requiring too much of it to make it take such precautions against accidents, when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful, and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to, and not a probable consequence of, the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors, as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants."

²In *Pearson v. Cox* (1877; C. A.) L. R. 2 C. P. Div. (Eng.) 369, the defendants were builders and contractors who, after the outside of a house was finished, had removed the outer hoarding and had employed a subcontractor to do the internal plastering. One of the men employed by the subcontractor, in walking, shook a plank, which caused a tool to fall out of a window of the house, and the tool, in falling, injured the plaintiff, who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of the defendants in not providing some other protection for the public. Upon this finding it was held that the defendants were entitled to judgment. Commenting upon the doctrine, propounded by the plaintiff's counsel, that there was a general duty imposed upon the defendants to guard against accidents, Coleridge, Ch. J., said: "That

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must mean accidents which could reasonably be foreseen, and there was no evidence that this was such an accident. No doubt the accident has happened, and may happen again, but the falling of a tool in this manner is not such a probable incident in the plastering of the interior of a house as that it could reasonably have been foreseen. If it was so, that would be a ground for holding someone liable; but if anyone is liable for not providing some protection, it would be the subcontractor." Bramwell, L. J., said: "I am of the same opinion, and for the same reasons. The only ground on which the action could be maintained against the defendants would be that the carrying on of the work, in the course of which the accident happened, was a nuisance to the highway unless the passers-by were guarded against the results. It may be that when a house is being built there is a probability that tools or other things will fall, and the jury might be justified, either upon the evidence of experts, or from knowledge of common life and without experts being called, in finding that some protection to the public must be afforded. . . . But however that may be, if there was any such duty, it was the duty of the person whose conduct was a nuisance to the highway. I agree that the general builder would be the person who is to guard against general dangers in the course of the building, but this, according to the opinion of the jury, is not such an accident. But even if I assume danger to the public from plastering, I cannot understand upon what ground the defendants are to be made liable. The plasterer, if any person, ought to be made liable; it is he who knows when he is going to begin, and when he is going to leave off, and how the work will be done, and he is the person who ought to provide against the accident. Going, therefore, as far as I can, and assuming that someone ought to have provided against the danger, the last link in the chain fails; it is the plasterer who ought to have pro-

liability on the theory that it is his duty to insert in a contract an affirmative provision to the effect that the contractor shall not be guilty of negligence. "The law always implies that every person who is authorized to do any act which, if it is done improperly, may injure his neighbor, will do that act without negligence, and such an implication is a necessary part of every contract."³ Still less can an employer be held responsible on the ground that the injury was a natural and probable result of his contract, where that instrument expressly provides that the stipulated work shall be

provided against it, and not these defendants." Brett, L. J., said: "The negligence alleged was that the hoarding ought to have been kept up, or that there ought to have been some protection at the window, but there was no evidence that the tool fell by the negligence of anyone; no such question was left to the jury. It seems to have been assumed that the falling of this tool was the result of accident. If there had been any evidence that such an accident might probably happen whilst such work was going on in the interior of a house, then there might have been a question for the jury whether someone ought not to have guarded the public against such an accident. If there had been such evidence, then, with all deference to what has been said, I should have thought it a question whether the builders were not the persons who ought to have put up that protection to the public, as they had control over the whole building. But there was no evidence that any such accident was probable, and no one said it was probable that such things would fall from the window; nor is it a thing the probability of which must be known to all the world, so that the jury must be taken to know it without any evidence. The accident was highly improbable, and a man need not guard against highly improbable accidents."

³ *White v. New York* (1897) 15 App. Div. 440, 44 N. Y. Supp. 454, holding a complaint to be demurrable which was based upon the theory that the failure of a city to include in a contract with an independent contractor for the improvement and grading of a street a provision that the contractor should care for and remove all

carefully done, and the injury complained of would not have occurred had that provision been observed.⁴

§ 8. Invalidity of contract, effect of.

It has been laid down that, where the provisions of a written contract are of such a tenor as to render the person employed an independent contractor, the mere fact that it is void, as not having been filed in accordance with a statutory requirement, does not operate so as to convert the relationship between the parties into that of master and servant.¹

It is difficult to reconcile this de-

surface water, sewage, and drainage which would be interfered with by such grading, rendered it liable for the negligence of such contractor in failing to provide for the removal of surface water and sewage.

In *Aston v. Nolan* (1883) 63 Cal. 269, it was urged that it was the duty of defendant to insert in the contract an express term to the effect that the work should be so conducted and finished as not to disturb the soil of the adjacent lot, and that in default of such express provision the defendant was liable, because the work was done in accordance with the contract. The court, however, said: "When a contract provides for doing a thing which may be, and generally is, done in a lawful manner, and is silent as to the mode of doing it, the contract is to be construed as requiring it to be done in a lawful manner. As the injury was caused by the contractor while doing work which, it must be assumed, could have been done without causing it, and the contractor had agreed so to do it, the injury was done in violation of his contract."

⁴ *Samuelson v. Cleveland Iron Min. Co.* (1882) 49 Mich. 164, 43 Am. Rep. 456, 18 N. W. 499.

¹ *Smith v. Dryden* (1911) 15 Cal. App. 568, 115 Pac. 455, decided with reference to § 1183 of the Cal. Code of Civ. Proc., which provides that, in case of failure to file a building contract, it "shall be wholly void, and no recovery shall be had by either part thereto." The court reasoned thus: "In such cases, persons furnishing labor and materials at the instance of the contractor would possess the right to recover against him personally, but the fact that the contract was void

cision with another, the effect of which is that, where an independent contract with respect to municipal work which is within the scope of the charter powers of the contractee is invalid by reason of its having been made without a due observance of certain formal requirements prescribed by statute or ordinance, the right of a third person to recover for an injury resulting from a tort committed during the progress of the work is determined on the same footing as if the municipality had undertaken to perform the work without the interposition of a contractor.²

Agents of a municipal corporation, who, without being properly authorized to do so, enter into a contract for the performance of civic work, render themselves responsible for any injury which may result from a tort committed by the contractor in the course of the work.³

would impose no personal liability upon the owner for such labor and materials. The only remedy against the owner is the foreclosure of such liens upon the building as they may have acquired. *McMenomy v. White* (1896) 115 Cal. 339, 47 Pac. 109. Since the relation existing between the owner and contractor under a void contract imposes no personal liability upon the owner for such labor and materials, it must follow that such relation can impose no liability upon the owner for damages sustained by reason of the negligence of the contractor in the performance of such contract."

²In *Davis v. Wenatchee* (1915) 86 Wash. 13, 149 Pac. 337, where a boy was injured by the explosion of a dynamite cap which, together with other explosives, a contractor for the excavation of a sewer trench had left in a sack on a highway near the boy's home, the invalidity of the contract resulted from the omission of the civic officials to insert in it the prescribed covenants with respect to the indemnification of the defendant by the contractor. It was laid down that the plaintiff, being a total stranger to the contract, was not estopped to deny "the contractual relation, as relieving the city of its positive duty to provide such adequate supervision of those employed on the work as to avoid

No evasion of the provisions of the Federal Employers' Liability Act that "any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void," results from the making of a contract by an interstate railway carrier, under which the work of handling at the carrier's coal chutes the coal required for its engines, of breaking the coal into suitable sizes, of unloading wood from cars to storage piles of loading cinders from the right of way on cars, and of unloading sand from cars at designated points, is to be performed by an independent contractor who expressly assumes all liability for injury to himself or his property, or to his employees or to third persons.⁴

dangers reasonably to be anticipated from the negligent use or care of explosives necessarily employed in the performance of the work." The situation presented was declared to be precisely the same as that found in *Collensworth v. New Whatcom* (1896) 16 Wash. 224, 47 Pac. 439, where the defendant had, without letting any contract, undertaken to dig certain ditches for the extension of its water system by the direct employment of the day labor under the supervision of the city engineer. In an action brought to recover for an injury caused by a blast, it was held that the city could not avoid liability on the ground that in doing the work by day labor, instead of letting the work to an independent contractor, it was acting ultra vires, and consequently that the parties who fired the blast were not its servants or agents.

³So laid down, arguendo, in *Colgrove v. Smith* (1894) 102 Cal. 221, 27 L.R.A. 590, 36 Pac. 411, where the action was brought against a contractor employed by the board of trustees of the city in question.

⁴*Chicago, R. I. & P. R. Co. v. Bond* (1916) 240 U. S. 449, 60 L. ed. 735, 36 Sup. Ct. Rep. 403, 11 N. C. A. 342, construing the Act of April 22, 1903 (35 Stat. at L. 66, chap. 149, Comp. Stat. § 8661, 8 Fed. Stat. Anno. 2d ed. p. 1364) § 5.

§ 9. Stipulation obligating the contractor to indemnify the employer.

It has been laid down that, if the employer is otherwise exempt under the contract from liability in respect of the contractor's want of care, such liability is not imposed by a clause which provides "that all losses, accidents, and damages of whatever kind and from whatever cause, which shall at any time happen to the work, or any person or persons whomsoever, shall be wholly borne and made good by the" contractor.¹

More commonly, a stipulation of this tenor has been viewed as one which tends affirmatively to prove the independence of the contractor.

§ 10. Stipulation forbidding the use of the employer's name by the contractor.

A provision in a contract, to the

effect that the person employed shall not use the name of his employer in any manner whereby the public or any individual may be led to believe that such employer is responsible for his actions, does not in any degree relieve the employer of liability for his negligence, if, as a matter of fact, the other provisions of the contract show that he is a servant, and not an independent contractor.¹

§ 11. Effect of statutory provisions.

In the cases cited below, the conclusion that the contractors by whom the stipulated work was being performed were not acting under the control of the defendants in respect of such performance was held to be deducible from the language of the statute authorizing the work.¹

¹ *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642; *Wray v. Evans* (1875) 80 Pa. 102, followed in *Thomas v. Asttona & L. Valley Electric R. Co.* (1899) 191 Pa. 366, 43 Atl. 215, 6 Am. Neg. Rep. 383.

In *Harger v. Harger* (1920) 144 Ark. 375, 222 S. W. 736, where the contract in question provided for the operation of a mine by a lessee, the court said: "Nor does the fact that the lessor, in his contract with the lessee, exacted of the latter an undertaking 'to provide such personal injury liability insurance as will indemnify and be satisfactory,' create responsibility on the part of the lessor for the negligent acts or omissions of the lessee. Appellant coal company had the right to require indemnity, against all loss under any contingency, without committing itself to an obligation to become responsible for any injuries to persons or property."

In *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304, the court laid it down that a stipulation of the character "does not inure to the benefit" of a third person.

For cases in which the nonliability of the defendant was affirmed with reference to a contract embracing an indemnity clause, but in which the court did not discuss its effect, see *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059.

In *Tibbetts v. Knox & L. R. Co.*

(1873) 62 Me. 437, the defendant was held not to be liable for injuries caused to buildings in the vicinity of its road by the blasting operations of persons who had contracted to grade the road, although under the contract the company had reserved the right to retain in its hands sums sufficient to pay all damages that were not adjusted within thirty days from the time they were inflicted. This stipulation was treated as being "immaterial to the determination of the action."

¹ *Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175.

¹ In *Welde v. New York & H. R. Co.* (1898) 28 App. Div. 379, 51 N. Y. Supp. 290, plaintiff claimed damages for the injury occasioned to his property by the erection of a viaduct which was to carry the tracks of the defendant companies, and also asked for an injunction restraining them from maintaining the structure. The contention of the defendants that the contractors were acting solely under the authority and the procurement of the board of improvement created by Laws 1892, chap. 839, was upheld. The court was of opinion that, with respect to the general question of the defendants' liability for what was done by the contractors while engaged in building the viaduct, the case was governed by the decision in *Taylor v. New York & H. R. Co.* (1898) 27 App. Div. 190, 50 N. Y. Supp. 697, where the action was brought for substantially the same

In the case cited below, it was held that a municipal ordinance by which liability was imposed upon owners, contractors, or builders having control or supervision of the construction of a building did not operate so as to render owner and contractor liable, without regard to whether they actually had supervision or control.³

relief, and it was held that the work "was not that of the railroad company, and was nothing for which they were responsible, but that they had no connection with it, legally or otherwise, in such a way as to be able to control it, or to prevent it, or to be responsible for it—at least, until the structure, when finished, had been delivered over to them; and that after that time they would only be liable, if at all, by reason of their adoption of the work and using it for the purposes for which it was intended." The special point relied upon by the plaintiff was that the defendants had, apart from the board of improvement, begun to build a station opposite the plaintiff's premises, and that by this act they became wrongdoers. Discussing this aspect of the case, the court said: "It appeared that some work had been done on One Hundred and Twenty-fourth street by way of making the entrance to the station, and the posts to sustain the viaduct in front of the plaintiff's premises were set at the curb on Park avenue so as to afford sufficient width for the erection of the station which the act originally permitted to be built there. It may be that, so far as this work had been done by the defendant railroad companies, they would be liable for it; that all of it was done by them was strenuously denied. It appeared that they had let the contract for building the station to a particular firm, and that the board of improvement had also made a contract with a different firm to build that portion of the structure to be used as a station which the defendants undertook to construct. The defendants proposed to show that no work had been done upon that viaduct by their contractor, or under their direction, but that all the work which was done had been done by the contractor of the board, and under the direction and pursuant to the plans

II. Evolution of the common-law doctrine.

§ 12. Effect of the English case, *Bush v. Steinman*.

The earliest case in which we find any thorough discussion of the extent of the liability of an employer for the torts of an independent contractor is *Bush v. Steinman*.¹ In that case,

of the board. This evidence, if admitted, would have shown that the defendants were not responsible for the work that was done, and also that, if the contractor was guilty of any illegal act in his manner of doing the work, it was not a thing for which the defendants were liable; and upon that being made to appear it is quite likely that the award of damages would have been materially diminished. The defendants, therefore, should have been permitted to make that proof."

By § 2 of Oregon Laws of 1911, p. 16, it is declared: "The manager, superintendent, foreman, or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee." In *Harvey v. Corbett* (1915) 77 Or. 51, 150 Pac. 263, where the plaintiff's injury resulted from conditions produced by compliance with an order given by an employee of the architects engaged by the defendant to supervise the erection of a building, recovery was allowed on the ground that, having regard to this provision, the architects were not independent contractors.

See also *Hoag v. Washington-Oregon Corp.* (1915) 75 Or. 588, 144 Pac. 574, 147 Pac. 756, where the liability of the employer was affirmed, and that of the employee actually in charge of the work denied.

³ *Gibbons v. Chapin* (1909) 147 Ill. App. 575. The affirmance in (1913) 179 Ill. App. 12, of a judgment for plaintiff against the owner upon a new trial was upon the ground that the evidence on that trial justified a finding that the owner had supervision and control of the building at the time the accident occurred.

¹ (1799) 1 Bos. & P. 404, 126 Eng. Reprint, 978.

which came before the court of common pleas towards the close of the eighteenth century, the facts established by the evidence were as follows: The defendant, having a house by the roadside; contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house, and placed it in the road, the result being that the plaintiff's carriage was overturned. It was argued that the action was not maintainable, because the liability of a principal to answer for his agents is founded on the superintendence which he is supposed to have over them (1 Bl. Com. 481), and it was not in the power of the defendant to control the agent by whose act the injury was caused; but this contention did not prevail. Eyre, Ch. J., said: "I find great difficulty in stating with accuracy the grounds on which it (the action) is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." But he considered that the defendant might be charged with liability on the authority of three cases.

In the first of these³ the actual point determined was that the manager of a mine could not be held liable for an injury caused by the negligence of one of the workmen hired by him. The rationale of the decision was that the underworkmen, when hired by the manager, became the servants of the owner of the mine, and not of the manager himself. It is manifest, therefore, that the case was not really a precedent in point, as regards such circumstances as those presented in *Bush v. Steinman*. So far as it was relevant, it simply affirmed by implication the liability of the mine owner as the master of the tort-feasor.

The following remarks were made by Chief Justice Eyre with regard to the second case cited by him:⁴ "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference) that an injury was done to the plaintiff's house, and his lordship was held responsible. Why? Because the injury was done in the course of his working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet, the work being carried on for his benefit and on his property, all the persons employed must have been considered as his agents and servants, notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of '*sic utere tuo ut alienum non lædas*.' Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would, in contemplation of law, have been the agents and servants of Lord Lonsdale. . . . The principle of this case, therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from Blackstone's Commentaries, if one of a family 'layeth or casteth' anything out of the house which constitutes a nuisance, the owner is chargeable. Suppose, then, that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hoarding in the street (which, being for the benefit of the public, they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance; and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of

³ *Stone v. Cartwright* (1795) 6 T. R. 411, 101 Eng. Reprint, 622.

⁴ *Lonsdale v. Littledale* (1793) 2 H. Bl. 269, 126 Eng. Reprint, 544. The

footnote of the reporters of *Bush v. Steinman* mentions that the facts involved in the earlier case are to be gathered from the pleadings.

employing his own servants for the purpose; for in contemplation of law the erection of the hoarding would equally be his act. If that be established, we come one step nearer to this case. Here the defendant, by a contractor, and by agents under him, was repairing his house; the repairs were done at his expense, and the repairing was his act. If, then, the injury complained of by the plaintiff was committed in the course of making those repairs, I am unable to distinguish the case from that of erecting the hoarding, or from *Lonsdale v. Littledale*, unless, indeed, a distinction could be maintained (which, however, I do not think possible) on the ground of the lime not having been delivered on the defendant's premises, but only at a place close to them, with a view to being carried onto the premises and consumed there."

The effect of the third case (unreported) was thus stated: "A master having employed his servant to do some act, the servant out of idleness employed another to do it, and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved." This case manifestly had no real bearing upon the question presented to the court, for the point involved was simply the extent of the authority of a servant to engage another person to perform the work intrusted to him.⁴

The comments of the chief justice upon the second of the cases cited by him show that the theory upon which he intended to base his judgment was that the obligation of an occupier of fixed property to see that work performed on or with respect to it, for his benefit, does not injure third persons, is absolute in quality. In this point of view it was manifestly immaterial, so far as the responsibility of the occupier was concerned, whether the work was performed by

his own servants or by an independent contractor.

The language of *Rooke, J.*, also embodies the same conception of an absolute duty: "He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. According to the principle of the case in 2 Lev., it shall be intended by the court that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and, if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. The case which has been supposed of the lime being deposited at a distance from the defendant's house, and the accident having happened there, does not apply; for here a person acting under the general employment of the defendant brought a quantity of lime to the premises, and deposited it without any objection being made by any person there, whereas it was the duty of the defendant to have provided a person to superintend those employed in his work. . . .

The person from whom the whole authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." *Heath, J.*, thus defined his position: "I found my opinion on this single point, viz., that all the subcontracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus, a factor is not a servant; but, being employed and trusted by the merchant, the latter, according to the case in *Salkeld*,

⁴It may be observed in passing that the weight of authority is against the

decision as rendered. See *Labatt, Mast. & S. §§ 2514-2517*.

is responsible for his acts."⁵ It is apparent that the fact of adopting a theory so broad as that which is embodied in this passage would be to obliterate with respect to every kind of work, whether performed with relation to fixed or to movable property, the distinction between an independent contractor and a servant or agent. That some of the members of the court which sat in the subsequent case of *Laugher v. Pointer* (see next section) understood that the learned judge intended to go to this length is reasonably clear from the language used by them.

The foregoing detailed analysis of *Bush v. Steinman* is offered for the purpose of enabling the reader to comprehend clearly the actual purport and rationale of a case which for a long period exercised a marked influence upon the development of the general doctrine discussed in the present subtitle. That the decision is not sustainable upon the grounds adverted to by the members of the court by which it was rendered is fully settled. But even now it cannot be regarded as an entirely defunct precedent, in view of the fact that it contains the earliest distinct recognition of that theory of positive, non-delegable duties which has, by its operation in various directions, greatly abridged the immunity of an employer with respect to injuries caused by the

torts of an independent contractor. In this point of view, it should be observed that, although the owners or occupiers of fixed property, who procure the performance of work by a contractor "on, near, or in respect of" their property, are no longer deemed to be chargeable with an absolute liability merely by reason of the fact that the work is of this description (see next section), that theory operates so as to render them subject to such a liability as regards certain classes of the members of the public. In other words, the conception of a general obligation has been replaced by that of special obligations, enuring to the benefit only of definite and limited categories of persons.

Under circumstances similar to those involved in *Bush v. Steinman*, some, at least, of the American courts, would hold the employer liable on the ground of his being chargeable with a special duty of non-delegable quality in respect of safeguarding travelers against injury from dangerous conditions which are normally incident to such work as the contractor was engaged to perform.⁶

§ 13. Doctrine applied in later English cases.

The influence of the decision in *Bush v. Steinman* is distinctly traceable in two later rulings made by Lord Ellenborough in *nisi prius* cases.¹

⁵ *Hern v. Nichols* (1701) 1 Salk. 289, 91 Eng. Reprint, 256.

⁶ Some of the cases in which the doctrine is recognized that an abutter is liable for injuries caused by obstructions created on an adjacent highway in the course of work executed by a contractor for the benefit of the abutting premises were decided with reference to the conception of a general duty to see that reasonable care was used for the protection of travelers. *Friedman v. New York* (1909; App. T.) 63 Misc. 310, 116 N. Y. Supp. 750; *Harrodsburg v. Vandersdall* (1912) 148 Ky. 507, — A.L.R. —, 147 S. W. 1; *Louisville v. Nicholls* (1914) 158 Ky. 516, 165 S. W. 660; *Kampmann v. Rothwell* (1908) 101 Tex. 535, 17 L.R.A.(N.S.) 758, 109 S. W. 1089. In other cases the right of action was predicated upon the exist-

ence of a special duty in that regard, which was regarded as being incidental to the privilege conferred by a municipal license to perform the work in question. *Pine Bluff Natural Gas Co. v. Lenyard* (1913) 108 Ark. 229, — A.L.R. —, 158 S. W. 1091; *Kirk v. Santa Barbara Ice Co.* (1910) 157 Cal. 591, 108 Pac. 509; *Darmstaetter v. Moynahan* (1873) 27 Mich. 188; *Hundhausen v. Bond* (1874) 36 Wis. 29.

¹ In *Sly v. Edgley* (1806) 6 Esp. (Eng.) 6, the plaintiff was allowed to recover for an injury received through falling into a sewer opened by a bricklayer, whom he had employed jointly with others. One of the points taken by defendant's counsel was that the bricklayer was not the servant of the defendant, for whose acts he might be made responsible; that as he was

But it was not until 1826 that the general questions involved were again considered by a court of review in the leading case of *Laugher v. Pointer*.^a In that case a nonsuit had been directed by Abbott, Ch. J., in an action brought to recover damages for an injury caused by the negligent driving of a coachman, who had been sent with a pair of horses which the defendant had hired from a jobmaster to draw his carriage. As the questions raised by the case were of exceptional importance, and the members of the court of King's bench were divided in opinion, when a motion for a new trial was argued, it was ordered that the points submitted should be discussed before the whole body of the judges of the common-law courts. The judgments finally delivered in the King's bench, therefore, represent the results of an unusually exhaustive and searching examination of principles and authorities. It should be observed that two separate and distinct questions were suggested by the evidence, viz.: (1) Whether the effect of a contract of employment was to render the employer liable for the torts of the person employed, irrespective of whether the latter was a servant or a contractor; and (2) whether, supposing that no such general liability could be predicated, the coachman might not be regarded as the special servant *pro tempore* of the defendant as long as he was driving the carriage. It is only with the former of these questions that we are here concerned. Holroyd and Bayley, JJ., were of opinion that the nonsuit was erroneous.

employed to do a certain work, and the mode of doing it, which had caused the injury, was entirely his own act, he only should be liable. According to the report, Lord Ellenborough disposed of this contention by the remark: "It was the rule of respondeat superior; what the bricklayer did was by the defendant's direction; he had employed the bricklayer."

In *Matthews v. West London Waterworks Co.* (1818) 3 Campb. (Eng.) 403, where a verdict was obtained against a waterworks company for an injury resulting to the plaintiff from the negligence of men employed by certain

They relied upon *Bush v. Steinman*, which was considered to have established the general propositions that "responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act in the negligent execution of which the injury has arisen." It should be noted that, in the earlier case cited, the liability of the hirer of a job carriage for the negligence of the coachman who is sent with it was taken for granted by Heath, J., in his opinion. The opposite view was adopted by Abbott, Ch. J., and Little-dale, J. The former judge considered that, if the defendant should be declared responsible simply on the ground of his having had the temporary use and benefit of the horses, it would follow that the hirer of a hackney carriage would be answerable for the negligence of the coachman, and the hirer of a wherry on a river would be answerable for the conduct of a wherryman. In his opinion, a doctrine which led to consequences by which "the common sense of mankind would be shocked" could not be sound. That he approved of the decision in *Bush v. Steinman*, so far as it rested upon the theory of an absolute duty incumbent upon the defendant as owner of the fixed property with relation to which the work in question was being performed, is clearly shown by the following passage in his judgment: "Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately em-

pipe layers, with whom the company had contracted for the laying down of certain water pipes in a public street, Lord Ellenborough said he had "no doubt" as to the defendant's liability. The precise rationale of this ruling, however, is not very clearly apparent. The report is short and unsatisfactory, and the particular circumstances are not detailed. See the comments of Maule, J., in *Overton v. Freeman* (1852) 11 C. B. 867, 138 Eng. Reprint, 717, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65.

^a 5 Barn. & C. 547, 108 Eng. Reprint, 204.

ployed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another." Littledale, J., referring to *Bush v. Steinman* and the decisions based upon it, said: "Supposing the cases to be rightly decided, there is this material distinction, that there the injury was done upon, or near, and in respect of, the property of the defendants, of which they were in possession at the time. And the rule of law may be that, in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. . . . It may be said that the defendant in the present case was owner of the carriage, and that therefore the principles of these latter cases apply; but, admitting these cases, the same princi-

ple does not apply to personal movable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is intrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner, to be conducted by other persons; the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it."³

This exposition of the law was approved in several later cases, decided between 1842 and 1847.⁴ In one of the cases belonging to this period the liability of the employer for injuries caused by a nuisance in a highway was affirmed on the ground that he

³ Sir Federick Pollock, in his preface to vol. 29 of the Rev. Rep. (p. IX.) remarks that the judgment of Littledale, J., contains a suggestion of the rule settled many years later in *Indermaur v. Dames* (1867) L. R. 2 C. P. 311, 36 L. J. C. P. N. S. 181, 16 L. T. N. S. 293, 15 Week-Rep. 434, 19 Eng. Rul. Cas. 64, and other cases of that class. But, as already stated, the theory of an absolute duty as arising from the possession of fixed property had been already propounded in *Bush v. Steinman*. See preceding section.

⁴ In *Quarman v. Burnett* (1840) 6 Mees. & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969, in which the defendant was held not liable upon evidence which, in its general features, was virtually identical with that presented in *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 108

Eng. Reprint, 204, 8 Dowl. & R. 550, 4 L. J. K. B. 309, Parke, B., incorporated in the judgment delivered for the whole court a large part of the remarks of Littledale, J., which are quoted in the text, and expressed the opinion that they stated the law correctly.

In *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, Car. & M. 64, 11 L. J. Exch. N. S. 271, 6 Jur. 606, 152 Eng. Reprint, 301, this judge again expressed his approval of the doctrine, saying: "If a man has anything to be done on his own premises, he must take care to injure no man in the mode of conducting the work."

The language of Littledale, J., was also quoted in *Rich v. Basterfield* (1847) 4 C. B. 783, (p. 802), 136 Eng. Reprint, 715, in which the defendant was a landlord who, on the ground of his not being in possession of the

was chargeable with personal fault in respect of having allowed the dangerous conditions to exist.⁶

demised premises, was held not to be liable in respect of a nuisance created thereon by his tenant.

In *Randelson v. Murray* (1838) 3 Ad. & El. 109, 112 Eng. Reprint, 777, decided a few years before *Quarman v. Burnett* (Eng.) supra, the facts were as follows: The defendants, for the purpose of removing some barrels of flour from their warehouse, had employed one Wharton, who was a master porter in Liverpool, and who used his own tackle, and brought and paid his own men. Taylor, a master carter, was employed by Wharton to carry the barrels away; Taylor also sent his own carts, etc., and his own men, one of whom was the plaintiff. The injury to the plaintiff was occasioned by a barrel falling on him in consequence of part of Wharton's tackle failing while it was being used by Wharton's men. The defendant's counsel argued that Wharton was a bailee for a special purpose, and that the remedy of the plaintiff was against him, not against the defendants. But this contention did not prevail, and the defendant was held liable. Lord Denman, Ch. J., said: "Had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendants, there can be no doubt they would have found in the affirmative." Littledale, J., said: "It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case." Patteson, J., said: "The case of a carrier is quite distinct. He has goods in his custody as bailee." In *Quarman v. Burnett* (Eng.) supra, Parke, B., intimated that this case might be classed with those in which the occupiers of land or buildings have been held responsible for acts of "others than their servants, done upon, or near, or in respect of" their property. But the passages quoted above show clearly that the actual ratio decidendi was that the master

The result of the authorities so far referred to in the present section was, on the one hand, to abrogate defini-

porter and his workmen were in the service of the defendant while the work was in progress.

That this was the standpoint of the court is shown by the following comment which was made upon the decision by Lord Denman in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 113 Eng. Reprint, 993: "The work was in effect done by the defendant himself at his own warehouse; if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter, *while under his control*." (The italics are ours.) This explanation, it should be observed, proceeded from a member of the court who had taken part in the decision. That such a conclusion would not be drawn by any court at the present time is reasonably certain. But it is at all events clear that the case is not one which exemplifies any theory respecting the limits of an employer's liability for the acts of a person who is, in point of fact, an independent contractor. It is not easy to determine what was the precise point of view from which Pollock, C. B., was speaking, when he remarked in *Murphy v. Caralli* (1864) 3 Hurlst. & C. 462, 159 Eng. Reprint, 611, 34 L. J. Exch. N. S. 14, 10 Jur. N. S. 1206, 13 Week. Rep. 165, that "the case of *Randelson v. Murray* seems at variance with the current of authority." He may have intended to express his disapproval of the decision as being an apparent recurrence to the doctrine of *Bush v. Steinman*, or he may merely have stated his opinion that, on the facts, the relation of master and servant was improperly inferred.

⁶ *Burgess v. Gray* (1845) 1 C. B. 578, 135 Eng. Reprint, 667. There a building contractor had excavated a drain for the purpose of making a connection between the defendant's house and the main sewer. A man employed by him to cart away the surplus earth and gravel remaining after the drain was finished left some of it heaped up on the highway. The defendant had applied to the commissioner of sewers for leave to break into the sewer. There was also evidence showing that a policeman had called his attention to the heap, and told him it must be taken away; whereupon he said he would remove it as soon as he could.

tively, so far as movable chattels were concerned, the doctrine of the employer's imputed liability for the torts of an independent contractor, and, on the other hand, to leave that doctrine intact to the full extent, in so far as the torts of the contractor were incidental to work performed "upon, near, or in respect of" fixed property of which he was in possession. But the scope of the employer's responsibility was narrowed still further by the decision in the leading case of *Reedie v. London & N. W. R. Co.*⁶ Having regard to the actual facts considered in this case, it might conceivably be viewed as one by which the right of action was denied in re-

spect merely of injuries resulting from the transitory acts of the servants of a contractor employed to perform work with relation to fixed property. But the language used by Rolfe, B., in the judgment delivered for the court, shows that he intended to propound a doctrine of much broader scope, viz., that, where the gravamen of the claim is negligence, the employer's exemption from liability is equally predicable, whether the subject-matter of the contract was fixed property or movable chattels.

This doctrine was again applied a few years afterward in a case in which it was unsuccessfully sought to charge the employer with liability for damage

Held, that the plaintiff was entitled to recover for an injury resulting from the collision of his chaise with the obstruction. Tindal, Ch. J., took the position that the soil was placed upon the road with the defendant's consent, if not by his express direction. Coltman, J., was of opinion that "there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to the contractor." Cresswell, J., declared that "there was abundant evidence to show that the defendant had at least sanctioned the placing of the nuisance on the road." Erle, J., said: "The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit. . . . He clearly would be liable unless he had parted with the entire control to Palmer [the contractor], and altogether abstained from personal interference himself. And even if the defendant had parted with the entire control to Palmer, I am at a loss to know why he should not be liable jointly with Palmer." Contrast the decision, with regard to somewhat similar circumstances, in *Peachey v. Rowland* (Eng.) reviewed in note 9, *infra*.

⁶ (1849) 4 Exch. 244, 154 Eng. Reprint, 1201, 19 Eng. Rul. Cas. 168, where the defendant was held not to be liable for the negligence of the servants of a contractor in letting fall a stone from a bridge which was under construction. Rolfe, B., in delivering the judgment of the court, made the following observations: "The case of *Bush v. Steinman*, where the owner of a house was held liable for the act

of a servant of a subcontractor, acting under a builder employed by the owner, was a case of fixed real property. That case was strongly pressed in argument, in support of the liability of the defendants, both in *Laugher v. Pointer* and in *Quarman v. Burnett*; and as the circumstances of those two cases were such as not to make it necessary to overrule *Bush v. Steinman*, if any distinction in point of law did exist, in cases like the present, between fixed property and ordinary movable chattels, it was right to notice the point. But on full consideration we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and in fact that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events that it cannot be supported on the ground on which the judgment of the court proceeded. It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a

which excavations made by a contractor on his land had occasioned to an adjacent building.⁷ The doctrine laid down in *Reedie v. London & N. W. R. Co.* was also applied in a case where the alleged cause of action was that the workmen of a subcontractor had, in contravention of the orders of the defendant's engineer, excavated a road in such a manner as to cut into a drain, the consequence being that the plaintiff's land was flooded by the water which escaped.⁸

In several cases where the injuries complained of resulted from danger-

nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants."

It may be pointed out that, several years before the *Reedie* Case was decided, a doubt as to "whether the distinction as to the law in cases of fixed property and movable chattels could be relied on" had been expressed by Lord Denman, *arguendo*, in *Milligan v. Wedge* (1840) 12 Ad. & El. 737, 118 Eng. Reprint, 998, 4 Perry & D. 714, 10 L. J. Q. B. N. S. 19.

In *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. (Eng.) 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196, the remark made in the *Reedie* Case, with regard to the liability which may possibly be imposed upon an owner or occupier of land for injury caused to another by the user of the land, was referred to by Smith, L. J., in language which indicated that he regarded such liability as being predicable.

⁷ *Gayford v. Nicholls* (1854) 9 Exch. 702, 156 Eng. Reprint, 301. In delivering the judgment of the court, Parke, B., said: "It may be the defendant would have been liable for improperly building on his own soil; but there is nothing of that sort here, the claim in this part of the case going entirely upon the supposed obligation of the defendant to support the adjoining house. But he is under no such obligation or duty, in the absence of the plaintiff's right to support as before mentioned. In the next place, the learned judge says that if the jury should be of opinion that the workmen, whilst they were on the land by

ous conditions created in the course of work which was being performed within the limits of public highways, the ratio decidendi was the absence of personal fault on the part of the defendants. With regard to three of these cases it should be observed that, as the employers were private persons, and consequently not in possession of the fixed property which was affected by the stipulated work, the circumstances were not appropriate for the application of the general principle alluded to by *Littledale, J.*, in *Laugher v. Pointer*, *supra*.⁹ In the remaining

the defendant's permission, had from want of due care injured the plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts. But I am clearly of opinion that no action would lie against him unless he carried away the materials himself, or unless that was done by some person authorized by him to do so as his servant. But here the defendant entered into an agreement with a contractor to do the work, and the acts complained of were done by the contractor's servants, who, according to the several authorities upon this subject, cannot be considered as the defendant's servants, so as to render him responsible for such acts. The ruling, therefore, cannot be supported." The ruling of the trial judge that the employer was liable by reason merely of the fact of the workmen being upon his land with his permission was declared to be erroneous. In this case the responsibility of the employer for the misappropriation of certain materials belonging to the owner of the damaged building was also denied.

⁸ *Steel v. Southeastern R. Co.* (1855) 16 C. B. 550, 189 Eng. Reprint, 875. Cresswell, J., observed, during the argument of counsel: "It was proved that the defendant's surveyor directed the thing to be done, but not the improper manner of doing it." In his judgment he said: "This was work done under a contract,—whether parol or otherwise is immaterial,—and there is nothing to show negligence in anyone for whose acts the company is responsible."

⁹ In *Knight v. Fox* (1850) 5 Exch.

case the employer was a public authority responsible for the maintenance of the highway. A state

of facts was therefore presented which might well have suggested a discussion of the relevancy of that

721, 155 Eng. Reprint, 316, 20 L. J. Exch. N. S. 9, 14 Jur. 968, the defendant, a subcontractor whose undertaking required him to erect a railway bridge across a highway, employed a subcontractor to construct a scaffold to be used for the purposes of the work. One of the supports of this scaffold was fixed in a piece of timber rested on the pavement of the highway, and the plaintiff tripped over the obstacle thus created. Held, that the action was not maintainable. The contention of counsel that the principle laid down in *Reedie v. London & N. W. R. Co.* was met by *Parke, B.*, with the remark that the nuisance there referred to "means a nuisance as connected with a man's house, or with his fixed property."

In *Overton v. Freeman* (1852) 11 C. B. 867, 138 Eng. Reprint, 717, the defendants were employed by A. to pave a district. They contracted with B. to pave one of the streets. B's workmen, in the course of paving the street, left some stones, at night, in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over these stones. No personal interference of the defendants with or sanction of the work of laying down the stones was proved. Held, that the defendants were not liable. *Maule, J.*, said: "I apprehend that if the defendants had been present, and directed or sanctioned the doing of the act complained of, they would have been responsible for it. But here they are sought to be charged simply on the ground that they had contracted with the parish authorities to do the work in the performance of which, by their subcontractor, the negligence happened which has given rise to the plaintiff's misfortune." *Cresswell, J.*, said: "The defendants, not having personally interfered or given any directions as to the performance of the work, but merely having contracted with a third person to do it, cannot be held responsible for an unauthorized and unlawful act of such third person in the course of it. It is quite true, as was said in *Bush v. Steinman* (1799) 1 Bos. & P. 404, 126 Eng. Reprint, 978, that the original contractor might be liable equally with the subcontractor, if he in any manner directed or counte-

nanced the doing of the act complained of. But there is no pretense for so charging the defendants here. They contracted with Warren to lay down the curbstone in a particular way, not to so place the stones, and so negligently leave them, as to occasion injury to the plaintiff. If the act contracted to be done would itself have been a public nuisance, of course the defendants, would have been responsible." *Williams, J.*, said: "The plaintiff's counsel has rested his argument upon a broad and intelligible ground, viz., that the act complained of is a public nuisance. Some of the cases, it is true, would seem to justify that distinction; but it seems to me that we cannot give any weight to it without overruling *Knight v. Fox* (1850) 5 Exch. 721, 155 Eng. Reprint, 316, 20 L. J. Exch. N. S. 9, 14 Jur. 963."

In *Peachey v. Rowland* (1853) 13 C. B. 182, 138 Eng. Reprint, 1167, the defendants, having built some houses, contracted with S. and R. to construct a drain in connection with them. S. and R. employed A. to excavate the drain and fill it in as the work was done, at so much per foot, and to carry away the surplus earth. In doing this the defendant's carts were to be employed, if required, by A. The earth was placed by A. so much above the level of the road that it formed a dangerous obstruction. It was left unguarded, and the plaintiff's carriage drove against it at night. One of the defendants testified that a few days before the accident, while the work was still incomplete, he had seen the improper manner in which A. was doing his work. Held, that the action was not maintainable. During the argument of counsel, *Maule, J.*, observed: "Unless you can show that the work was so done that the defendants might have been indicted for obstructing a public highway, they are not liable in this action. I am satisfied that the decision in *Overton v. Freeman* (1852) 11 C. B. 867, 138 Eng. Reprint, 717, 16 Jur. 65, 21 L. J. C. P. N. S. 52, 3 Car. & K. 52, was right, though I was afterwards less satisfied with the reasons which I gave." In his judgment he made the following remarks: "The true result of the evidence here was that the defendants had nothing whatever to do

principle. But the attention of the court was not directed to this point.¹⁰

In another case, involving a private nuisance which was maintained by a contractor upon premises of which the defendant was in possession, the defendant's responsibility was affirmed with reference to that principle.¹¹

§ 14. General review of the American cases.

In several of the earlier American

with the wrongful act complained of. They employed somebody to do something, which might be done either in a proper or an improper manner, and he did it in a negligent and improper manner, and injury resulted to the plaintiff. That is the substance of the evidence. The question is whether the evidence fairly justified a verdict for the defendants. We have no right to look with extreme scrupulosity, in cases of this sort, to see if there is not some grain of evidence the other way. If the whole evidence taken together is not such as to warrant a jury in finding for the plaintiff, practically speaking, there is no evidence. I am of opinion that if the jury had, upon this evidence, found that the defendants did the wrong complained of, their verdict would have been set aside as not being warranted by the evidence. There was, in truth, no evidence for the practical purpose in hand." *Burgess v. Gray* (Eng.) (see note 5, *supra*) was distinguished by *Jervis, Ch. J.*, on the ground that in the earlier case "the nuisance was pointed out to the defendant, and he promised to remove it."

¹⁰ In *Reid v. Darlington Highway Board* (1877; Q. B. Div.) 41 J. P. (Eng.) 581, a highway board instructed its surveyor to employ one S., a contractor, to repair a road. In the course of the work, with which the board did not interfere, the servants of S. left stones on the highway at night, without placing a light to show where they were, and a traveler drove his gig against the obstruction and was injured. In the very brief judgment delivered for the court by *Lush, J.*, it was held that there was no evidence of negligence on the part of the highway board or its surveyors. The precise rationale of this decision is not clear from the report, which merely mentions that plaintiff's counsel argued that the contractor's men were servants of the board—a contention

cases, *Bush v. Steinman* was treated as a valid precedent, in so far as it rested upon the theory of an employer's responsibility for those torts of an independent contractor which are committed in the course of work performed on or with relation to fixed property of which the employer is in possession.¹

In two of these cases, the court must have proceeded upon the assump-

manifestly untenable. Neither the court nor the counsel adverted to the possibility of maintaining an action on the ground that the duty of the board to keep the highway safe for travel was primary and non-delegable.

¹¹ *White v. Jameson* (1873) L. R. 18 Eq. (Eng.) 308, where the actual point determined was that, where the occupier of lands grants a license to another to do certain acts on the land, and the licensee, in doing them, commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance. The nuisance complained of consisted in the burning of bricks in a kiln situated upon a shipyard owned and occupied by the defendant. The kiln was being operated in pursuance of a contract by which it was agreed that one *Proffitt* should excavate and take away, at his own cost, all clay to the depth of 10 feet or more, where required, from the shipyard, and that in payment therefor he should give the defendant a certain sum for every 1,000 bricks made therefrom. *Sir G. Jessel, M. R.*, after having decided that the burning of the bricks was a nuisance to the plaintiff's cottages, continued thus: "I hold the defendant *Jameson* liable to be sued for the acts complained of. The land on which they were committed was his; and, independently of his having an interest in the profits, the defendant *Proffitt* did these acts by his license." The learned judge therein quoted the language of *Littledale, J.*, and continued thus: "Here *Jameson* was in possession of the property, for he did not demise it to *Proffitt*; he merely granted to him a revocable license to burn bricks on it. Consequently he has brought *Proffitt* on his land and allowed him to commit a nuisance, and for this I hold he is liable to be sued in equity as well as at law."

¹ In *Sproul v. Hemmingway* (1833)

tion that this theory was controlling, irrespective of whether it was at-

14 Pick. (Mass.) 1, 25 Am. Dec. 350, the owner of a vessel which was being towed was held not to be liable for a collision caused by the negligence of the crew of a tugboat. Such a decision was in harmony with the modern rule, but the court cited *Bush v. Steinman* with approval, remarking that "it was decided principally on the ground that the owner of real estate must be taken to be the employer of all those who are engaged in making repairs for him; and that, having the power to control and regulate the use of his own estate, he is bound to do it in such a manner that others may not be injured by the mode in which it is used."

In *Lowell v. Boston & L. R. Corp.* (1889) 23 Pick. (Mass.) 24, 34 Am. Dec. 33, the workman of a contractor engaged in constructing the defendant's roadbed had negligently omitted to replace the barriers which the agents of the plaintiff municipality had set on each side of a cutting opened through a highway. The consequence was that a traveler drove into the excavation and suffered serious injury. Held, that the damages which the plaintiff had been compelled to pay to the injured person could be recovered from the defendant. The court again expressed its approval of the decision in *Bush v. Steinman*, and took the broad ground that as "the work was done for the benefit of the defendants, under their authority, and by their direction," they were "to be regarded as the principals," and that "it was immaterial whether the work was done under contract for a stipulated sum, or by workmen employed directly by the company at daily wages." This case was explained in *Hilliard v. Richardson* (1855) 3 Gray (Mass.) 349, 63 Am. Dec. 743, as being sustainable on the following grounds: That the corporation, being intrusted by the legislature with the execution of a public work, such as the building of the railway in question, was bound, while the work was in progress, to protect the public against danger; that it could not escape this responsibility by a delegation of its power to others; that the work was done on land appropriate to the purpose of the railway, and under the authority of the corporation, vested in them by law for the purpose; that the barriers, the omis-

sion to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; that that servant had the care and supervision of them; and that the accident occurred through the negligence of a servant of the railroad corporation, acting under its express orders. The fact that *Bush v. Steinman* was expressly approved is disposed of with the passing remark that the decision of the case before the court did not involve the correctness of the rule in the case cited. The explanation thus given of the rationale of *Lowell v. Boston & L. R. Corp.* may be adequate to afford a justification for the actual decision on the special grounds enumerated. But it will be apparent to everyone who peruses page 31 of the report in 23 Pick. that the court did not rely upon these special grounds, but upon the doctrine applied in the English case.

In *Earle v. Hall* (1841) 2 Met. (Mass.) 353, A. agreed to convey land to B., and B. agreed to build a house thereon and pay for the land. B., in preparing to build the house on his own sole account, by workmen employed by himself alone, undermined the wall of the adjoining house of C., whereby it was injured. It was declared that "the general principle to be extracted from the cases, in regard to the use of real property, is that the owner of real estate, either absolutely or for the time being; he who has the management and control, and takes the benefit and profit of the estate; he at whose expense and on whose account the business is conducted—shall be responsible to third persons for the carelessness, negligence, or want of skill of those who are carrying on and conducting the business by which they are damaged; and this, whether the persons thus employed and engaged are working on wages or by contract; and whether they are employed directly by the principal, or by a steward, agent, or manager having the superintendence of his estate." The court then referred approvingly to the cases of *Bush v. Steinman* (1799) 1 Bos. & P. 404, 126 Eng. Reprint, 978, and *Laugher v. Pointer* (1826) 5 Barn. & C. 547, 108 Eng. Reprint, 204, 8 Dowl. & R. 550, 4 L. J. K. B. 309, as authorities for the doctrine concerning the

tributable to conditions which constituted a nuisance of more or less per-

larger liability of an owner of real property. That liability was said to be predicated on the broad ground that, "if one have the control and management of all that belongs to his house or land, it is his fault if he do not so exercise his authority as to prevent injury to another." The actual decision was in favor of the defendant, but it was based on the ground that, although the work was "done on land of which he was the general owner, it was not land of which he at the time had the possession or control, nor by persons appointed and employed by him."

In another case belonging to the same period (*Stone v. Codman* (1834) 15 Pick. (Mass.) 297), the plaintiff was allowed to recover damages for an injury to his goods caused by water which escaped from a drain which was being dug from the defendant's house to a common sewer by a mason who procured the materials and hired the laborers, charging a compensation for his services and disbursements. But there the decision was expressly put upon the ground that the relation of master and servant existed between the defendant and the mason; a conclusion which, according to the opinion in *Hilliard v. Richardson* (1855) 3 Gray (Mass.) 349, 63 Am. Dec. 743, was deduced in a great measure from the fact that there was no contract, written or oral, by which the work was to be done for a specific price, or as a job.

In *Hilliard v. Richardson* (Mass.) *supra*, where the distinction between cases of fixed and movable property was held unsound (see note 5, *infra*), an attempt was made to explain these earlier Massachusetts cases on such a footing as would render them consistent with the doctrine that was being adopted by the court. But, having regard to the explicitly approving language used in the earlier cases with regard to *Bush v. Steinman*, the success of this effort to demonstrate a continuity of doctrine seems to be questionable, to say the least.

In *New York v. Bailey* (1845; Ct. of Err.) 2 Denio (N. Y.) 433, affirming (1842) 3 Hill, 531, one of the precedents cited was *Bush v. Steinman*, and the doctrine as to the distinction between cases of fixed and movable property was invoked by Walworth, Ch., and Senator Hand, as a ground for

declaring the plaintiff to be entitled to recover for damage caused to a building by the collapse of a defective dam which had been constructed by commissioners appointed to supervise the construction of the Croton waterworks. The latter judge observed: "It is upon the ground that the dam was the property of the corporation, and that such corporation was legally bound to see that its corporate property was not used by anyone so as to become noxious to the occupiers of property on the river below, that the judgment in this case must be sustained if it can be sustained at all."

In *Wiswall v. Brinson* (1849) 32 N. C. (10 Ired. L.) 554, where the injury was caused by a hole in the street, which a contractor employed to move a house had left uncovered, the plaintiff was held entitled to recover. The decision was put upon the ground that the stipulated work was to be done "in respect to the defendant's property." Considering the date of this case, it is rather surprising to find in the opinion of the majority some language which indicated a more unqualified approval of *Bush v. Steinman* than is observable in any other case decided since *Laugher v. Pointer* (Eng.) *supra*. *Ruffin, Ch. J.*, dissented. So far as his conclusion was determined by the doctrine as to a distinction between real and personal property, it was based upon the theory that the liability which is predicated with reference to that distinction takes effect only when the nuisance created by the contractor is actually on the premises of his employer. In this respect his opinion is in accord with the doctrine applied in the English cases. See preceding section.

For other American cases in which a distinction between the liabilities incident to the ownership or possession of real and of personal property is recognized more or less definitely, see *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209 (where the allusion to the doctrine is somewhat remarkable, as it had been expressly condemned in *DeForrest v. Wright* (1852) 2 Mich. 368—see note 4, *infra*), and *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

In *Memphis v. Lasser* (1849) 9 Humph. (Tenn.) 757, and *Nashville v. Brown* (1871) 9 Heisk. (Tenn.) 1,

manent nature, or to a merely casual act.²

In the more recent American cases, the decision in *Bush v. Steinman*, whether viewed as one which embodies the broad principle that tortious acts committed in the course of his employment by a person who is doing work for the benefit of another are imputable to the latter,³ or as one which may be sustained on the ground

that such a principle is applicable where the stipulated work is done on, near, or in respect of the employer's fixed property, has never been mentioned except with disapproval. In some of the cases in which the authority of the decision as a precedent in the latter of these points of view have been repudiated, the circumstances were such as to preclude the claimants from alleging nuisance as a cause of

Bush v. Steinman was cited without any expression of disapproval; but the actual ratio decidendi in both cases was that the defendant was subject to an absolute duty in respect of the claimant.

² In *Stone v. Cheshire R. Corp.* (1849) 19 N. H. 427, 51 Am. Dec. 192, a person injured by a rock which was thrown out by a blast set off by a contractor who was building a portion of a railroad was held entitled to recover on the ground that, "where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants, or by contractors or their servants." This case is virtually overruled in *Wright v. Holbrook* (1872) 52 N. H. 120, 13 Am. Rep. 12, where, however, it was suggested that it might stand upon the same principle as *Lowell v. Boston & L. R. Corp.* (1839) 23 Pick. (Mass.) 24, 34 Am. Dec. 33, as that decision is explained in *Hilliard v. Richardson* (1855) 3 Gray (Mass.) 349, 63 Am. Dec. 743. It will be observed that the general principle laid down in the *Stone Case* is derived from the statement of *Littledale, J.*, which is quoted in the preceding section. But the court evidently failed to appreciate the fact that this principle was viewed by that judge as one which was applicable only with respect to conditions amounting to conditions of a more or less permanent nature.

In *Gardner v. Heartt* (1848) 2 Barb. (N. Y.) 165, where the action was brought to recover for injuries occasioned to plaintiff's land by reason of its sliding, as a result of certain excavation work which was being done by a contractor on the defendant's property, the trial judge charged the jury that if the digging which caused the slide was done by the direction, or the permission, of the defendant, and

was negligently done, and the plaintiff sustained an injury by reason of the slide, the defendant was liable to the extent of such injury, unless the plaintiff directly or indirectly procured the digging to be done; and that if the digging was a mere trespass, or if the defendant had not permitted it to be done negligently, the defendant was not liable. The charge was approved on the ground that "it is a general principle of the common law that the owner of premises is bound so to control the use of them as not to produce injury to others; and if he permits another to place his premises in such a situation as to cause an injury, he will be answerable." The position taken was that defendant's liability was a necessary inference, if the evidence showed, in addition to the defendant's ownership and the negligent manner in which the earth was removed, the fact that the digging was permitted by the defendant. To a modern lawyer an interesting feature of this decision is that the actual conclusion arrived at was the same as that which would have resulted from an application of the doctrine that the duty of a landowner not to interfere with an adjacent landowner's right of lateral support is absolute. (This decision was reversed in (1848) 1 N. Y. 528; but the theory of the lower court, as above explained, was not adverted to.)

³ The authority of this case was denied in *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352 (where the carcasses of animals destroyed in a fire were disposed of by a contractor with a city in such a manner that they were carried by a subsequent flood into plaintiff's quarry); and in *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632 (where the plaintiff was injured while on a train operated by servants of contractors).

action.⁴ In other cases the conditions by which the injury complained of

was occasioned were of such a nature as to constitute a nuisance.⁵

⁴ *Kellogg v. Payne* (1866) 21 Iowa, 575 (fire carelessly set out damaged plaintiff's land); *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430 (timber was cut and fire kindled on plaintiff's land during construction of railroad); *DeForrest v. Wright* (1852) 2 Mich. 368 (plaintiff injured by negligence of servants of public licensed drayman in handling barrels of salt which he had been employed to deliver at a warehouse); *Cuff v. Newark & N. Y. R. Co.* (1870) 35 N. J. L. 17, 10 Am. Rep. 205, opinion of Depue, J., adopted in (1871) 35 N. J. L. 574 (traveler injured by explosion of nitroglycerin while it was being carried to a place where blasting was to be done); *Simons v. Monier* (1889) 29 Barb. (N. Y.) 419 (negligence in setting out fire).

Numerous cases in which circumstances of this character were involved, but in which the decision in *Bush v. Steinman* was not explicitly referred to, are collected in §§ 33, 34, *infra*, 858, 859.

⁵ *Myer v. Hobbs* (1876) 57 Ala. 175, 29 Am. Rep. 719 (excavation weakened lateral support of adjacent building and caused it to collapse); *Robinson v. Webb* (1875) 11 Bush (Ky.) 464 (defective wall of house under construction fell on adjacent building); *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267 (blasting negligently done); *Barry v. St. Louis* (1852) 17 Mo. 121 (unlighted sewer trench); *Independence v. Slack* (1895) 134 Mo. 66, 34 S. W. 1094 (stones deposited in street were left unguarded and unlighted); *Clark v. Fry* (1858) 8 Ohio St. 358, 72 Am. Dec. 590 (uncovered excavation made for area); *Painter v. Pittsburgh* (1863) 46 Pa. 213 (unprotected sewer trench); *Allen v. Willard* (1868) 57 Pa. 374 (unguarded excavation made for cellar of building).

In *Hilliard v. Richardson* (1855) 3 Gray (Mass.) 349, 63 Am. Dec. 743, where the injury complained of was caused by a horse taking fright at a pile of boards left on a highway, the earlier authorities were exhaustively examined and collated, and the doctrine of *Reedie v. London & N. W. R. Co.* (see preceding section) was approved.

In *Blake v. Ferris* (1851) 5 N. Y. 48,

55 Am. Dec. 304 (damage caused by blasting operations), it was held error to give an instruction by which the jury were in effect told that the person who undertakes the erection of a building or other work, for his own benefit, is responsible for injuries to third persons, occasioned by the negligence of the servants of the builder, or the person who is actually engaged in executing the whole work under an independent employment or a general contract for that purpose.

In *Pack v. New York* (1853) 8 N. Y. 222, where the plaintiff's house was injured by a rock thrown up by a blast set off in the course of grading operations in a street, a charge to the effect that, if the jury believed that the contractor employed by the defendant to do the work had been guilty of negligence in blasting, and that the injury to the plaintiff was caused by such negligence, the plaintiff was entitled to recover compensation for certain injuries specified by the court, was held erroneous, inasmuch as it conflicted with the doctrine "that a person who undertakes the erection of a building or other work, for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person, or his servant, who is actually engaged in executing the whole work under an independent employment or a general contract for that purpose."

In *Ryder v. Thomas* (1878) 13 Hun (N. Y.) 296, where the plaintiff had fallen into an unguarded trench made in front of the plaintiff's house by a contractor employed to raise it, the court remarked: "The rule that an owner of real estate is subjected to liability for any injury resulting from negligence, done in the performance of work for the benefit of land, is not now recognized." The question whether liability might have been imputed to the employer on the ground of nuisance was not referred to.

In *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 845, 10 Mor. Min. Rep. 616, the court, referring to *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 244, 154 Eng. Reprint, 1201, 19 Eng. Rul. Cas. 168 (see preceding section), said: "The doctrine laid down in this last case appears to us to be founded in good sense; and it follows from it that the distinction as to the

§ 15. Concluding remarks.

From the foregoing review of the authorities, it is apparent that about the middle of the nineteenth century almost every court which had had an opportunity of expressing an opinion on the subject had definitely discarded the doctrine upon which it was for some time supposed that the decision in *Bush v. Steinman* could be supported, viz., that responsibility for the tortious acts of an independent contractor is imputable to the employer as regards all cases which involve injuries resulting from the manner in which the contractor performs work on, near, or in respect of fixed property.

What may be regarded as the characteristic, as it is certainly the most important, feature of the doctrinal developments during the subsequent period, is the gradual delimitation and definition of the domain within which the general rule as to the nonliability of an employer for the torts of an independent contractor is controlled and overridden by the principle that a person who is subject to an absolute duty cannot, by delegating it to another party, relieve himself from liability for injuries caused by its nonfulfilment. The result of working out this principle in its application to certain situations has been the formation of several groups of precedents which, in any case involving similar facts, put a plaintiff, so far as his actual right of recovery is concerned, in a position

liability of a party when he engages a contractor to erect structures on his own premises, and when he engages such contractor to erect them on the premises of another, does not rest on any just principle. If the enterprise undertaken be a lawful one, and be intrusted to competent and skilful architects, there is no just reason why liability should attach to the proprietor for injuries occurring in its progress, any more if such enterprise be executed on his own land, than if executed elsewhere." The injury complained of was caused by the collapse of a defectively constructed dam.

For other cases in which the nonliability of employers for injuries resulting from nuisances was affirmed

which is very nearly, if not quite, as favorable as he would have occupied, if the broad doctrine that an employer is liable for all the tortious acts of an independent contractor, as well as for those of a servant or agent, had found a permanent place in Anglo-American jurisprudence. How far these encroachments upon the doctrine of nonliability will be carried remains to be seen. But in view of the trend of judicial opinion, as indicated by the most recent decisions, it seems perfectly safe to predict that, in some directions at least, the immunity of the employer will continue to be more and more abridged.

It should be observed that the various developments of the conception of absolute duties have considerably diminished the practical importance of one phase of the subject, viz., the extent of the employer's obligations in respect of remedying a nuisance which supervenes upon his property, as a result of the manner in which the contractor performs the stipulated work. The authorities show that the general rule discussed in the present chapter is no protection to the employer, where the evidence shows that, while the work was in progress, he remained in possession of the property upon which it was performed, and permitted the nuisance complained of to be created or maintained.¹ But the precise scope of this exception to the rule has not yet been determined. In a considerable number of the cases in which the action was held not to be maintain-

without any explicit reference to the decision in *Bush v. Steinman*, see §§ 21-30, *infra*, 843-854.

¹ For the English cases, see § 13, *supra*, 824, especially *White v. Jamieson*, cited in note 11.

The same doctrine has been taken for granted in numerous American cases.

A recognition of the doctrine is clearly imported by the statement in *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267, where one of the reasons assigned for denying the liability of the defendant company was that it "did not authorize or permit a nuisance upon its premises."

able,² the courts seem to have proceeded upon the broad theory that the divestiture of the employer's possession, which results from his handing over his fixed property to a contractor for the purposes of work with respect to it, is as complete as the divestiture which is effected by a demise to a tenant. Under such a theory the abatement of a nuisance is not incumbent upon the employer, his exemption from any obligation in that regard being predicable, irrespective of whether he was or was not chargeable with notice of its existence. But the soundness of this theory is by no means self-evident, and there is specific authority for the doctrine that, during the progress of the work, the employer remains responsible to the extent that he is bound to remedy a nuisance, as soon as its existence becomes known to him, either actually or constructively.³

The reasons for holding him to be subject to a duty of this scope seem to be especially strong as respects cases in which this contract is one which expressly reserves to him more or less extensive powers of supervision and control. It may be affirmed with some confidence that, in the great majority of the instances in which the employer's rights are defined by a con-

tract of this type, any supervening conditions which constitute a nuisance will also constitute a violation of the contractor's obligations to his employer. In this point of view it may not unreasonably be argued that, although the employer may, if he chooses, refrain from enforcing those obligations for his own benefit, his right to insist upon their observance carries with it, in respect of the public at large, a corresponding duty to see that damage is not occasioned by the conditions which are the consequence of their not having been performed. With regard to such a situation, the principle embodied in the maxim "*qui non prohibet cum prohibere potest, assentire videtur*," might well be treated as controlling. That the suggested duty would not be unduly onerous to the employer is apparent from the consideration that proof of his knowledge, actual or constructive, that the nuisance in question existed, must always be a prerequisite to the imputation of responsibility.⁴

III. Doctrine applied in civil-law jurisdictions.

§ 16. Louisiana.

The doctrine which prevails in this state with regard to the nonliability of

² See §§ 21-30, *infra*, 843-854.

³ In *James v. McMinimy* (1892) 93 Ky. 471, 40 Am. St. Rep. 200, 20 S. W. 435, where the plaintiff was injured by a rock thrown up by a blast set off in the course of the work of excavating a cellar, it was held to be error to direct a verdict for the defendant on the ground that the work was being done by an independent contractor. In stating the principles which were to control the case at the second trial, the court said: "Where he [i. e., the employer], as a prudent man, has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out during the progress of the work that it is necessary to create a nuisance in order to do the work, then the contractee is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence. But, in such case, upon receiving notice, it would be his duty to

take such reasonably prompt and efficient means as are in his power to suppress the nuisance, else he will be responsible for injuries to third persons resulting from the nuisance after notice."

⁴ For a case in which the very elaborate argument of the courts might apparently have been dispensed with if the decisive significance of the element of want of notice had been duly recognized, see *Kilts v. Kent County* (1910) 162 Mich. 646, — A.L.R. —, 127 N. W. 821.

In other cases the availability of such a defense was excluded by the evidence which showed that the employer or his supervising agents were clearly chargeable with notice of the existence of the nuisance complained of. See, for example, *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 13 S. E. 277, the effect of which is stated in § 26, *infra*.

an employer for the torts of an independent contractor seems to be in all respects identical with that which is applied in the American states in which the common law prevails.¹

§ 17. *Scotland.*

In this country the rules regarding the circumstances under which the employer of an independent contractor is or is not liable for the torts of an independent contractor are apparently the same as in jurisdictions in which the common law is administered.¹

§ 18. *France.*

The accepted doctrine is that "ouvriers d'une profession reconnue et déterminée" are not within the purview of art. 1384 of the Code Napoléon, under which "les maitres et com-

mettants sont responsables du dommage causé par leurs domestiques et preposés dans les fonctions auxquelles ils les ont employés."¹

§ 19. *Province of Quebec.*

The French law, as administered in the Canadian province of Quebec, seems to be substantially the same as that of jurisdictions in which the common law prevails.¹ The general rule, as laid down in a recent case, is that the propriétaire (owner of the property with reference to which the stipulated work is to be performed) is responsible only where he has reserved to himself the conduct and direction of the work; otherwise, the entrepreneur (person undertaking the performance of the work) is not his preposé (agent).² Some cases which il-

¹ See *Robideaux v. Hebert* (1907) 118 La. 1089, 12 L.R.A. (N.S.) 632, 43 So. 887; *Lutenbacher v. Mitchell-Borne Constr. Co.* (1915) 136 La. 805, 19 A.L.R. —, 67 So. 888.

By La. Rev. Code, art. 2320, it is provided: "Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed; . . . responsibility only attaches when the masters or employers, teachers, and artisans, might have prevented the act which caused the damage, and have not done it." This provision has been held not to be applicable to a case in which the injury resulted from the manner in which an independent contractor employed by the defendant had performed work over which the defendant himself had no supervisory control. *Gallagher v. Southwestern Exposition Asso.* (1876) 28 La. Ann. 943. The same construction has been placed on the similar Quebec provision. See § 19, note 2, *infra*.

¹ See, for example, *M'Lean v. Russell* (1850) 12 Sc. Sess. Cas. 2d series 887, 12 Scot. Jur. 394; *Braidwood v. Bonnington Sugar Ref. Co.* (1866; Ct. of Sess.) 2 Scot. L. R. 152.

¹ This provision, and not the exception to it, was held to be controlling in *Serendat v. Saisie* (1866) 1 P. C. 152, where the Judicial Committee was dealing with a case which involved a tort committed in Mauritius, where the Code Napoléon is in force.

In 2 *Sourdat, Responsabilite*, n. 887,

the law is thus stated: The relationship of commettant (employer) and preposé between two persons, in the sense of art. 1384 of the Civil Code, depends upon the concurrent existence of these two conditions: (1) that the preposé has been voluntarily and freely selected; and (2) that the commettant has the power to give him instructions, and even orders, respecting the manner of performing the acts which are intrusted to him. Wherever the existence of these two conditions shall be established, it can be asserted with confidence that responsibility exists; while, if one of them is lacking, responsibility is not predicable (*cesse*).

See also *Tuzier-Herman, Code Civil Annoté*, art. 1384, Nos. 78, 79, 85; and *Sirey, Codes Annotés*, vol. 1, p. 655.

¹ See *Eastern Twps. Bank v. De Kérangat* (1907) *Rap. Jud. Quebec* 17 B. R. 232.

² *Fraser v. Dumont* (1912: *Cour d'Appel*) 18 *Rev. L. N. S.* 317. It was also laid down that when works are "donnés à l'entreprise à forfait," the damages caused by the "entrepreneur" do not affect with responsibility the person "qui a donné l'entreprise." The point actually determined in this case was that the defendants, who were lumber merchants, could not be held liable for the damages inflicted upon the plaintiff's land from the overflow of a river, resulting from a jam of logs, occasioned by the negligence of a log-driving company,

illustrate this rule under its positive and negative aspects are cited in the footnote.³

IV. Torts of contractors for which employers are not answerable.

§ 20. Introductory.

The following propositions and defining formulæ will serve as sufficient examples of the phraseology which has been used by the courts for the purpose of describing the category of tor-

tious acts of an independent contractor for which an employer is not answerable:

"Where the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences, for there the maxim '*qui facit per alium facit per se*' applies; but where the mischief arises not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, un-

which at the time when the jam occurred was in the exercise of a statutory right to use the river for the purpose of transporting the lumber. The doctrine that, "when a person can only exercise a right on condition of his paying the damages which may result therefrom, he cannot relieve himself of responsibility by exercising his right by the entremise (interposition) of a third person," was approved, but held inapplicable, for the reason that the statutory right exercised was absolute.

In *Harold v. Montreal* (1867; Q. B.) 11 Lower Can. Jur. 169, Badgley, J., discussing the right of action in one of the points of view suggested, said: "The defendants, however, urge an important objection to their liability in the fact that the work was done by contract, and that the contractor was not their servant or agent. As to this, it has been a prevailing doctrine that a party who has contracted for the doing of certain work for his own use and benefit is not liable for injuries arising in the performance of such work whilst a master is responsible for injuries arising from the negligence of his servant; and the distinction is made to rest upon the ground that the master has the control of his servant and can remove him for misconduct."

In *Ware v. Dominion Exp. Co.* (1908) 13 Rev. L. N. S. 358 (reversed in 14 Rev. L. N. S. 398, but merely on the ground of a difference of view concerning the construction of the contract in question), the accepted doctrine was thus formulated by Archibald, J., sitting as a court of first instance: "If the proprietor commits his work to an independent contractor for a price fixed, the obligation of the contractor being only to deliver over to the proprietor the work in a finished condition, the contractor, and

not the proprietor, is responsible for accidents which may occur during the progress of the work through the contractor's negligence; but if the proprietor has reserved a control over the proceedings of the contractor through the progress of the work, the proprietor still remains liable."

In *Blanchard v. Montreal* (1912; Cir. Ct.) 18 Rev. L. N. S. 489, it was held that an architect was not a "preposé" (agent).

In *Marine v. Atlantic N. W. R. Co.* (1889) 12 Leg. News, 89, it was laid down that contractors are not *ouvriers* (workmen) within the meaning of the Quebec Civil Code, art. 1054, which provides that "masters" and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed. (*Les maitres et les commettants sont responsables du dommage cause par leurs domestiques et ouvriers, dans l'exécution des fonctions auxquelles ces derviers sont employés.*) A similar construction has been placed upon the corresponding provision of the Louisiana Code. See § 16, note, *supra*, 837.

³ *Bélanger v. Bélanger* (1895) 24 Can. S. C. 678; *Harold v. Montreal* (1867; Montreal Q. B.) 11 Lower Can. Jur. 169; *Robert v. Montreal* (1881; Montreal Q. B.) 2 D. C. A. 68, 4 L. N. 292; *Loiselle v. Muir* (1889) Montreal L. Rep. 5 S. C. 155; *Groleau v. Quebec C. R. Co.* (1895; Cir. Ct.) 1 Rev. de Jurispr. 54; *Eastern Twps. Bank v. De Kérangat* (1907) Rap. Jud. Quebec 17 B. R. 232; *Gagnon v. Saraguay Electric Light & P. Co.* (1909; Ct. of Review) Rap. Jud. Quebec 36 C. S. 227; *Blanchard v. City of Montreal* (1912) 18 Rev. L. N. S. 489; *Beaulieu v. Picard* (1912; Montreal Ct. of Rev.) 7 D. L. R. 2, Rap. Jud. Quebec 42 C.

less the relation of master and servant exists." ¹

"The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this—that, when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'collateral negligence,' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do." ²

"When the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskilful or improper person as the contractor." ³

"For negligence of the contractor, not done under the contract, but in violation of it, the employer is in general not liable." ⁴

"If the nuisance necessarily occurs

in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor, or his servants, he should alone be responsible." ⁵

It has been laid down that the employer is not liable where the injury was caused by "the manner in which the contractor managed the details of the work;" ⁶ by "a wrongful act of commission by a contractor beyond the scope of his employment;" ⁷ by "a wrongful act unnecessarily done" by the contractor; ⁸ by acts which were "unnecessary for the accomplishment of the work, and in no way connected with its proper performance;" ⁹ by acts which "did not necessarily occur as an incident to the prosecution of the work;" ¹⁰ and by an "act of the contractor in doing what it was not necessary for him to do—what he was not expected to do." ¹¹

The term by which acts which come within the scope of the foregoing statements are commonly designated is "collateral." ¹² Another word which conveys a similar meaning, but which

S. 455; *Scott v. Quebec* (1913) *Rap. Jud. Quebec* 44 C. S. 184.

¹ *Butler v. Hunter* (1862) 7 *Hurlst. & N.* 826, 158 *Eng. Reprint*, 702, per *Pollock, C. B.*

² *Rigby, L. J.*, in *Hardaker v. Idle Dist. Council* [1896] 1 *Q. B. (Eng.)* 352. It may be pointed out that the phrase, "imperfect or improper performance," evidently refers to the performance of the work in pursuance of the terms of the contract. But it might also be construed as having relation merely to the manner of performing those details of the work which are left to the management of the contractor, and its ambiguity in this respect renders it somewhat unsuitable for use in a general statement.

³ *Cuff v. Newark & N. Y. R. Co.* (1870) 35 *N. J. L.* 17, 10 *Am. Rep.* 205, opinion of *Depue, J.*, adopted in (1871) 35 *N. J. L.* 574.

⁴ *Lawrence v. Shipman* (1873) 39 *Conn.* 586.

⁵ *Scammon v. Chicago* (1861) 25 *Ill.* 424, 79 *Am. Dec.* 334.

⁶ *Hauser v. Metropolitan Street R. Co.* (1899) 27 *Misc.* 538, 58 *N. Y. Supp.* 286. The conception of nonliability for an injury which was the result of

the manner in which the contract was performed is also explicitly adverted to, in *Shute v. Princeton Twp.* (1894) 58 *Minn.* 337, 59 *N. W.* 1050.

⁷ *Gray v. Pullen* (1864) 5 *Best & S.* 984, 122 *Eng. Reprint*, 1096, 34 *L. J. Q. B. N. S.* 265, 11 *L. T. N. S.* 569, 13 *Week. Rep.* 257, per *Erle, Ch. J.*

⁸ *Upton v. Townend* (1855) 17 *C. B.* 30, 139 *Eng. Reprint*, 976, 4 *Week. Rep.* 56, 25 *L. J. C. P. N. S.* 44, 1 *Jur. N. S.* 1089.

⁹ *Scammon v. Chicago* (1861) 25 *Ill.* 424, 79 *Am. Dec.* 334.

¹⁰ *Ibid.*

¹¹ *Boomer v. Wilbur* (1900) 176 *Mass.* 482, 53 *L.R.A.* 172, 57 *N. E.* 1004, 8 *Am. Neg. Rep.* 246.

¹² "Liability for collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default." *Blackburn, J.*, in *Mersey Docks & Harbour Bd. v. Gibbs* (1864) *L. R.* 1 *H. L. (Eng.)* 93. In a later case the same judge (then a member of the House of Lords) observed: "Ever since *Quarman v. Burnett* (1840) 6 *Mees. & W.* 499, 151 *Eng. Reprint*, 509, 9 *L. J. Exch. N. S.* 308, 4 *Jur.* 969, it has been considered settled

is found less frequently in the reports, is "casual."¹³ Occasionally those two epithets are combined in the same statement.¹⁴

In some instances the language used is indicative of the conception that no casual connection between the letting of the contract and the injury can be said to exist, where that injury resulted solely from the tortious act of the contractor.¹⁵ To establish such a connection it is not enough to show that the employer supplied one or

more of the instrumentalities which were necessary for the execution of the stipulated work. It does not follow that, because those instrumentalities were capable of being so used as to constitute a nuisance, or of being used in an improper, negligent, or mischievous manner, an injury of which they were an efficient cause must therefore be regarded as a natural consequence of the permission to use them.¹⁶ The extent of the authority conferred by the employer is to

law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants." *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 14 Eng. Rul. Cas. 769. The same term is also used in many other cases. See, for example, the following:

Alabama.—*Birmingham v. McCary* (1887) 84 Ala. 469, 4 So. 630.

California.—*Frassi v. McDonald* (1898) 122 Cal. 400, 55 Pac. 139, 772.

Louisiana.—*Davie v. Levy* (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395.

Maryland.—*Philadelphia, B. & W. R. Co. v. Mitchell* (1908) 107 Md. 600, 17 L.R.A. (N.S.) 974, 69 Atl. 422.

Missouri.—*Jackson v. Butler* (1913) 249 Mo. 342, 155 S. W. 1071.

Rhode Island.—*Sanford v. Pawtucket Street R. Co.* (1896) 19 R. I. 537, 33 L.R.A. 564, 35 Atl. 67.

West Virginia.—*Anderson v. Tug River Coal & Coke Co.* (1906) 59 W. Va. 301, 53 S. E. 718.

England.—*Hole v. Sittingbourne & R. Co.* (1861) 6 Hurlst. & N. 488, 158 Eng. Reprint, 201, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274; *Butler v. Hunter* (1862) 7 Hurlst. & N. 826, 158 Eng. Reprint, 702, 31 L. J. Exch. N. S. 214, 10 Week. Rep. 214; *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *Padbury v. Holliday & Greenwood* (1912; C. A.) 28 Times L. R. 494.

¹³ *Hardaker v. Idle Dist. Council* [1896] 1 Q. B. (Eng.) 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; *Wilson v. White* (1883) 71 Ga. 506, 51 Am. Rep.

269; *Lampton v. Cedartown Co.* (1909) 6 Ga. App. 147, 64 S. E. 495; *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56; *Jackson v. Butler* (1913) 249 Mo. 342, 155 S. W. 1071.

¹⁴ See, for example, *Holliday v. National Teleph. Co.* [1899] 2 Q. B. (Eng.) 392, 68 L. J. Q. B. N. S. 1016, 47 Week. Rep. 658, 81 L. T. N. S. 252, 15 Times L. R. 483.

¹⁵ Thus we find it laid down that the employer is not liable where the execution of the work did not entail the injury in question as a "natural or necessary" consequence (*O'Rourke v. Hart* (1860) 7 Bosw. (N. Y.) 511, later appeal (1862) 9 Bosw. 301); as a "natural result" (*Knowlton v. Hoit* (1891) 67 N. H. 155, 30 Atl. 346; *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572; *Fuller v. Grand Rapids* (1895) 105 Mich. 529, 63 N. W. 530); as a "probable" consequence (*Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56); or as a "necessary consequence" (*Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209).

¹⁶ *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572 (plaintiff's land was flooded owing to the improper use of defendant's dam by a logging contractor).

The fact that the materials for paving a highway were brought to the required spot by the principal contractor for the work will not render him liable for the negligence of a subcontractor in leaving a portion of those materials in such a position as to obstruct the highway. *Overton v. Freeman* (1852) 11 C. B. 867, 138 Eng. Reprint, 717, 3 Car. & K. 52, 21 L. J. C. P. N. S. 52, 16 Jur. 65, citing *Knight v. Fox* (1850) 5 Exch. 721, 155 Eng. Reprint, 316, 20 L. J. Exch. N. S. 9, 14 Jur. 963.

In *Leavitt v. Bangor & A. R. Co.* (1897) 89 Me. 509, 36 L.R.A. 382, 36

execute the contract by a proper and reasonable use of any means and appliances which he furnishes. His liability for the careless management of an appliance cannot be inferred from the mere fact that there was an understanding between him and the contractor that such an appliance was to be used.¹⁷ Nor is he chargeable with

responsibility for injuries which resulted solely from the contractor's having adopted a particular method of performing the work, and failed to take the precautions appropriate to that method.¹⁸ But, for practical purposes, the immunity which these rules secure to the employer is considerably abridged by the operation of the doc-

Atl. 998, 1 Am. Neg. Rep. 605, where the plaintiff's mill was burned by fire communicated from the stove of a cooking car occupied by a man who had contracted to supply cordwood to a railway company, it was sought to charge the company with liability on the ground that, inasmuch as it had, for the purpose of enabling the contractor to do his work conveniently, placed this and other cars on a siding close to the mill, the mischief complained of was not the negligent act of the contractor or his servants, but the direct result of using an appliance located by defendant; that the proximate cause was the location of the car, the use of which naturally would and did cause the damage. This contention was rejected by the court, which said: "The act of locating the car, and of using it with fire, must be distinguished. The former was the act of the defendant. The latter, of the contractor. The car itself was harmless, and its location, when unused, threatened no injury to plaintiff. The use might create mischief. The thing unused was harmless. . . . True, there might be cases where the landowner would be liable if the use was contrived by him for the purpose of mischief, with intent of avoiding liability; but there is no element of that sort here. The car was located without intent to injure. The liability for its imprudent use then rested upon its owner, who was tenant. There is no principle of law that can be invoked to charge the defendant. It did not create or maintain a nuisance, nor a condition that directly caused the mischief. That was perhaps caused from the misuse, by another, of the conditions created by defendant, for whose acts defendant is in no way responsible. . . . The act complained of in the case at bar was locating a car upon the employer's land, an act not dangerous to anyone. Its use might, or might not, be. A dangerous use was not contracted for."

The fact that certain appliances or materials were furnished by the employer is treated as immaterial in the following cases, among others:

Alabama.—Harris v. McNamara (1892) 97 Ala. 181, 12 So. 103.

Connecticut.—Corbin v. American Mills (1858) 27 Conn. 275, 71 Am. Dec. 63.

Iowa.—Miller v. Minnesota & N. W. R. Co. (1898) 76 Iowa, 655, 14 Am. St. Rep. 258, 5 N. W. 188.

Maine.—Mayhew v. Sullivan Min. Co. (1884) 76 Me. 100.

Maryland.—Deford v. State (1868) 30 Md. 179.

New York.—Benedict v. Martin (1862) 36 Barb. 288.

Pennsylvania.—Smith v. Simmons (1883) 103 Pa. 32, 49 Am. Rep. 113.

Virginia.—Emmerson v. Fay (1896) 94 Va. 50, 26 S. E. 386.

England.—Murray v. Currie (1870) L. R. 6 C. P. 24, 40 L. J. C. P. N. S. 26, 23 L. T. S. N. 557, 19 Week. Rep. 104.

¹⁷ In Bailey v. Troy & B. R. Co. (1884) 57 Vt. 252, 52 Am. Rep. 129, where the plaintiff's horse was frightened by a steam shovel and ran away, the court disapproved of an instruction contravening the principle stated in the text, saying: "If the shovel became a nuisance merely because it was negligently operated, and such operation was controlled by Munson [the contractor], he is the author of the nuisance, and answerable for the consequences; and the understanding between the parties that the shovel should be used in the work does not change the liability to the defendant. This understanding calls for the proper, not negligent, use of the shovel."

¹⁸ In Winniford v. MacLeod (1913) 68 Or. 301, 136 Pac. 25, where an action brought to recover for injuries caused to a house which the plaintiff was then constructing, by rocks thrown against it by an excessive blast set off by an independent contractor engaged by his codefendant, a municipal corporation, to grade

trine by which he is subjected to a positive, non-delegable duty in respect of the proper performance of work "from which mischievous consequences will arise unless preventive measures are adopted,"¹⁹ or which is of that quality which is denoted by the expression "intrinsically dangerous."²⁰

In the remaining sections of this annotation the cases in which various kinds of collateral negligence are involved have been arranged in such a manner as to facilitate comparison and contrast with those in which recovery has been allowed on the ground that the torts in question amounted to breaches of non-delegable duties which were incumbent upon the employers. Such a comparison shows that, in a large number of instances, the decisions regarding virtually identical states of fact are inconsistent, owing to the circumstance that the rights and liabilities of the parties were determined with reference to different doctrinal criteria. Having regard to this inconsistency, particular precedents for the nonliability of an employer as regards injuries caused by a tort of a certain description cannot safely be treated as re-

liable, unless it has been ascertained, by a careful investigation, that their authority has not been weakened or destroyed by decisions based upon the theory of non-delegable duties. As the domain of facts within which that theory is deemed to be controlling is being continually extended by the rulings of the courts, caution in the use of the older cases is constantly becoming more and more necessary.

a. Acts productive of more or less permanent conditions injurious to persons.

§ 21. Work performed for a railroad company.

The nonliability of railroad companies has been affirmed in cases where a workman left on a highway one of a number of large stones which were to be used for the abutments of a bridge;¹ where a young child was drowned in a pool of water, formed, while the defendant's line was under construction, by a heavy storm on the defendant's right of way, in a corner between one of its own embankments and one belonging to an intersecting line;² where the loading of cars was done in an improper manner;³ where a

certain streets and lots, was held not to be maintainable, the court argued thus: "The contract was for grading. It was a lawful, harmless undertaking. There was nothing about it intrinsically dangerous to anyone. The fallacy of the argument for the plaintiffs consists in the assumption that the contract required blasting and the use of dangerous quantities of powder. So far as the defendant company was concerned, it mattered not whether the contractor excavated the earth by the use of large steam shovels, by hydraulic process, or by picks and shovels, or whether he removed it by trains of cars, by wheelbarrows, or in bags. The method of performing a harmless work was left to the contractor, and the latter alone is responsible for damages involved and arising out of the manner of accomplishment. Whether we consider the question as one of failure of proof entailing a nonsuit, or as a question of directed verdict, it should be decided in favor of the defendant company."

¹⁹ This is the phraseology used in

the leading case, *Bower v. Peate* (1876) L. R. 1 Q. B. Div. (Eng.) 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321.

²⁰ Having regard to the fact that such work as that involved in *Winniford v. MacLeod*, note 18, *supra*, is in these days usually performed by means of explosives, it is probable that some courts would, under similar circumstances, proceed upon the theory that the employer contemplated the use of this agency, and that the right of action was consequently determinable with reference to the question whether the work for which the contractor was engaged was intrinsically dangerous—a question with regard to which there is a difference of opinion.

¹ *Pawlet v. Rutland & W. R. Co.* (1855) 28 Vt. 298.

² *Charlebois v. Gogebic & M. River R. Co.* (1892) 91 Mich. 59, 51 N. W. 812.

³ In *Haley v. Jump River Lumber Co.* (1892) 81 Wis. 412, 51 N. W. 321, 956, where a member of a train crew on a line built by a lumber company

traveler's horse was frightened by the flapping of canvas suspended under a trestle as a protection against the dropping of paint on the street, the accident being due to the negligence of the servants of a contractor employed to paint the trestle, in so hanging the canvas that it became loose;⁴ where an embankment, not specified in the contract or necessary for its performance, was raised in a street on which the plaintiff's premises abutted;⁵ and where a wire fence which had been removed from its usual position while the road was being graded was placed so close to the track that it was caught by a passing train and dragged, together with a child who was leaning upon it, under the wheels of a car.⁶

§ 22. Work performed with respect to building. Conditions on the employer's premises.

The effect of the cases relating to

for its own use was injured as a result of some logs slipping off a car, the evidence tended to show that the loading was done by a contractor. Held, error to refuse to submit to the jury the question whether the accident was wholly caused by negligent loading.

⁴ *McCann v. Kings County Elev. R. Co.* (1892; Brooklyn City Gen. T.) 46 N. Y. S. R. 327, 19 N. Y. Supp. 668.

⁵ *Chattahoochee & G. R. Co. v. Behrman* (1903) 136 Ala. 508, 35 So. 132.

⁶ *Wood v. Long Island R. Co.* (1910) 187 App. Div. 63, 122 N. Y. Supp. 159. Plaintiff's theory was that, when the contractor's workmen were moving a piece of timber through the fence, it became tangled in the wires, and dragged them near the track.

¹ *McEnanny v. Kyle* (1887; C. P.) 14 Daly (N. Y.) 268 (servant of owner injured).

² *Mahon v. Burns* (1894) 9 Misc. 223, 29 N. Y. Supp. 682, affirmed in (1895; C. P.) 13 Misc. 19, 34 N. Y. Supp. 91 (tenant struck his foot against a plank put down to protect newly laid tiling).

In *Boss v. Jarmulowsky* (1903) 81 App. Div. 577, 81 N. Y. Supp. 400 (appeal dismissed on a point of practice in (1906) 184 N. Y. 597, 77 N. E. 1182) where a servant fell over portions of a fire escape which had been left in the hallway of a tenement house, the

work performed for street railway companies is stated in § 24, *infra*, 849.

(a) Injuries to persons in the building or elsewhere on the premises.

The employer's nonliability has been affirmed with respect to injuries caused by the overloading of an upper floor with materials to such an extent as to cause it to collapse;¹ by building material so placed in a passageway as to form a dangerous obstruction;² by cleats nailed in a staircase in such a manner as to be likely to cause a person using it to stumble;³ by a heavy fixture laid in such a position that it was likely to fall on a person near it;⁴ by the temporary removal of steps leading from the door of a house in front of which a concrete sidewalk was being constructed;⁵ by a dangerous opening;⁶ by an excavation so made as to form a dangerous

contention that the case should not be considered as one of negligence only, but that the allegations of the complaint were broad enough to charge the defendant with maintaining a nuisance in a hallway, and the evidence sufficient to sustain that charge, was thus dealt with: "It is evident that this obstruction was not created in the hallway by the owner, or by his servants or agents, but was the wrongful act of a third party. If it were a nuisance, it was created by the servants or employees of the independent contractor. It was not the result of the ordinary method of doing work intrusted to an independent contractor, but was caused by the negligence of the contractor or his servants, and was in a matter purely collateral to the contract, viz., depositing materials, and the case comes within the distinction referred to by Gray, Ch. J., in *Gorham v. Gross* (1873) 125 Mass. 240, 28 Am. Rep. 224."

¹ *Louthan v. Hewes* (1902) 138 Cal. 116, 70 Pac. 1065.

² *Jackson v. Butler* (1913) 249 Mo. 342, 155 S. W. 1071 (clothes locker had been temporarily moved while building was being altered; person injured was servant of lessee).

³ *Carey v. Baxter* (1909) 201 Mass. 522, 87 N. E. 901 (action against principal and subcontractor).

⁴ In *Wiese v. Remme* (1897) 140 Mo.

bank;⁷ by a pile of lumber placed so near a railway siding on the employer's premises as to endanger the safety of trainmen operating cars on the siding.⁸

The action was also held not to be maintainable in cases where a tenant's premises were exposed and foods injured, as a result of the manner in which a man contracting with the landlord for the removal of the adjoining house performed the work;⁹ where the death of a son of a tenant of the employer resulted from his inhaling sooty vapor which filled the room, owing to the negligence of workmen engaged in repairing the chimney;¹⁰ where a chimney of a house which was being removed was left standing in a dangerous condition during a suspension of the work;¹¹ and where a con-

tinuous escape of gas was caused by the manner in which fixtures were handled.¹²

(b) Injuries to persons on adjoining premises.

The right of recovery has been denied in cases where the injuries complained of were caused by the collapse of the building itself;¹³ by the collapse of a defective wall which was being taken down;¹⁴ and by the fall of lumber insecurely piled.¹⁵

(c) Injuries to persons on adjacent highway.

The right of action against the employer has been denied in respect of injuries occasioned by the collapse of a defective portion of the building itself;¹⁶ by the fall of a street sign

289, 41 S. W. 797, 3 Am. Neg. Rep. 222, a landlord was held not to be liable in an action for damages brought by the parents of a child who fell into an unfinished privy vault which a contractor had dug on property of which they were the tenants, and had left uninclosed for several months.

In two cases where the defendant was held not to be liable for injuries caused by trapdoors left open, the report does not show whether the claimants were tenants or invitees. *Burns v. McDonald* (1894) 57 Mo. App. 599.

In *Joseph v. Philip Henrici Co.* (1907) 137 Ill. App. 171, where it was held that the plaintiff could not recover for an injury caused by falling into an uncovered catch basin filled with hot water, the evidence showed affirmatively that he was not an invitee, but a bare licensee.

⁷ *Fink v. Missouri Furnace Co.* (1884) 82 Mo. 276, 52 Am. Rep. 376 (bank collapsed and fell on child).

⁸ *Wright v. Big Rapids Door & Blind Mfg. Co.* (1900) 124 Mich. 91, 50 L.R.A. 495, 82 N. W. 829.

⁹ *Rotter v. Goerlitz* (1890) 16 Daly, 484, 34 N. Y. S. R. 1001, 12 N. Y. Supp. 210. The court was of opinion that there is no implied covenant in a lease that the landlord will keep in repair the demised premises, or that the adjacent property will remain in the condition in which it was at the time of letting. But a different view would probably be taken by some courts.

¹⁰ *O'Connor v. Schnepel* (1895) 12 Misc. 356, 33 N. Y. Supp. 562.

¹¹ *Wilmot v. McPadden* (1905) 78 Conn. 276, 61 Atl. 1069 (person injured was a child who had strayed onto the defendant's premises).

¹² In *McCauley v. Fidelity & C. Co.* (1896; Sup. App. T.) 16 Misc. 574, 38 N. Y. Supp. 773, the servant of a person employed by a company to put in a new pane of glass found a gas pipe interfered with his work, and removed two lengths of it, the consequence being that an explosion occurred when the gas was lighted in the evening. One of the grounds on which the liability of the company for the resulting damage was denied was that the tort-feasor's master was an independent contractor.

¹³ *Braidwoods v. Bonnington Sugar Ref. Co.* (1866; Ct. of Sess.) 2 Scot. L. R. 152. The parties injured were apparently persons on the adjoining premises; but the report is not clear as to this point. Nor is it distinctly stated whether the accident occurred while the building was under construction, or after its construction.

¹⁴ *Engel v. Eureka Club* (1893) 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052, reversing (1892) 45 N. Y. S. R. 940, 18 N. Y. Supp. 945.

¹⁵ *Andrews v. Boedecker* (1885) 17 Ill. App. 213 (pile toppled over and killed a man on the adjoining premises).

¹⁶ *Peyton v. Richards* (1856) 11 La. Ann. 62 (iron front of building fell); *Scales v. Llewellyn* (1916) 172 N. C. 494, — A.L.R. —, 90 S. E. 521 (porch of house which was being raised fell).

defectively attached to a building;¹⁷ by a scaffold defectively secured or adjusted;¹⁸ by a ladder so placed by workmen engaged in repairing a roof that it was blown down by the wind;¹⁹ by the absence of a protective fence in front of a building while it was under construction;²⁰ by a derrick insecurely set up;²¹ by an excavation made in the immediate neighborhood of the highway;²² and by a horse taking fright at a pile of boards deposited in a street.²³

(d) Injuries to property on adjacent premises.

The right of action was denied in

In *Brown v. Accrington Cotton Spinning & Mfg. Co.* (1895) 3 Hurlst. & C. 511, 159 Eng. Reprint, 631, the following remarks were made during the argument of counsel:—Pollock, C. B.: "If a person is walking along a public street, and a house in the course of building falls down and injures him, that is evidence of negligence for which the owner of the house is *prima facie* liable; but he may show that he employed a competent builder, and that the accident was caused by the negligence of a servant of the builder." Martin, B.: "That is the case of a nuisance."

In *Deford v. State* (1868) 30 Md. 179, where a cornice and a portion of a wall fell, the liability of the landowner was declared not to be predicable, unless the wall had been so defectively constructed as to constitute a nuisance; and, as there was evidence tending to establish such a condition, a new trial was ordered.

¹⁷ *McNulty v. Ludwig* (1908) 125 App. Div. 291, 109 N. Y. Supp. 703. The court expressly stated that it had not considered the case from the standpoint of nuisance, because the complaint was drawn, and the case was tried and submitted to the jury, on the theory of negligence.

¹⁸ *Hexamer v. Webb* (1886) 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755 (piece of scaffolding was blown down upon passer-by); *Phillips v. Roth* (1914) 160 App. Div. 792, 145 N. Y. Supp. 745. *Weilbacher v. J. W. Putts Co.* (1914) 123 Md. 249, 91 Atl. 343, Ann. Cas. 1916C, 115 (painter fell on pedestrian from platform not properly secured); *Regan v. Keighley Metal Ceiling & Roofing Co.* (1915) 220 Mass. 259, 107 N. E. 984 (staging used

a case where a wall of a building under construction was blown down by a high wind and fell against the plaintiff's house.²⁴

§ 23. Same subject. Conditions on highway adjacent to employer's premises.

It has been held that the employer is not chargeable with responsibility for injuries occasioned to travelers by the following conditions: Obstructions produced by depositing materials in front of the building under construction;¹ obstructions of other

by painters was tipped over by a gust of wind and struck person entering building).

¹⁹ *McCarty v. Second Parish* (1880) 71 Me. 318, 36 Am. Rep. 320.

²⁰ In *Crawford v. Peel* (1887) Ir. L. R. 20 C. L. 332, it was laid down that, unless the obligation to place a hoarding in front of a building under erection is imposed by a statute applicable to the locality in which the work is being executed, the owner of the building is not liable for injuries resulting from the fact that the contractor by whom it was being erected omitted to put up the hoarding. In this case *Murphy, J.*, was of opinion that, even if a breach of a statutory obligation had been proved, the owner's liability did not extend beyond the penalty imposed. But the doctrine propounded by the learned judge is in conflict with decisions cited in *Labatt, Master & Servant*, § 1905.

²¹ *Potter v. Seymour* (1859) 4 Bosw. (N. Y.) 140.

²² *Cary v. Sparkman & M. Co.* (1911) 62 Wash. 363, — A.L.R. —, 113 Pac. 1093; (pedestrian fell into unguarded excavation, which was made for the purpose of constructing a basement window, and extended to the edge of the sidewalk).

²³ *Hilliard v. Richardson* (1855) 3 Gray (Mass.) 349, 63 Am. Dec. 743.

²⁴ *Scharff v. Southern Illinois Constr. Co.* (1905) 115 Mo. App. 157, 92 S. W. 126.

¹ *Morning v. Cramp* (1909) 170 Fed. 364 (plaintiff, when alighting from a street car, came into collision with a pile of girders near the track); *Green v. Soule* (1904) 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8 (buggy driven against pile of materials deposited by subcontractor); *Hilliard v. Richard-*

descriptions;² a defective fence erected for the purposes of the

son (1855) 3 Gray (Mass.) 349, 63 Am. Dec. 743 (plaintiff's horse, being frightened by pile of boards deposited in a street, swerved aside and threw his wagon against a post); Aldritt v. Gillette-Herzog Mfg. Co. (1902) 85 Minn. 206, 88 N. W. 741 (principal contractor held liable for injury caused to pedestrian by unguarded heap of materials); Winters v. American Radiator Co. (1915) 128 Minn. 508, L.R.A.1915D, 476, 151 N. W. 277 (plaintiff fell over radiators left on sidewalk); Ege v. Phoenix Brick & Constr. Co. (1906) 118 Mo. App. 630, 94 S. W. 999 (dirt deposited in street opposite defendant's property); Solberg v. Schlosser (1910) 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91 (wagon collided with materials left on street); Grandy v. Anderson (1913) — R. I. —, 85 Atl. 641 (plaintiff tripped over mortar bed of subcontractor, for plastering); Blanchard v. Montreal (1912) 18 Rev. Leg. (N.S.) (Can.) 489 (vehicle collided with unlighted pile of stones deposited in street by building contractor).

Where a proprietor of a house contracted with a builder to execute certain repairs, and the builder made a subcontract for the plaster work, it was held that neither the proprietor nor the principal contractor was liable for injuries caused by the upsetting of a vehicle, which resulted from the negligence of the subcontractor in leaving a heap of lime in the street, without any fence or protection, outside the space which had been duly set apart, fenced in, and lighted by the principal contractor, in accordance with the provisions of a police act. *M'Lean v. Russell* (1850) 12 Sc. Sess. Cas. 2d series, 887, 22 Scot. Jur. 394. Lord Fullerton said: "Here there was nothing hazardous; and if a party employed to perform the very safe operation of plastering a house executed it in a dangerous way, he only is blamable." Adverting to the contention that there was a constructive culpa in employing careless persons, Lord Mackenzie said: "It is perfectly vain to say that any such blame can attach to a man who employs responsible tradesmen to execute harmless repairs on his house, or in these persons contracting with another to do part of the work."

In *Hoff v. Shockley* (1904) 122

Iowa, 720, 64 L.R.A. 538, 101 Am. St. Rep. 289, 98 N. W. 573 (where plaintiff's buggy collided with pile of sand), the argument unsuccessfully advanced by plaintiff's counsel was that "defendant should have known that the carrying on of the work by the contractor would involve the deposit of sand in the street, and, while this would not necessarily and of itself constitute a nuisance, it might become a nuisance by reason of failure to properly guard it, or warn against it, and the defendant should have taken pains to see that the contractor took proper precautions." The court said: "It was not the concern of the defendant how the contractor used the street, nor did defendant have any control over the use which the contractor should make of the street. . . . The real negligence complained of was the failure to put out barriers of warning lights, and this was not an act as to which the defendant had any responsibility, or over which defendant had any control. Even if defendant's husband acted as her agent in approving the placing of the sand in the street, his assent did not render her liable, for the placing of the sand in the street was not a wrong in itself. *Callanan v. Gilman* (1887) 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264. Such an act may be entirely proper, and does not necessarily give rise to a nuisance. The wrong was in leaving the pile of sand in the street at night, without barricade or danger signals, so as to imperil the safety of those using the street in the usual way. For this neither defendant nor her husband was responsible."

A contractor for the erection of a building is not liable for the penalty imposed by a city ordinance which forbids any person to place, leave, or deposit in the street any material, except such as is permitted by ordinance or resolution, if it appears that the ordinance was infringed by his subcontractor, and there was no necessity for putting the material in the street. *Buffalo v. Clement* (1892) 46 N. Y. S. R. 676, 19 N. Y. Supp. 846.

² *Peachey v. Rowland* (1853) 13 C. B. 182, 138 Eng. Reprint, 1167, 17 Jur. 764, 22 L. J. C. P. N. S. 81 (earth was so replaced in drain made for sewer connection as to create an obstruction); *Massey v. Oates* (1905) 143

work;³ an unguarded trench dug for making a sewer connection;⁴ an unguarded excavation made in the side-

walk adjacent to the building;⁵ by an open and unguarded area;⁶ an unguarded opening left in a temporary

Ala. 248, 39 So. 142 (plaintiff tripped over planks laid over newly laid cement pavement); Winslow v. Glendale Light & P. Co. (1918) 164 Cal. 688, 130 Pac. 427 (plaintiff tripped over wire stretched across sidewalk); Davie v. Levy (1887) 39 La. Ann. 551, 4 Am. St. Rep. 225, 2 So. 395 (driver knocked off his wagon by a coal run, built for the purpose of unloading coal from a barge); Independence v. Slack (1895) 184 Mo. 66, 34 S. W. 1094 (pedestrian collided with stones which were to be used for construction of a sidewalk); Goldstein v. Wolkenberg (1907) 54 Misc. 545, 104 N. Y. Supp. 786 (plaintiff tripped over cable of hod elevator); Whitehill v. Hartman Constr. Co. (1914) 87 Misc. 184, 149 N. Y. Supp. 518, affirmed in (1915) 168 App. Div. 928, 152 N. Y. Supp. 1149, on opinion below (similar accident); Richmond v. Sitterding (1903) 101 Va. 354, 65 L.R.A. 445, 99 Am. St. Rep. 879, 43 S. E. 562, 13 Am. Neg. Rep. 616 (pedestrian tripped over plank way laid across sidewalk by masons).

In Larow v. Clute (1891) 60 Hun, 580, 37 N. Y. S. R. 859, 14 N. Y. Supp. 616, the injury for which the employer was held not to be liable, was caused by the plaintiff's falling on a ridge of ice which the servants of a contractor, engaged to pump water from a cellar, had allowed to form on a sidewalk.

Where the owner of premises, having occasion to construct an improvement in his cellar which is required by the board of health, employs a contractor who is bound to do all work and furnish materials, the employer is not liable for injuries to a pedestrian from colliding with a barrel placed over an open coalhole in the sidewalk, and kept there by the contractor to supply necessary ventilation for the prosecution of the work. Maltbie v. Bolting (1893; Super. Ct.) 6 Misc. 339, 26 N. Y. Supp. 903.

In Evansville v. Senhenn (1898) 151 Ind. 42, 41 L.R.A. 728, 68 Am. St. Rep. 218, 47 N. E. 634, 51 N. E. 88, the liability of a city for an injury caused by lumber which the vendor had negligently piled in a street was denied on the ground that the vendor was not the "agent" of the city.

³ Martin v. Tribune Asso. (1883) 30 Hun (N. Y.) 391 (fence was blown down and struck passer-by); Ewing v. Litzmann (1916) — Tex. Civ. App. —, 188 S. W. 742 (fence constructed in front of building fell on pedestrian).

⁴ Zimmerman v. Baur (1894) 11 Ind. App. 607, 39 N. E. 299 (horse injured by stepping into trench); Kelly v. Doody (1889) 116 N. Y. 575, 27 N. Y. S. R. 653, 22 N. E. 1084.

⁵ Fuller v. Citizens' Nat. Bank (1882) 15 Fed. 875; Ryan v. Curran (1878) 64 Ind. 845, 31 Am. Rep. 123 (answer alleging that the defendant's lot and appurtenances were, at the time of the injury, in the exclusive possession of the contractor, held to be sufficient); Schweickhardt v. St. Louis (1876) 2 Mo. App. 671; Allen v. Willard (1868) 57 Pa. 374 (pedestrian fell into excavation for cellar which extended 4 feet outside the line of the houses).

The facts with reference to which the defendant's liability was denied in Ryder v. Thomas (1878) 13 Hun (N. Y.) 296, were thus stated by the court: "The defendant made a contract with one Clynes to raise a building. . . . It was not necessary to interfere with the sidewalk or street to perform the contract. The building was to be raised 4 feet from a point about 1 foot above the level of the sidewalk. The contractor dug a trench in the sidewalk next to the house about 2 feet in width and about the same depth, and threw the earth excavated upon the sidewalk. The excavation was left unguarded at night, and the plaintiff fell into it and was injured. Defendant did not dig or authorize the digging of the ditch, and did not know of its being done until the next morning after the injury."

⁶ Du Pratt v. Lick (1869) 38 Cal. 691 (accident was due to the negligence of a carpenter employed to repair a sidewalk); Scammon v. Chicago (1861) 25 Ill. 424, 79 Am. Dec. 334 (disapproved in Chicago v. Robbins (1862) 2 Black (U. S.) 418, 17 L. ed. 298, and Robbins v. Chicago (1867) 4 Wall. (U. S.) 657, 18 L. ed. 427); Clark v. Fry (1858) 8 Ohio St. 358, 72 Am. Dec. 590.

sidewalk, while an excavation was being made underneath;⁷ a coalhole left open and unguarded;⁸ an unguarded opening made in a sidewalk by raising the flap of a cellar door;⁹ and a ladder which was left standing against the front of a store and was blown down on a passer-by.¹⁰

⁷ *Frassi v. McDonald* (1898) 122 Cal. 402, 59 Pac. 139, 772.

⁸ *Harrison v. Collins* (1878) 86 Pa. 153, 27 Am. Rep. 699.

⁹ *Wilson v. Hodgson's Kingston Brewery Co.* [1915] W. N. (Eng.) 352, 32 Times L. R. 60, 60 Sol. Jo. 142.

¹⁰ *Bacon v. Chandler* (1914) 181 Mich. 372, 148 N. W. 194.

¹ *Hauser v. Metropolitan Street R. Co.* (1899) 27 Misc. 538, 58 N. Y. Supp. 286 (horse sank through the earth between the pavement and a bridge laid over an excavation made in a street on which a railway was being constructed).

Where the plaintiff was injured by falling into a hole dug in a public street by a railroad company engaged, as an independent contractor, in erecting a line of poles and wire for the defendant company, the action was held not to be maintainable. *Hackett v. Western U. Tele. Co.* (1891) 80 Wis. 187, 49 N. W. 822.

² *Overton v. Freeman* (1852) 11 C. B. 867, 138 Eng. Reprint, 717, 16 Jur. 65, 21 L. J. C. P. N. S. 52, 8 Car. & K. 52 (plaintiff stumbled over stones left in a street by the workmen of a paving contractor); *Fulton County Street R. Co. v. McConnell* (1891) 87 Ga. 756, 13 S. E. 828 (plaintiff's horse struck his foot against some nails which had been deposited in a street by the instructions of a street railway company); *Overhouser v. American Cereal Co.* (1902) 118 Iowa, 417, 92 N. W. 74 (bicycle collided with a stone thrown from a wagon used for transporting building materials); *Manchester v. Warren* (1893) 67 N. H. 482, 32 Atl. 763 (man engaged in hauling logs left one of them on a highway); *Lancaster Ave. Improv. Co. v. Rhoads* (1887) 116 Pa. 377, 2 Am. St. Rep. 608, 9 Atl. 852 (wagon overturned by bank of earth left on road which was being graded by a land development company); *Sanford v. Pawtucket Street R. Co.* (1896) 19 R. L. 537, 33 L.R.A. 564, 35 Atl. 67 (wire stretched along a street during construction of street

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§ 24. Work performed on a highway.

Private employers have been held to be exempt from liability for injuries occasioned to travelers by a defect in the surface of a highway;¹ by an obstruction on or above the surface;² by an open trench;³ by an opening formed in a footpath by lifting cellar

railway injured pedestrian); *Texarkana Teleph. Co. v. Burge* (1917) — Tex. Civ. App. —, 192 S. W. 807 (guy wire of a telephone company's pole, which had been slackened by the servant of a man employed to transport a motor boat, caught the top of a buggy and overturned it).

³ In *Blake v. Ferris* (1851) 5 N. Y. 48, 55 Am. Dec. 304, the defendants, who had received a license from the authorities to construct a public street at their own expense, were held not to be liable for an injury received by one who drove at night into an open sewer which had been left unguarded and unlighted. In *Storrs v. Utica* (1858) 17 N. Y. 104, 72 Am. Dec. 437, Comstock, J., distinguished this case from those in which the liability of a municipal corporation for the defective condition of a street is in question, but took occasion to express a doubt whether the decision was correct in view of the facts. There would certainly seem to be good grounds for contending that the position of a licensee of a municipality under such circumstances cannot be either more or less favorable than that of the municipality itself. But the decision is in line with several of those cited below.

In *Smith v. Simmons* (1883) 103 Pa. 32, 49 Am. Rep. 113, the employer was held not to be responsible for injuries received by a pedestrian from falling into an open trench which had been dug in a street by permission of the authorities, and left unprotected by the contractor.

Where W. contracted with the A. gas company to dig a trench, the work to be under the supervision of the company's engineer, and he sublet the work to D., and in consequence of D's negligence in not guarding the excavation a foot passenger was injured, it was held that D. alone was liable. *Wray v. Evans* (1875) 80 Pa. 103, approved in *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

flaps for the purpose of delivering merchandise;⁴ by an opening in a trestle used for the purposes of the work of constructing a street railway;⁵ by gas pipes stacked in an unsafe manner.⁶

The courts have also denied the liability of municipalities and other public bodies for injuries occasioned to travelers by unguarded obstructions on or above the surface of the highway;⁷ by unguarded trenches;⁸ by defective bridges;⁹ by an explosion of gas which escaped from a pipe into a sewer trench which was under construction;¹⁰ and by machinery left in such a position as to frighten horses.¹¹ But the preponderance of authority is opposed to these decisions.

§ 25. Other descriptions of work.

The right of action has been denied under the following circumstances: Where a brakeman on a passing train came into collision with a plank laid by a teamster in the employ of the defendant across a gondola car on a siding, for the purpose of faci-

tating the transfer of goods to a wagon;¹ where the plaintiff was thrown from a vehicle, as a result of his horse having shied at a broken-down truck which had been left on the highway;² where a man was injured by the fall of a chute by means of which goods were being lowered into his lighter.³

b. Acts productive of more or less permanent conditions injurious to property.

§ 26. Work performed for a railroad company.

The right of action against the employer has been denied under the following circumstances: Where a subcontractor's workmen, in contravention of the orders of the defendant's engineer, excavated a road in such a manner as to cut into a drain, the consequence being that the water escaped onto the premises of an adjoining landowner;¹ where construction work was performed in such a manner as to produce a nuisance affecting land adjacent to the right of

⁴ *Wilson v. Hodgson's Kingston Brewery Co.* [1915] W. N. (Eng.) 352, 32 Times L. R. 60, 60 Sol. Jo. 142.

⁵ *Rinker v. Galveston-Houston Electric R. Co.* (1915) — Tex. Civ. App. —, 176 S. W. 737 (child fell through opening).

⁶ *O'Hara v. Laclede Gaslight Co.* (1912) 244 Mo. 395, 148 S. W. 884 (boys set a pipe rolling).

⁷ *Reid v. Darlington Highway Board* (1877; Q. B. Div.) 41 J. P. (Eng.) 581 (pile of stones left on the road); *Quayle v. Sewerage & Water Bd.* (1912) 131 La. 26, 58 So. 1021 (plank laid to protect newly laid pavement).

In a Newfoundland case, the court being of the opinion that there was no statutable obligation on the part of the defendant board of works to keep a certain road in repair, held that it was not liable for an injury to a person who drove against a heap of gravel which had been left in the road through the negligence of one who had contracted for its repair. *Duchemin v. Chairman Bd. of Works* (1880) Newfoundl. Rep. (1874-1884) 236.

⁸ *Barry v. St. Louis* (1852) 17 Mo. 121 (sewer trench); *Wendell v. Troy* (1862) 39 Barb. (N. Y.) 329 (wheel of

truck sank into a hole made by collapse of side of drain); *Charlock v. Freel* (1891) 125 N. Y. 357, 26 N. E. 262 (nonliability of municipal corporation in respect of injuries occasioned by a hole in a sidewalk was affirmed by the court, arguendo, in a case in which the action was brought against the contractor); *Painter v. Pittsburgh* (1863) 46 Pa. 213 (sewer trench); *Erie v. Caulkins* (1877) 85 Pa. 247, 27 Am. Rep. 642 (same); *Eby v. Lebanon County* (1895) 166 Pa. 632, 31 Atl. 332 (trench dug for the purpose of laying a curbing).

⁹ *Wood v. Watertown* (1890) 58 Hun, 298, 11 N. Y. Supp. 864 (bridge collapsed while under construction).

¹⁰ *Brady v. New York* (1912) 149 App. Div. 816, 134 N. Y. Supp. 305.

¹¹ *Howarth v. McGugan* (1893) 23 Ont. Rep. 396 (hammer of pile driver used for constructing a bridge).

¹ *Hopkins v. Empire Engineering Corp.* (1912) 152 App. Div. 570, 137 N. Y. Supp. 478.

² *Lake v. Bennett* (1915) 41 R. L. 154, 103 Atl. 145.

³ *Woodward v. Peto* (1862) 3 Fost. & F. (Eng.) 389.

¹ *Steel v. Southeastern R. Co.*

way;² where, owing to the negligence of a contractor in constructing defective stock gaps and throwing down fences, cattle strayed onto land adjoining the right of way;³ where a contractor's workmen left down the bars of an opening in the fence of a field adjoining the right of way;⁴ where a horse was entangled in a wire fence which was being constructed along the right of way.⁵

§ 27. Work performed with respect to a building.

The employer's liability has been

(1855) 16 C. B. 550, 189 Eng. Reprint, 875.

² *Atlanta & F. R. Co. v. Kimberly* (1891) 87 Ga. 161, 27 Am. St. Rep. 231, 18 S. E. 277 (conditions complained of were that the earth taken from a cut had been deposited in such a manner as to dam up a small stream and form a pond near the complainant's house, and that the filth accumulating in the sinks of a construction camp had been permitted to flow therefrom and be deposited near the house); *Louisville & N. R. Co. v. Hughes* (1910) 134 Ga. 75, 67 S. E. 542, second appeal in (1915) 143 Ga. 206, 84 S. E. 451, land injured by rocks and debris thrown upon it, and by the diversion of waters from their natural channel, so that it was flooded); *Clark v. Hannibal & St. J. R. Co.* (1865) 36 Mo. 203 (embankment thrown up so as to cause the flooding of land).

³ *Alabama Midland R. Co. v. Martin* (1893) 100 Ala. 511, 14 So. 401.

⁴ *Clark v. Vermont & C. R. Co.* (1854) 28 Vt. 103.

⁵ *Missouri, K. & O. R. Co. v. Ferguson* (1908) 21 Okla. 266, 96 Pac. 755.

¹ In *Van Wert v. Brooklyn* (1865) 28 How. Pr. (N. Y.) 451 (where the wall of a municipal engine house in course of erection fell on the plaintiff's building, the supreme court refused to accept the theory of the trial judge that liability of the defendant was predicable on the ground "that all owners of real property, and especially where the property is actually improved and occupied by the owner, are bound so to use it as not to injure the property of others; and that any improper or careless use of it, whether by the owner personally, or by a person or persons by him put in charge of it."

denied, with regard to injuries caused by the following conditions: A wall defectively built;¹ water pipes defective owing to the unskilfulness of a plumber;² earth so piled that, when a rainstorm occurred, water was turned into the cellar of an adjoining house;³ a derrick insecurely set up;⁴ the construction of additional stories in such a manner as to cause a drain-pipe to burst, the result being that a tenant's goods were damaged;⁵ and the impairment of the lateral support of the adjacent land and buildings thereon.⁶

For another case in which the employer's liability in respect of a similar injury was denied, see *White v. Green* (1904) — Tex. Civ. App. —, 82 S. W. 329.

² *Blake v. Woolf* [1898] 2 Q. B. (Eng.) 426, 67 L. J. Q. B. N. S. 813, 62 J. P. 659, 79 L. T. N. S. 188, 47 Week. Rep. 8 (cistern overflowed).

³ *Dutton v. Amesbury Nat. Bank* (1902) 181 Mass. 154, 63 N. E. 405.

⁴ *Prairie State Loan & T. Co. v. Doig* (1878) 70 Ill. 52 (adjacent property injured).

⁵ *Jefferson v. Jameson & M. Co.* (1897) 165 Ill. 138, 46 N. E. 272, reversing (1895) 60 Ill. App. 587. The ratio decidendi was that the plaintiff, "having agreed that the repairs might be made, occupied no better position, so far as its right to recover damage is concerned, than a stranger." It is not clear whether this statement is to be understood as being indicative of the view that, apart from this factor of an agreement, the action would have been maintainable on the ground of the landlord's being chargeable with an absolute duty to protect the tenant. But it seems to be questionable, to say the least, whether the quality of the landlord's obligation in this respect could be qualified by the mere injection of such a factor.

⁶ *Gayford v. Nicholls* (1853) 9 Exch. 702, 156 Eng. Reprint, 301, 2 C. L. R. 1066, 23 L. J. Exch. N. S. 205, 2 Week. Rep. 453 (workmen in excavating soil shook and damaged plaintiff's buildings); *Myer v. Hobbs* (1876) 57 Ala. 175, 29 Am. Rep. 719; *Aston v. Nolan* (1883) 63 Cal. 269; *Lawrence v. Shipman* (1873) 39 Conn. 586 (excavation made under party wall for the purpose of constructing a new portion); *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S.

§ 28. Work performed on a highway.

The liability of employers has been denied in respect of injuries caused by grading a street in such a manner as to cause surface water to flood adjacent land;¹ by breaking a culvert and leaving piles of earth in such a position as to cause surface water to flood adjacent land;² by obstructing the surface drainage in such a manner, by earth taken from a sewer trench, that the plaintiff's cellar was flooded;³ by constructing a sewer so defectively that water escaped from and flooded the premises of an abutter;⁴ by constructing a tunnel re-

quired for a sewer connection so unskillfully that a water pipe was broken, the result being that the premises of an abutter were flooded;⁵ by allowing water to collect in a trench dug for a sewer connection, the result being the flooding of a trench in which the plaintiff was laying a water pipe;⁶ by cutting through the roots of trees on a street so as to render them liable to fall;⁷ by excavating a sewer trench so as to cause the ground to subside in front of the plaintiff's premises;⁸ by the failure of a gas company to support pipes which another company had previously laid;⁹ and by leaving

E. 320; *Crenshaw v. Ullman* (1898) 113 Mo. 683, 20 S. W. 1077; *McGrath v. St. Louis & H. Constr. Co.* (1918) 215 Mo. 191, 114 S. W. 611; *Nelson v. Connecticut Mut. L. Ins. Co.* (1884) 14 Mo. App. 592; *King v. Livermore* (1876) 9 Hun (N. Y.) 298, affirmed in (1877) 71 N. Y. 605; *Keller v. Abrahams* (1885) 13 Daly (N. Y.) 188; *Korn v. Weir* (1904) 88 N. Y. Supp. 976 (wall of adjacent house was pierced for the purpose of inserting needles while the foundations of a new building were being excavated); *Schulhofer v. Mulhare* (1906) 50 Misc. 658, 99 N. Y. Supp. 489.

In *Butler v. Hunter* (1860) 7 Hurlst. & N. 826, 158 Eng. Reprint, 702, there was held to be no evidence of liability on the part of the defendant, the owner of a house, where the workmen of the contractor in pulling down the front wall of the house removed a breastsummer which was inserted in the party wall between the defendant's and plaintiff's houses, without taking any precautions, by shoring or otherwise, the result being that the front wall of the plaintiff's house fell. *Wilde, B.*, considered that "the absence of a shoring is like the absence of a proper hoarding, or any of the ordinary precautions which belong to the careful taking down of a wall." This decision, however, was disapproved by Lord Blackburn in *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 50 L. J. Q. B. N. S. 689, 44 L. T. N. S. 844, 30 Week. Rep. 196, 14 Eng. Rul. Cas. 769, and in *Hughes v. Percival* (1883) L. R. 8 App. Cas. (Eng.) 443, 52 L. J. Q. B. N. S. 719, 49 L. T. N. S. 189, 31 Week. Rep. 725, 47 J. P. 772.

¹ *White v. New York* (1897) 15 App.

Div. 440, 44 N. Y. Supp. 454, 2 Am. Neg. Rep. 213.

² *Sappington v. Centralia* (1911) 162 Mo. App. 418, 144 S. W. 1112 (negligence of contractor engaged to construct waterworks plant).

³ *Dorst v. Toronto* (1908) 11 Ont. Week. Rep. 738 (decision of a single judge).

⁴ *Fields v. Johnston City* (1908) 143 Ill. App. 485.

⁵ *Von Lengerke v. New York* (1912) 150 App. Div. 98, 134 N. Y. Supp. 832, affirmed without opinion in (1914) 211 N. Y. 558, 105 N. E. 1101.

⁶ *Kelly v. New York* (1905) 106 App. Div. 576, 94 N. Y. Supp. 872.

⁷ *Morris v. Salt Lake City* (1909) 35 Utah, 474, 101 Pac. 373. In this case, where the trees were blown down six days after the roots had been cut through by a paving contractor, and fell against the plaintiff's dwelling, the defendant municipality was held liable on the special ground that it was chargeable with constructive notice of the dangerous conditions.

⁸ *Uppington v. New York* (1901) 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115 (recovery was denied on the ground that the damages were consequential, and the plan adopted for the work was reasonably safe).

⁹ *Chartiers Valley Gas Co. v. Lynch* (1887) 118 Pa. 362, 12 Atl. 435; *Chartiers Valley Gas Co. v. Waters* (1888) 123 Pa. 220, 16 Atl. 423 (gas exploded when undermined pipe broke). Commenting on a charge of the trial judge which seemed to imply that because the pipe of the other company was necessarily undermined, and this result was therefore contemplated by the contract, the employer

an unguarded and unlighted pile of earth on the highway.¹⁰

§ 20. Work performed by means of explosives.

In many of the cases involving the various descriptions of work referred to in §§ 26 to 28, *supra*, 850-852, the gravamen of the action was alleged negligence in respect of the use of explosives. As the decisions denying the employer's liability for injuries caused by such negligence form a well-defined category, and are inconsistent with a considerable number of others in which claims have been allowed on the ground that the employer is under a positive duty to see that explosives are used by the contractor with reasonable care, it will be advisable to

was liable, for the reason that there was a necessary interference with the rights of others, the courts pointed out that there was no necessary interference with the rights of others unless negligence existed. Both companies had their rights, and they were perfectly consistent with each other. In some jurisdictions it may be that this case would have been referred to the doctrine embodied in the charge criticized.

¹⁰ *Crowder v. Emery* (1917) 206 Ill. App. 562, where the plaintiff's horse and buggy were injured by coming into collision with the obstruction. Compare cases cited in § 24, note 2, *supra*, 849.

¹ *Logansport v. Dick* (1880) 70 Ind. 65, 36 Am. Rep. 166; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267.

² *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (1874) 61 N. Y. 178, 19 Am. Rep. 267.

³ *French v. Vix* (1893) 2 Misc. 312, 21 N. Y. Supp. 1016, affirmed in (1894) 143 N. Y. 90, 37 N. E. 612.

⁴ *Schnurr v. Huntington County* (1899) 22 Ind. App. 188, 53 N. E. 425.

⁵ In *McCafferty v. Spuyten Duyvil & P. M. R. Co.* (N. Y.) *supra*, where the rocks were cast against the plaintiff's house, the court argued thus: "The injuries were not occasioned in consequence of the omission of any duty which was incumbent on the defendant. It had let the contract, so far as appears, to a competent person, and had provided in the contract that he should be responsible for any damage

group them together in the same section.

It is clear that the doctrine as to the nonliability of the employer for injuries of this type involves an acceptance of the proposition, expressly affirmed in some of the cases, that the latter cannot be charged with responsibility on the theory of his having authorized the performance of work which constituted a nuisance;¹ or would "necessarily produce" such injuries as those referred to above;² or was "dangerous in itself;"³ or "inherently dangerous."⁴

The liability of the employer for the acts of the contractor has been denied in respect of damage occasioned to property by flying rocks,⁵

occasioned by blasting. The defendant did not authorize or permit a nuisance upon its premises. If it had, it would have been liable for any damage occasioned by the nuisance. Hence, if the defendant can be held liable in this case it must be upon the naked ground that it is responsible for the careless acts of the subcontractor's servants over whom it had no control. There is no authority in this state for imposing such a liability under such a state of facts." In this case Dwight, C., delivered a very elaborate and able dissenting opinion. The decision was expressly disapproved in *Wetherbee v. Partridge* (1899) 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894.

For other cases in which the plaintiff was held not to be entitled to recover for injuries caused by the blasting operations of railroad contractors, see *Tibbetts v. Knox & L. R. Co.* (1873) 62 Me. 437; *Pack v. New York* (1853) 8 N. Y. 222; *Stephensville, N. & S. T. R. Co. v. Couch* (1909) 56 Tex. Civ. App. 336, 121 S. W. 192.

In *Schnurr v. Huntington County* (Ind.) *supra*, a city, which, as licensor, had permitted the board of public commissioners to construct a sewer from the courthouse to a sewer of the city, was held not to be liable for damage occasioned to a house by the negligent manner in which rock was blasted by the contractor engaged to perform the work.

The liability of a municipal corporation for injuries caused to a house by stones thrown up while a

and by the shock of the explosion.⁶

The effect of the cases which relate to personal injuries is stated in § 33, *infra*, 858.

§ 30. *Other descriptions of work.*

The liability of the employer has been denied under the following circumstances: Where an embankment made for the purpose of diverting a creek proved to be too weak to resist the action of the water which it was

intended to confine;¹ where a sub-contractor, engaged to construct the abutments of a bridge, dredged out the river bed in such a manner as to throw the stream against the land of a riparian proprietor;² where a dam burst while it was being built;³ where a contractor employed to dredge out a canal built dams without constructing a by-pass to carry off the water, the result being that land adjacent to the canal was flooded;⁴ where splash

street was being graded was denied in *Kelly v. New York* (1854) 11 N. Y. 432; *Pack v. New York* (1853) 8 N. Y. 222. In *Storrs v. Utica* (1858) 17 N. Y. 104, 72 Am. Dec. 437, Comstock, J., doubted whether the second of these cases had been correctly decided upon the facts.

For cases in which it was held that an action was not maintainable for similar injuries, sustained as a result of blasting for the purpose of excavating the foundations of a house, see *French v. Vix* (1894) 143 N. Y. 90, 37 N. E. 612, affirming (1893) 2 Misc. 312, 21 N. Y. Supp. 1016; *Roemer v. Striker* (1894) 142 N. Y. 134, 36 N. E. 808 (holding that no error had been committed in allowing the defendant to give in evidence a written contract between himself and another, whereby the latter agreed to make the excavation).

It has been held that art. 16, § 8, of the Pennsylvania Constitution of 1874, is merely intended to impose upon corporations having the power of eminent domain a liability for consequential damages caused by the taking of property, and cannot be so construed as to render a railway corporation, having the power of eminent domain, responsible for damages caused by the negligence of a contractor in blasting rocks so as to throw them on property adjacent to the right of way. *Edmundson v. Pittsburgh, M. & Y. R. Co.* (1885) 111 Pa. 316, 2 Atl. 404.

⁶ *Probst v. Hinesley* (1909) 133 Ky. 64, 117 S. W. 389.

On the ground that the "work contracted for was lawful and necessary for the improvement and use of the defendant's property," the negligence of a contractor or his employee, in blasting out a ledge of rock which extended close up to the wall of a building on adjoining property, was held not to be chargeable to his employer,

who engaged him to excavate the lot preparatory to building thereon. *Berg v. Parsons* (1898) 156 N. Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N. E. 957, 4 Am. Neg. Rep. 432, reversing (1895) 90 Hun, 267, 35 N. Y. Supp. 780, Gray, J. (with whom agreed Bartlett and Haight, JJ.), dissented, but merely on the ground that there was evidence justifying the conclusion that the employer was culpable in engaging an incompetent contractor.

In the somewhat earlier case of *Hill v. Schneider* (1897) 13 App. Div. 299, 43 N. Y. Supp. 1, the court refused to grant, at the instance of a tenant, a preliminary injunction to restrain his landlord from blasting in an adjoining piece of land, the evidence being that the landlord personally had not been concerned in the blasting, but had employed an independent contractor to accomplish a certain result, not in itself wrongful, reserving to himself no control over the manner in which it shall be done. The decision was put upon the ground that the defendant was not proceeding to do something which might injure the petitioner *pendente lite*.

In *Seattle Lighting Co. v. Hawley* (1909) 54 Wash. 137, 103 Pac. 6, it was held that a gas company could not recover for damage caused to one of its mains by the explosion of dynamite used in grading a street.

¹ *Allen v. Hayward* (1845) 7 Q. B. 960, 115 Eng. Reprint, 749, 4 Eng. Ry. & C. Cas. 104, 15 L. J. Q. B. N. S. 99, 10 Jur. 92.

² *Salliotte v. King Bridge Co.* (1903) 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378.

³ *Boswell v. Laird* (1857) 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616.

⁴ *White v. Philadelphia* (1902) 201 Pa. 512, 51 Atl. 332.

dams designed to facilitate the delivery of logs at a sawmill were located in such a manner as to diminish the amount, and impair the quality, of the water which the plaintiff supplied to a town;⁵ where the plaintiff's land was flooded in consequence of the failure of a dredging contractor to close a gap which had been opened in a river levee to admit his dredges;⁶ where logs which were being driven down a river were so handled as to create an obstruction to navigation;⁷ where logs were so negligently driven that they lodged against a bridge, the consequence being that it was carried away;⁸ where a boom of logs which was about to be towed across an inlet of the sea was insecurely fastened, and, being detached from its moorings by a storm, was driven against the piles supporting a house;⁹ where a man employed to drive logs to a sawmill, and for that purpose to make use of his employer's dams, kept the lower one closed, and so caused the water

to be backed up, to the injury of a riparian proprietor;¹⁰ where a contractor employed to improve a harbor failed to provide lights and set marks for the guidance of ships;¹¹ and where a trained nurse, employed by the defendant to attend on his wife, created a nuisance in a hotel by depositing in a closet the corpse of an illegitimate child, of which she had been delivered while in her employer's apartments.¹²

c. Acts productive of transitory occurrences injurious to persons or property.

§ 31. Work performed for a railroad company.

The liability of the employer has been denied under the following circumstances: Where the injury complained of resulted from the negligent management of a train, used and controlled by contractors on a portion of the road not yet turned over to the company;¹ where a plank which

⁵ *Cartier Van Dissel v. Holland-Horr Mill Co.* (1916) 91 Wash. 239, 157 Pac. 687. In this case the evidence showed that the dams had been constructed against the advice of the owner of the sawmill.

⁶ *Teller v. Bay & R. Dredging Co.* (1907) 151 Cal. 209, 12 L.R.A.(N.S.) 267, 90 Pac. 942, 12 Ann. Cas. 779.

⁷ *Moore v. Sanborne* (1853) 2 Mich. 519, 59 Am. Dec. 209 (nuisance held not to be a necessary consequence of the work contracted for).

⁸ *Pierrepont v. Loveless* (1878) 72 N. Y. 211; *Road Dist. v. Pelton* (1901) 129 Mich. 31, 87 N. W. 1029.

⁹ *Easter v. Hall* (1895) 12 Wash. 160, 40 Pac. 728.

¹⁰ *Carter v. Berlin Mills Co.* (1876) 58 N. H. 52, 42 Am. Rep. 572 (gates of lower dam kept shut so that water was backed up).

¹¹ *Gilbert v. Halpin* (1858) 3 Ir. Jur. N. S. 300 (Pigot, C. B., dissenting). This decision was put on the broad ground that it was the duty of the contractor either to apprise the employer that the work had reached the stage at which it was necessary to have lights to prevent accidents, or to put the lights out himself. The inference drawn was that, as the contractor had not performed this duty, he was the only culpable party against

whom the injured person could proceed. This case was decided before the evolution of the doctrine regarding the non-delegable quality of certain duties, and at the present day the conclusion of most courts with regard to the same facts would probably be different.

¹² *Parke v. Seasingood* (1907) 152 Fed. 583. The court sustained the contention of defendant that, upon the allegations of the declaration, the nurse alone caused the plaintiff's injury, and was alone responsible for her actions, unless "there was either active participation in the concealment of the body outside of the rooms under the defendant's control, . . . and suffering it to become offensive, having knowledge of its presence."

¹ *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449; *Hitte v. Republican Valley R. Co.* (1886) 19 Neb. 620, 28 N. W. 284 (stranger was run over); *Houston & G. N. R. Co. v. Van Bayless* (1876) 1 Tex. App. Civ. Cas. (White & W.) 248 (mule run over), cited in *Houston & G. N. R. Co. v. Meador* (1878) 50 Tex. 77; *Meyer v. Midland P. R. Co.* (1873) 2 Neb. 319 (similar accident); *Cunningham v. International R. Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632 (injury to passenger on construction train, his re-

formed a temporary crossing was turned up by the negligence of a contractor's servant in driving against it, and injured a person who had stepped on it;² where a traveler was struck by a stone dropped from a bridge which was being constructed over a highway;³ where workmen dropped a chain from an elevated railway onto the street below;⁴ where the iron rail of an awning which was being moved for the purpose of obtaining more space for a street railway was let fall on a passer-by;⁵ where a railway car which was being drawn along a street by horses collided with a wagon;⁶

where two of the cars of a street railway company, after they had been turned over for repairs to another company over whose lines the defendant had running powers, broke loose while they were being hauled to the barn, and ran down a grade until they collided with a stationary car, thereby causing the death of a passenger;⁷ where a child was drawn into a machine used for the manufacture of the concrete needed for the construction of a street railway;⁸ where a horse was frightened by the operation of machinery near a highway;⁹ where fire kindled for the purpose of clearing the

ception on the train being a violation of the express prohibition of the railway company); *Union P. R. Co. v. Hause* (1871) 1 Wyo. 27 (in this case the plaintiff was conveyed in the caboose on a regular ticket issued by the contractor's employees).

In cases of this class it is error to give a charge to the jury which bases the responsibility of the defendant upon the isolated fact that the contractor was transporting freight and passengers for reward, on a finished portion of the line. This fact would be insufficient to warrant the inference thus drawn from it, if it should be shown, either (1) that the contractor was operating that particular section of the road, as a means of furthering the construction of the unfinished portion, or (2) that, although the contractor might have been transporting freight and passengers under an arrangement which did not avail to exempt the company from liability for his negligence, while he was rendering that service, yet he exercised at the same time, in respect to the work of construction, an independent occupation, and was not the agent of the company while discharging the functions incident to that position. *Rome & D. R. Co. v. Chasteen* (1889) 88 Ala. 591, 7 So. 94.

² *Thomas v. Altoona & L. Valley Electric R. Co.* (1899) 191 Pa. 361, 43 Atl. 215, 6 Am. Neg. Rep. 383.

³ *Reedie v. London & N. W. R. Co.* (1849) 4 Exch. 244, 154 Eng. Reprint, 1201, 20 L. J. Exch. N. S. 65, 6 Eng. Ry. & C. Cas. 184, 19 Eng. Rul. Cas. 168.

⁴ *Burmeister v. New York Elev. R. Co.* (1881) 15 Jones & S. (N. Y.) 264.

⁵ *O'Rourke v. Hart* (1860) 7 Bosw.

(N. Y.) 511, later appeal in (1862) 9 Bosw. 301.

⁶ *Schular v. Hudson River R. Co.* (1862) 38 Barb. (N. Y.) 653.

⁷ *Beckman v. Meadville & C. Street R. Co.* (1907) 219 Pa. 26, 67 Atl. 983.

⁸ *Chicago City R. Co. v. Hennessy* (1884) 16 Ill. App. 153. The court said: "The accident arose from the prosecution of work by the contractor purely collateral to the construction of the road. The company contracted with Holmes to build a designated cable system, with certain specified materials to be furnished by him, among which were engines, wire, concrete, etc. How or where the contractor should procure such materials was a matter with which the company had no concern. The contract did not provide how or where the concrete should be procured or mixed, much less that it should be mixed in a machine like the one which caused the injury; nor was Holmes the agent of the company in procuring and using the machine. The making of the concrete upon the street, and the use of the machine, were the idea and device of Holmes for his own convenience and benefit. The company could not interfere or control as to where he should procure or manufacture his materials, and he might manufacture them in the public street if the municipal authorities did not object. The use of the machine was not one of the natural contingencies which the company was required to anticipate, or which it could have provided against. Its use was only subsidiary to the performance, by the contractor, of his undertaking."

⁹ *Wabash, St. L. & P. R. Co. v. Farver* (1887) 111 Ind. 195, 60 Am. Rep.

right of way spread to adjacent premises;¹⁰ and where goods in a warehouse were destroyed by a fire communicated from the engine of a pile driver, used in connection with the work of repairing the company's wharf.¹¹

§ 32. Work performed with respect to a building.

(a) Injuries to persons in the building.

The right of action has been denied in cases where a workman in the employ of one who had undertaken to lay an upper floor pushed his foot through the ceiling of the room underneath, and caused a large piece of plaster to

fall on the occupants;¹ where the failure of a gas fitter to turn off the gas caused an explosion;² where a fire which started in the defendant's house, owing to the negligence of a man employed to paint it, destroyed the plaintiff's house.³

(b) Injuries to persons on adjacent highway.

The liability of the employer has been denied in cases where the platform of a hoisting apparatus was lowered so as to strike a person using the street;⁴ where such a person was injured by a heavy substance falling from the building;⁵ where a vehicle

696, 12 N. E. 296 (pumping engine); *Grant v. Louisville & N. R. Co.* (1914) 129 Tenn. 398, 165 S. W. 963 (portable forge).

¹⁰ See § 34 note, 1, *infra*, 859.

¹¹ *Brunswick Grocery Co. v. Brunswick & W. R. Co.* (1898) 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92. But a decision which proceeds upon the theory that the obligations of a bailee are not absolute is in conflict with the general doctrine that all contractual obligations are of this nature.

¹ *Fitzgerald v. Timoney* (1895; New York City Ct.) 13 Misc. 327, 34 N. Y. Supp. 460.

² *Rapson v. Cubitt* (1842) 9 Mees. & W. 710, 152 Eng. Reprint, 301, 6 Jur. 606; *Car. & M.* 64, 11 L. J. Exch. N. S. 271.

³ *Francis v. Johnson* (1904) 127 Iowa, 391, 101 N. W. 878, 17 Am. Neg. Rep. 507.

⁴ *Sartirana v. New York County Nat. Bank* (1910) 139 App. Div. 597, 124 N. Y. Supp. 197.

⁵ The injuries in the cases under this head were caused by the following:

A cornice which was being placed in position. *Chute v. Moeser* (1908) 77 Kan. 706, 95 Pac. 398; *Eastern Twps. Bank v. De Kérangat* (1907) *Rap. Jud. Quebec* 17 B. R. 232; *Deford v. State* (1868) 30 Md. 179.

A storm window which was being installed. *Phillips v. Roth* (1914) 160 App. Div. 792, 145 N. Y. Supp. 745.

A shutter which was being painted. *DAVIS v. JOHN L. WHITNEY & SON CO.* (reported herewith) ante, 782.

A piece of timber. *Pearson v. Cox* (1877; C. A.) L. R. 2 C. P. Div. (Eng.) 369, 36 L. T. N. S. 495; *Hurlstone v.*

London Electric R. Co. (1913; C. A.) 30 Times L. R. (Eng.) 398, reversing 29 Times L. R. 514; *Long v. Moon* (1891) 107 Mo. 334, 17 S. W. 810; *Vanderpool v. Husson* (1858) 28 Barb. (N. Y.) 196.

A stone. *Johnson v. Helbing* (1907) 6 Cal. App. 424, 92 Pac. 360.

A brick. *Boomer v. Wilbur* (1900) 176 Mass. 482, 53 L.R.A. 172, 57 N. E. 1004, 8 Am. Neg. Rep. 246; *Gardner v. Bennett* (1874) 6 Jones & S. (N. Y.) 197; *Wolf v. American Tract Soc.* (1898) 25 App. Div. 98, 49 N. Y. Supp. 236, reversed on another point in (1900) 164 N. Y. 30, 51 L.R.A. 241, 58 N. E. 31, 8 Am. Neg. Rep. 296; *Neumeister v. Eggers* (1899) 29 App. Div. 385, 51 N. Y. Supp. 481; *Smith v. Humphreyville* (1907) 47 Tex. Civ. App. 140, 104 S. W. 495; *Smith v. Milwaukee Builders' & T. Exch.* (1895) 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041.

A bucket of paint. *Drennen Co. v. Jordan* (1913) 181 Ala. 570, — A.L.R. —, 61 So. 938.

A rivet. *Padbury v. Holliday & Greenwood* (1912; C. A.) 28 Times L. R. (Eng.) 494; *SMITH v. BANK OF COMMERCE & T. Co.* (reported herewith) ante, 788 (ratio decidendi was that such an occurrence could not have been anticipated as a direct or probable consequence of the work).

A tool. *Pearson v. Cox* (1877) L. R. 2 C. P. Div. (Eng.) 369, 36 L. T. N. S. 495; *Fitzpatrick v. Chicago & W. I. R. Co.* (1888) 31 Ill. App. 649, writ of error dismissed for want of jurisdiction in (1891) 139 Ill. 248, 28 N. E. 837.

A coil of rope. *Geist v. Rothschild* (1900) 90 Ill. App. 324.

In *Meighan v. Hollister* (1892) 28

came into collision with a mortar box left on the roadway;⁶ where a pedestrian was struck by a wheelbarrow in which rubbish was being carried across the sidewalk;⁷ and where a pedestrian was injured, owing to the negligence of a workman in throwing a piece of lime into a mortar bed in the street.⁸

(c) Injuries to property on adjacent premises.

The nonliability of the employer has been affirmed in cases where a defectively built wall was blown down;⁹ where a house fell while it was being raised with a view to making an addition underneath;¹⁰ and where brick and mortar used for constructing a brick wall were allowed to drop.¹¹

Jones & S. 139, 17 N. Y. Supp. 180, the actual ground on which the complaint was held to have been properly dismissed was that the plaintiff had not discharged the burden of proving that an injury caused by a falling brick was attributable to the fault of the owner.

⁶ Green v. Soule (1904) 145 Cal. 96, 78 Pac. 337, 17 Am. Neg. Rep. 8.

⁷ Wilson v. Crutcher (1915) — Tex. Civ. App. —, 176 S. W. 625.

⁸ Strauss v. Louisville (1900) 108 Ky. 155, 55 S. W. 1075.

⁹ Benedict v. Martin (1862) 36 Barb. (N. Y.) 288.

¹⁰ Conners v. Hennessey (1873) 112 Mass. 96.

¹¹ Pye v. Faxon (1892) 156 Mass. 471, 31 N. E. 640 (occurrence was regarded as not being necessarily involved in the work).

¹ Hunt v. McNamee (1905) 72 C. C. A. 441, 141 Fed. 293; Symons v. Allegany County (1907) 105 Md. 254, 65 Atl. 1067 (stone was cast from a quarry from which a contractor, engaged to repair a highway, was authorized to obtain materials); Houghton v. Loma Prieta Lumber Co. (1907) 152 Cal. 500, 14 L.R.A.(N.S.) 913, 93 Pac. 82, 14 Ann. Cas. 1159 (traveler injured by fragment of stump of tree which was being removed by dynamite).

In Blumb v. Kansas City (1884) 84 Mo. 112, 54 Am. Rep. 87, where a pedestrian was struck by a stone thrown from a sewer trench, the court took the position that the cases relating to the positive duty of a city to

§ 33. Work performed by means of or with respect to explosives.

(This section is to be read, in connection with § 29, *supra*, 853.)

That an action will not lie against an employer to recover for personal injuries caused by rocks or other materials cast up by a blast has been laid down with relation to persons on or near highways;¹ to persons on adjoining premises;² and to property in the neighborhood of the place of work.³ His nonliability has also been affirmed in respect of injuries which result from horses being frightened by the noise of the blasting.⁴

The nonliability of a city for injuries caused by an explosion of dynamite stored in a street for the pur-

keep its streets in a safe condition for public travel were not applicable as precedents.

In Joliet v. Seward (1877) 86 Ill. 402, 29 Am. Rep. 35, where a blast set off by the workmen of a contractor employed to construct a sewer frightened the plaintiff's horse and caused it to run away, the actual ground upon which it was sought to charge the defendant municipal corporation with liability for the resulting injuries was that it "permitted" the contractor "to set off blasts without giving notice of danger to persons in the immediate vicinity." It was not contended that the action could be maintained in the absence of proof that the defendant had been negligent in this regard.

² Hunt v. Vanderbilt (1894) 115 N. C. 559, 20 S. E. 168 (man standing in doorway of building); Hayes v. Chicago, O. & P. R. Co. (1916) 203 Ill. App. 472 (servant of one railroad company was struck by a stump thrown up by a blast set off on the adjoining property of another railroad company); Kendall v. Johnson (1907) 51 Wash. 477, 99 Pac. 310.

³ Winniford v. MacLeod (1913) 68 Or. 301, 136 Pac. 25 (house under construction was struck by flying rocks).

⁴ In Herrington v. Lansingburgh (1888) 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728, where a team, which was standing in a street crossing the one in which a sewer was being constructed, was frightened by the noise of a blast fired by the contractors in the prosecution of the work, and the

poses of construction work was affirmed in the cases cited below.⁵

In another case, where injuries were occasioned to persons and property by an explosion of dynamite which the servants of a stevedore were loading on a steamer, it was held that no action would lie against the steamship company.⁶

plaintiff, while attempting to control them, was injured, it was held that the defendant municipality was not liable. The court said: "If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blasts and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could, in some degree, smother the blasts so as to prevent falling rocks and much of the noise of the explosion, or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village."

⁵ *Smyth v. New York* (1911) 208 N. Y. 106, 96 N. E. 409 (adjacent property injured); *Carpenter v. New York* (1906) 115 App. Div. 552, 101 N. Y. Supp. 402 (person on adjacent premises injured).

⁶ *Joseph R. Foard Co. v. Maryland* (1914) 135 C. C. A. 497, 219 Fed. 827, affirming 213 Fed. 51.

¹ That a landowner was not liable where a person employed to clear land set fire to some of the brushwood, and the fire spread to the premises of an adjoining landowner, was held in *Ferguson v. Hubbell* (1884) 97 N. Y. 507, 49 Am. Rep. 544. *Ripley v. Priest* (1912) 169 Mich. 383, 135 N. W. 258.

In *Rogers v. Parker* (1909) 159 Mich. 278, 34 L.R.A.(N.S.) 955, 123 N. W. 1109, 18 Ann. Cas. 753, the court relied not only on what it conceived to be the general principles applicable to the circumstances, but also on a special consideration, thus stated: "The setting of fires in this state in the process of fitting lands for cultivation is a lawful and proper act, without which

§ 34. Other descriptions of work.

The liability of the employer has been denied under the following circumstances: Where fire kindled for the purpose of clearing land spread to adjoining premises;¹ where a fire negligently kindled on a tramroad on which timber was being cut spread

the extension of husbandry would have been greatly limited. The statute upon which plaintiffs count in this suit recognizes the lawfulness of such fires, and only makes the owner of lands responsible for the escape of fire therefrom to the lands of another, where such escape was wilfully or negligently permitted. In other words, the statute recognizes that, if the work is properly done, no injurious consequences will follow, and therefore only holds the owner liable where the work has been improperly done." The present writer ventures to express the opinion that the argument of the court, in so far as it was based upon the terms of this statute, was unsound. It is submitted that a provision of this tenor merely amounted to a declaration that proof of negligence in regard to the use of fire for the purpose authorized should be a condition precedent to the maintenance of an action, or, in other words, that a landowner's liability should not be deemed absolute, in the sense that he must, at his peril, see that a fire which he set out did not spread outside his own premises. In this point of view the provision would manifestly have no bearing whatever upon the question of a landowner's responsibility for the negligence of a contractor employed to set out the fire.

In several cases it has been held that a railroad company is not liable for injuries caused by fire which spreads to adjoining land from timber or brushwood which a contractor is burning on its right of way. *Woodhill v. Great Western R. Co.* (1855) 4 U. C. C. P. 449; *Rogers v. Florence R. Co.* (1889) 31 S. C. 378, 9 S. E. 1059; *Callahan v. Burlington & M. River R. Co.* (1867) 23 Iowa, 562.

The doctrine laid down in one case was that a railroad company cannot, under such circumstances, be held liable, as a matter of law, and that the propriety of imputing such liability depends upon whether, under the given circumstances, the burning of

outside the employer's premises;² where damage to plaintiff's property resulted from a fire caused by sparks from the smokestack of a sawmill;³ where a fire was kindled on premises adjacent to a highway by sparks escaping from a threshing machine which was being moved along it;⁴ where premises adjacent to a highway were flooded by water which escaped from a fire plug;⁵ where a vehicle was negligently driven;⁶

the brush would be obviously dangerous to such landowners, or whether the circumstances were such that the operation would create no danger, except in so far as such danger might arise from the careless manner in which the work should be done. *St. Louis, I. M. & S. R. Co. v. Yonley* (1890) 53 Ark. 503, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 800.

That an action is not maintainable against a railroad company, where a subcontractor cuts a road through the plaintiff's premises, outside the right of way, and sets fires which, through his negligence, spread and burn the plaintiff's timber, was held in *Eaton v. European & N. A. R. Co.* (1871) 59 Me. 520, 8 Am. Rep. 430.

In *Gillson v. North Grey R. Co.* (1872) 33 U. C. Q. B. 128, affirmed in (1874) 35 U. C. Q. B. 475, it was held that liability for damage resulting from the spread of fire from a right of way could not be imputed to the company, on the theory that it was bound to insure the adjacent landowners against injury, for the reason that the contractor might adopt this method of disposing of brush and logs.

That a municipality is not liable where fire spreads from timber which is being burned on a road by a contractor was held in *Carroll v. Plympton* (1860) 9 U. C. C. P. 345.

That a town which enters into a contract with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages caused by the negligence of said contractor when burning the brush, was held in *Shute v. Princeton Twp.* (1894) 58 Minn. 337, 59 N. W. 1050.

² *Gay v. Roanoke R. & Lumber Co.* (1908) 148 N. C. 336, 62 S. E. 436.

³ *Whitney v. Clifford* (1879) 46 Wis. 138, 32 Am. Rep. 703, 49 N. W. 835.

where a teamster unlawfully used a drag to hold back a loaded wagon on a steeply graded street in a city;⁷ where a workman dropped a heavy object from a bridge which was being constructed over a highway;⁸ where the injuries complained of were caused by the negligent manner in which heavy articles were handled by persons engaged to transport them;⁹ where a horse was frightened by the noise of a steam

⁴ *Taute v. J. I. Case Threshing Mach. Co.* (1913) 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365.

⁵ *Frank v. Rome* (1908) 125 App. Div. 141, 109 N. Y. Supp. 247; *Ginther v. Yorkville* (1897) 3 Pa. Super. Ct. 403.

⁶ *Segler v. Callister* (1914) 157 Cal. 377, 51 L.R.A.(N.S.) 772, 139 Pac. 819 (automobile); *Foster v. Wadsworth-Howland Co.* (1897) 168 Ill. 514, 48 N. E. 163, affirming (1896) 68 Ill. App. 600 (wagon); *Jahn v. Wm. H. McKnight & Co.* (1904) 117 Ky. 655, 78 S. W. 862 (same); *Muldry v. Fromherz* (1917) 142 La. 1087, 78 So. 126 (collision between plaintiff's automobile and a wagon); *Moore v. Stainton* (1904) 80 App. Div. 295, 80 N. Y. Supp. 244, affirmed in (1904) 177 N. Y. 581, 69 N. E. 1127 (truck); *Muldoon v. City Fireproofing Co.* (1909) 134 App. Div. 453, 119 N. Y. Supp. 320 (wagon); *Woodcock v. Sattle* (1914; Sup. Tr. T.) 84 Misc. 488, 146 N. Y. Supp. 540 (automobile); *Thorn v. Clark* (1919) 188 App. Div. 411, 177 N. Y. Supp. 201 (same); *Loiselle v. Muir* (1889) *Montreal L. Rep.* 5 C. S. (Quebec) 155 (wagon).

⁷ *Johnston v. Seattle Taxicab & Transfer Co.* (1915) 85 Wash. 551, 148 Pac. 900 (taxicab collided with drag, and passenger was injured).

⁸ *Dorn v. Snare & T. Co.* (1909) 62 Misc. 269, 114 N. Y. Supp. 820 (tool); *McNamara v. New York* (1911) 144 App. Div. 504, 129 N. Y. Supp. 230.

⁹ Liability for the negligence of draymen, etc., and their servants, has been denied under the following circumstances:

A person passing by was struck by a barrel which was being rolled along a skid to a truck. *McMullen v. Hoyt* (1867) 2 Daly (N. Y.) 271.

A barrel of salt which was being delivered at the vendee's store rolled against and injured a person passing

roller on a city street,¹⁰ or by the noise of a portable forge operated near a highway by a railroad contractor;¹¹ where one of the logs which were being cut for the purpose of timbering a mine was allowed to roll down a steep hillside to the entrance of a drift;¹² where damage was done to a wall by the servants of a drayman engaged by a tenant of the building to move his furniture;¹³ where, by reason of the negligence of a winchman in the service of a stevedore, steel rails fell on a lighter from which they were being hoisted into a ship;¹⁴ where dynamite exploded while it was being loaded on a ship;¹⁵

where a child's hand was caught in a pulley used by a contractor for stringing telephone wires;¹⁶ where a visitor to a public resort was injured owing to the fall of a pole, while a balloonist was endeavoring to raise it for the purposes of the exhibition which he was engaged to give;¹⁷ where such a visitor was injured by reason of the negligent manner in which fireworks were handled;¹⁸ where a ram escaped from a farm and attacked a person on an adjoining farm;¹⁹ where a vessel which was being towed on a canal came into collision with another vessel.²⁰

on the footpath. *DeForrest v. Wright* (1852) 2 Mich. 368.

A truckman negligently rolled barrels out of his employer's store. *Riedel v. Moran, Fitzsimons Co.* (1894) 103 Mich. 262, 61 N. W. 509.

A carpenter employed on the lower floor of a warehouse was injured through the negligence of a truckman, or his employees, in allowing a mass of paper to slip from the sling in which it was being raised. *Kueckel v. Ryder* (1900) 54 App. Div. 252, 66 N. Y. Supp. 522.

In *Brophy v. Bartlett* (1888) 1 Silv. Ct. App. (N. Y.) 575, reversing (1885) 37 Hun, 642, where a man sent in charge of a horse which had been hired from his master by a truckman was injured by the fall of a hoghead from the truck, the trial judge granted a nonsuit on the ground that the evidence showed that, while the truck was being used, the plaintiff either remained under the control of his master, or became the servant pro tempore of the truckman. But the court of appeals held that the position of the plaintiff was a matter for the jury to determine.

¹⁰ *Cary v. Chicago* (1895) 60 Ill. App. 341.

¹¹ *Grant v. Louisville & N. R. Co.* (1914) 129 Tenn. 398, 165 S. W. 963.

¹² *Anderson v. Tug River Coal & Coke Co.* (1906) 59 W. Va. 301, 53 S. E. 713 (log knocked down some of the timbers in the drift).

¹³ *Bogle v. Weber* (1914) 189 Ill. App. 184, 9 N. C. C. A. 351.

¹⁴ *The Satilla* (1916) 148 C. C. A. 552, 235 Fed. 58.

¹⁵ *State use of Goralski v. General Stevedoring Co.* (1914) 213 Fed. 51, affirmed in (1914) 135 C. C. A. 497, 219 Fed. 827. This case was decided with reference to the theory that the work was not "intrinsically dangerous," and for this reason would not be regarded by all courts as a sound precedent.

¹⁶ *Vosbeck v. Kellogg* (1899) 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86.

¹⁷ *Smith v. Benick* (1898) 87 Md. 610, 42 L.R.A. 277, 41 Atl. 56. The court assigned three distinct grounds for its decision, viz.: (1) That the negligence complained of was collateral to, and not a probable consequence of, the work in hand; (2) that a new method, not known to the defendant, was employed for raising the pole; and (3) that there were no concealed dangers against which the defendant was bound to warn visitors.

¹⁸ *Reisman v. Public Service Corp.* (1911; Ct. of Err.) 82 N. J. L. 464, 38 L.R.A. (N.S.) 922, 81 Atl. 838; *Deyo v. Kingston Consol. R. Co.* (1904) 94 App. Div. 578, 88 N. Y. Supp. 487; *Noggle v. Carlisle & Mt. H. R. Co.* (1906) 215 Pa. 357, 64 Atl. 547. In some jurisdictions the liability of the employer under such circumstances would doubtless be predicated on the ground that the stipulated work was "intrinsically dangerous."

¹⁹ *Marsh v. Hand* (1890) 120 N. Y. 315, 24 N. E. 463, 1 Am. Neg. Cas. 390.

²⁰ *Blattenberger v. Little Schuylkill Nav. R. & Coal Co.* (1839) 2 Miles (Pa.) 309.

d. Acts constituting a trespass as regards the property of third persons.

§ 35. Work performed for a railroad company.

The right of action has been denied in cases where the contractor damaged adjacent property by taking a strip of

land outside a right of way;¹ by making roads;² by throwing down fences;³ by destroying crops;⁴ by taking materials for the purposes of construction;⁵ by depositing materials excavated during the progress of the work.⁶

¹ In *St. Louis, I. M. & S. R. Co. v. Gillihan* (1906) 77 Ark. 551, 92 S. W. 793, the allegations of the plaintiff were that, after he had conveyed to the defendant a right of way 100 feet wide through his lands, defendant entered upon and took an additional strip 7½ feet wide; that defendant's agents and employees took and destroyed 1,000 cedar rails; that, without plaintiff's consent, they made roads through plaintiff's lands, and that they unlawfully, and without authority, threw down and destroyed plaintiff's fences, exposing the crops on said land to depredations by live stock. Held, that the action was not maintainable.

In *Murdfelt v. New York, W. S. & B. R. Co.* (1886) 102 N. Y. 703, 7 N. E. 404, affirming (1884) 34 Hun, 632, where a subcontractor trespassed on certain land adjoining the right of way, the defendant's nonliability was affirmed on the ground that the plaintiffs, through their agent, had knowledge, at the time, of what was done by the contractors under the defendant, and made no objection. But the court also adverted to the point that "it does not appear that the contract which the defendant made with the North River Construction Company could not have been executed as made, without any interference with plaintiff's land, . . . and hence it cannot be said that the defendant caused the trespass, or is liable for it."

² *St. Louis, I. M. & S. R. Co. v. Gillihan* (1906) 77 Ark. 551, 92 S. W. 793.

³ *St. Louis, A. & T. R. Co. v. Knott* (1891) 54 Ark. 424, 16 S. W. 9; *St. Louis, I. M. & S. R. Co. v. Gillihan* (Ark.) supra; *Chicago, R. I. & P. R. Co. v. Ferguson* (1893) 3 Colo. App. 414, 33 Pac. 684; *Clark v. Hannibal & St. J. R. Co.* (1865) 36 Mo. 203; *McKinley v. Chicago, S. F. & C. R. Co.* (1890) 40 Mo. App. 449.

⁴ *Texas & P. R. Co. v. Dudley* (1878) 1 Tex. App. Civ. Cas. (White & W.) 271.

⁵ *Parker v. Waycross & F. R. Co.* (1888) 81 Ga. 387, 8 S. E. 871 (timber taken); *Rooker v. Lake Erie & W. R. Co.* (1917) 66 Ind. App. 521, 114 N. E.

998 (gravel removed from plaintiff's land).

In *Waltmeyer v. Wisconsin, I. & N. R. Co.* (1887) 71 Iowa, 626, 33 N. W. 140, where a subcontractor hauled earth for an embankment from land which lay outside the right of way, and had not been condemned, the court disapproved an instruction by which the jury were told that the defendant was responsible for whatever injury was directly committed by anyone who, while acting in its interest in building the road, took such ground as was reasonably necessary to be used for its right of way, although it had not been condemned for that purpose.

In *Kerr v. Atlantic & N. W. R. Co.* (1895) 25 Can. S. C. 197, plaintiff's counsel contended that, as the company had agreed in one clause of its contract to provide the contractor with the necessary land for borrow pits, it had made itself responsible for his acts, even though such acts should constitute trespass upon the property of others. The court was, however, of the opinion that, upon a proper construction of the contract, this stipulation must be taken to refer to places at which the contractor had borrowed by the consent of the company's engineer, such consent being requisite under another clause of the contract. The trespass in question, therefore, was held to be an independent tortious act for which the company could not, upon any principle of law, be made responsible.

For a case in which the liability of the company for a trespass of this nature was affirmed on the ground of an implied authorization, see *McClanathan v. New York & O. Midland R. Co.* (1873) 1 Thomp. & C. (N. Y.) 501. That the action could not have been maintained in the absence of proof of the employer's consent to the acts complained of was recognized by the court.

⁶ *Louisville R. Co. v. Wigginton* (1913) 156 Ky. 400, 161 S. W. 209 (earth deposited outside right of way obstructed flow of water); *Clark v.*

§ 36. Work with respect to a building.

The right of action as against the employer was denied in a case where the workmen of a person who had contracted with the defendant to erect a building carried away some bricks and other materials belonging to the buildings of a person who owned the adjacent land.¹

§ 37. Work performed on a highway.**(a) Employer a private party.**

The action was held not to be maintainable in cases where a contractor, engaged to grade a street, deviated from the surveyed line, and constructed it through a lot previously purchased by the plaintiff from the contractor's employer;¹ where a contractor engaged to cut standing timber in his employer's land felled trees so that they damaged the fences of an adjoining proprietor;² where a contractor engaged to cut timber on his employer's land cut some on the land of an adjoining proprietor;³ where a con-

tractor, engaged by the grantee of a right to cut timber on the grantor's land, cut down trees expressly excepted from the grant.⁴

(b) Employer a municipal corporation.

The nonliability of such a corporation has been affirmed in cases where a contractor, engaged to raise the grade of a street, allowed some of the dirt used for the embankment to roll down and remain in an adjoining lot;⁵ where earth was deposited on the land of a private party by a contractor engaged to grade a street,⁶ or to construct a sewer;⁷ where a contractor, engaged by a city to construct an aqueduct, cut down a fence and used the materials for the purposes of the work;⁸ where a contractor, engaged to construct a sewer, took possession of plaintiff's lands and damaged his crops;⁹ where a contractor for such work transported building materials across land not belonging to, or in the possession of, his employer;¹⁰

Hannibal & St. J. R. Co. (1865) 36 Mo. 203; Hughes v. Cincinnati & S. R. Co. (1883) 39 Ohio St. 461.

¹ Gayford v. Nicholls (1854) 9 Exch. 702, 156 Eng. Reprint, 301. It was held error to instruct the jury that, if the jury should be of opinion that the workmen, whilst they were on the land by defendant's permission, had from want of due care injured the plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts.

That the owner of a lot is not liable for unauthorized acts of trespass committed by an independent contractor, employed to build a house thereon, was held in Davison v. Shanahan (1892) 93 Mich. 486, 53 N. W. 624. But the nature of the trespass in question is not stated.

¹ Clark v. Torchiana (1912) 19 Cal. App. 786, 127 Pac. 831.

² Knowlton v. Hoit (1891) 67 N. H. 155, 30 Atl. 346.

³ Phillips v. Brittingham (1910; Super. Ct.) 2 Boyce (Del.) 173, 77 Atl. 964 (in charge to jury).

⁴ Abbott v. Sumter Lumber Co. (1912) 93 S. C. 131, 76 S. E. 146.

⁵ Bloomington v. Wilson (1896) 14 Ind. App. 476, 43 N. E. 37.

⁶ Fuller v. Grand Rapids (1895) 105 Mich. 529, 63 N. W. 530; Reed v. Allegheny City (1875) 79 Pa. 300.

⁷ Harding v. Boston (1895) 163 Mass. 14, 39 N. E. 411 (not work "of a kind which necessarily or naturally involved any injury to the plaintiff's land").

⁸ In Robert v. Montreal (1881; Montr. Q. B.) 2 D. C. A. (Quebec) 68, 4 L. N. 292. There is nothing in the judgment to show the precise ground upon which the majority of the court proceeded, but presumably the ratio decidendi was the merely collateral character of the tort. Ramsay, J. (with whom one judge concurred), was of opinion that the defendant was liable because the contractor acted "under a misapprehension of the rights of the corporation." But it may be affirmed with some confidence that no common-law court would ascribe any exculpatory effect to such a circumstance.

⁹ Smith v. Montreal (1917) Rap. Jud. Quebec 52 C. S. 284, 37 D. L. R. 159.

¹⁰ Harding v. Boston (Mass.) supra.

and where scavenging work was so performed that the materials removed

were deposited on the property of the complainant.¹¹

¹¹ In *Hilsdorf v. St. Louis* (1869) 45 Mo. 94, 100 Am. Dec. 352, the defendant city had made a contract with a certain party for the removal of the carcasses of any animals which might die or be killed within the city limits. On one occasion, after a large number of mules had been destroyed by a fire, the mayor, in order to obviate the nuisance which would have resulted from conveying the carcasses through the streets to the reduction works of the contractor, arranged with the con-

tractor's servant to have them thrown into the Missouri river. This servant took a road to the river bank where it happened to be convenient of access, and threw the carcasses into the river at a place where it had temporarily overflowed, and concealed a quarry belonging to the plaintiff. The current did not catch them, and they sank into the quarry, the result being that the plaintiff could not reopen it. For the injury so caused the city was held not to be liable. C. B. L.

STATE OF NEVADA

v.

SAMUEL COHEN.

Nevada Supreme Court—December 2, 1921.

(— Nev. —, 201 Pac. 1027.)

Appeal — effect of serving term of imprisonment — dismissal.

The serving of his term of imprisonment by one convicted of deserting his wife and child will render moot questions raised by his appeal from an order denying a new trial in the case, and cause dismissal of the appeal.

[See note on this question beginning on page 867.]

MOTION by the State to dismiss an appeal by defendant from a judgment of the District Court for Washoe County (Moran, J.), denying his motions for new trial and in arrest of judgment of conviction of wife and child desertion. *Appeal dismissed.*

The facts are stated in the opinion of the court.

Messrs. L. D. Summerfield and Harlan L. Heward, for the State:

Defendant's appeal should be dismissed, because all the questions presented in said appeal are now moot questions.

State v. Pray, 30 Nev. 206, 94 Pac. 218; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; 17 C. J. 193; *Tropp v. State*, — Okla. Crim. Rep. —, 186 Pac. 737; *Kitchens v. State*, 4 Ga. App. 440, 61 S. E. 736; *Ex parte Stedham*, 84 Tex. Crim. Rep. 523, 208 S. W. 930; *Harris v. Lang*, 27 App. D. C. 84, 7 L.R.A.(N.S.) 125, 7 Ann. Cas. 141; *United States v. Mills*, 11 App. D. C. 510; *Tabor v. Hipp*, 136 Ga. 123, 70 S. E. 886, Ann. Cas. 1912C, 246; *Edwards v. Reno*, — Nev. —, 198 Pac. 1090.

Mr. H. V. Morehouse for defendant.

Ducker, J., delivered the opinion of the court:

This is a motion to dismiss the appeal which came on to be heard in advance of a hearing on the merits, by stipulation of the parties. Appellant was found guilty by a jury in the second judicial district court, in and for Washoe county, upon a charge of wife and child desertion; said wife and children being in necessitous circumstances. He was thereafter, on the 27th day of June, 1921, sentenced to be punished by imprisonment in the county jail for a term of not less than one month, nor more than twelve months, and

remanded to the custody of the sheriff for the execution of sentence. Appellant in due time made a motion for a new trial, and moved in arrest of judgment. From the judgment and order denying a motion for a new trial this appeal is taken.

It appears from the certificate of the clerk of the court in which the conviction was had, annexed to the notice of motion to dismiss the appeal, that no application for a certificate of probable cause to stay the execution of judgment was ever made.

After appellant had served one month of his imprisonment, and on the 26th day of July, 1921, he applied to the court in which judgment was rendered for a writ of habeas corpus. It was alleged that the illegality of his confinement consisted in this: "That no definite period of time was fixed for the punishment and imprisonment of the said Samuel Cohen under said sentence, and that there is no law in this state authorizing or empowering the aforesaid district court to pronounce an indeterminate sentence in a case of misdemeanor against the said Samuel Cohen, and that the said offense for which he was prosecuted was and is a misdemeanor, and that he, the said Samuel Cohen, has now served the said period of one month, fixed in the said sentence and judgment of the court, and is entitled to his discharge from custody, for the reason that the remainder of said sentence over and above the said one month is illegal and void, and that the said confinement and restraint and deprivation of liberty of the said Samuel Cohen by the sheriff is now illegal, and he, the said Samuel Cohen, is entitled to his discharge from custody."

The writ was granted and the petitioner released from custody on said 26th day of July, 1921.

Upon these facts, counsel for the state urges that all questions presented on the appeal have become moot questions, and insists that it should be dismissed.

Appellant contends, and the affi-

davit of his counsel sets forth, that the appellant's guilt or innocence, the jury's disregard of the instructions of the court, as well as the disregard of its own instructions by the court, are questions involved in the motion for a new trial and in arrest of judgment; that these questions are presented by a duly settled bill of exceptions; and that, as the appeal from the order denying the motion for a new trial herein is a distinct and separate appeal from the judgment, the said questions are squarely before the court on appeal, and affect the substantial rights of this appellant, and also the state of Nevada, and are therefore not moot questions. While we are unable to perceive why the fact that these questions are brought before this court on an appeal from the order denying a new trial has any bearing on the motion before us, it is plain that their determination could have no practical result in the case.

Assuming that a decision on the merits would result favorably to appellant, the most that could be determined is that the evidence was insufficient to establish his guilt of the offense charged, or at least that he was illegally convicted by reason of erroneous instructions.

A reversal of the case by this court on any or all of the errors claimed could afford him no relief from the judgment.

He has satisfied that by the term of imprisonment served,

Appeal—effect of serving term of imprisonment —dismissal.

and has been discharged from custody. Consequently the controversy between the state and appellant, involved in this appeal, has been terminated as effectually as though a verdict of not guilty had been rendered. There is nothing material to be accomplished,—nothing on which the judgment of this court can act effectively and work an advantage to the appellant. People v. Leavitt, 41 Mich. 470, 2 N. W. 812.

While there are cases to the contrary, the weight of authority is to the effect that an appeal or writ of

error will be dismissed when there has been a voluntary payment by the defendant of the fine imposed. *Brown v. Atlanta*, 123 Ga. 497, 51 S. E. 507; *State v. Westfall*, 37 Iowa, 575; *State v. Conkling*, 54 Kan. 108, 45 Am. St. Rep. 270, 37 Pac. 992; *Eutsler v. Com.* 154 Ky. 35, 156 S. W. 855; *People v. Leavitt*, supra; *Washington v. Cleveland*, 49 Or. 12, 124 Am. St. Rep. 1013, 88 Pac. 305; *Com. v. Gipner*, 118 Pa. 379, 12 Atl. 306; *Batesburg v. Mitchell*, 58 S. C. 564, 37 S. E. 36; *Payne v. State*, 12 Tex. App. 160; *Madsen v. Kenner*, 4 Utah, 3, 4 Pac. 992; *State v. Pray*, 30 Nev. 207, 94 Pac. 218; 17 C. J. 193.

In the case of *Tropp v. State*, — Okla. Crim. Rep. —, 186 Pac. 737, an appeal was taken from a judgment of conviction. It was dismissed on motion of the attorney general. The court stated as one of its reasons for the dismissal: "That each defendant having been committed to jail under said judgment, they have long since served their respective terms of imprisonment; any legal question involved in this pretended appeal is moot."

There can be no real distinction which might call for the application of a different rule in a case where a fine has been imposed and one where the term of imprisonment adjudged has been served. This was pointed out in *State v. Westfall*, 37 Iowa, 576, in which the court said: "By voluntarily paying a fine imposed upon them, they [appellants] stand in the same relation to the law as they would have done if they had served their period of imprisonment. All that can be said for them is that they have paid money in mistake of their legal rights. If the money need not have been paid, they have clearly made a mistake of law. If, upon this appeal, the judgment should be reversed, they could not recover it, and hence they could derive no benefit from the appeal. The judgment of the court, upon appeal, would determine a mere abstraction."

An appeal was dismissed by this

court in the case of *State v. Pray*, supra, on the following facts: Pray and his codefendant, Langdon, were convicted of a felony, and appealed from the judgment and order denying their motion for a new trial. The former paid his fine under protest, and attempted, by stipulation of his counsel with the district attorney, to reserve the rights of appeal. The attempted reservation was declared void by the court. In the course of its opinion upon this phase of the case, the court said that it fell within a class of cases referred to in 2 Cyc. 648, 649: "Where an order appealed from is of such a nature that its execution has left nothing upon which a judgment of reversal can operate, the appeal will be dismissed, unless such right was specially reserved;" and pointed out that, upon a reversal of the case, no effective relief could be granted, for the reason that neither this court nor the trial court had power to direct that the fine paid by Pray be restored to him. As previously stated, there can be no distinction between the voluntary payment of a fine and serving a term of imprisonment. Both satisfy the judgment of the lower court and leave nothing upon which a decision on appeal could operate. Counsel for appellant would distinguish the Pray Case, and, referring to the summary of the briefs, preceding the opinion, urges that, as it appears a fine was imposed instead of a sentence of imprisonment, at the request of the defendants, and the appeal taken after the payment of the fine, it was deemed waived by the appellate court. Whereas, in the instant case, he insists there could be no waiver of appeal, for the reason that the appeal was perfected and pending before appellant was released on habeas corpus. The opinion in the Pray Case speaks for itself; but, be that as it may, the effect is the same in either instance. The voluntary payment of a fine or serving a term of imprisonment in a criminal action operates as a final disposition of the case, and pre-

cludes the defendant from prosecuting an appeal, or proceeding further with an appeal already commenced.

If this appeal should be maintained, the appellant can derive no benefit in point of law from the judgment of this court. It is insisted that the conviction is erroneous for the reasons given, and casts a stigma upon appellant's good name, which he is entitled to have removed by a judgment of reversal. We agree with counsel for appellant, and the poet and authorities he quotes, and are also mindful of the scriptural assurances that a "good name is better than riches." Its loss or impairment is a melancholy disaster to anyone who values it. But we do not perceive how we can revive a dead judgment for the purpose of quieting title to a good reputation. Appellant's opportunity to relieve himself of any odium that may have attached to his name on account of his conviction was lost by his failure to avail himself of the procedure provided for staying execution of judgment, pending an appeal. See Rev. Laws, § 7294.

The authorities cited and quoted by appellant (*Com. v. Fleckner*, 167 Mass. 13, 44 N. E. 1053; *Barthelmy v. People*, 2 Hill, 248; *People v.*

Marks [Gen. Sess.] 64 Misc. 679, 120 N. Y. Supp. 1106; *Roby v. State*, 96 Wis. 667, 71 N. W. 1046), in which the right to maintain an appeal, notwithstanding the payment of the fine imposed, was upheld on account of the disgrace attaching to the defendant's good name by reason of the conviction, belong to a class of cases which form the minority rule. See note in *Ann. Cas.* 1913E, p. 300. The doctrine advanced was not recognized in *State v. Pray*, and we cannot sanction it.

A defendant who has taken an appeal in a criminal action is entitled to a reversal only when there is prejudicial error in the record, and an existing judgment upon which the decision of this court can operate.

Appellant served one month of the sentence imposed, and applied for a writ of habeas corpus to be released from further imprisonment, upon the ground that the remainder of his sentence was void. His petition was granted, and he was discharged from custody. He cannot now be heard to contend that the judgment has not been satisfied.

The appeal is dismissed.

Sanders, Ch. J., and Coleman, J., concur.

ANNOTATION.

Payment of fine, serving sentence, or discharge on habeas corpus, as waiver of right to review conviction.

I. Payment of fine:

- a. Majority view, 867.
- b. Minority view, 871.

II. Serving sentence, 872.

III. Discharge on habeas corpus, 873.

I. Payment of fine. —

a. Majority view.

Generally.

There is some conflict in the decisions on the right of a defendant, after he has paid a fine, to have reviewed the judgment imposing the fine, but the view is taken in a majority of the jurisdictions that a voluntary payment of the fine terminates

the action and precludes a review of the conviction.

Arkansas.—*Floyd v. State* (1877) 32 Ark. 200; *Schlieff v. State* (1882) 38 Ark. 522; *Hubbard v. State* (1903) 71 Ark. 467, 75 S. W. 853.

Georgia.—*Brown v. Atlanta* (1905) 123 Ga. 497, 51 S. E. 507; *White v. Tifton* (1907) 1 Ga. App. 569, 57 S. E. 1088; *Kitchens v. State* (1908) 4 Ga. App. 440, 61 S. E. 736.

Iowa.—*State v. Westfall* (1873) 37 Iowa, 575.

Kansas.—*State v. Conkling* (1894) 54 Kan. 108, 45 Am. St. Rep. 270, 37 Pac. 992.

Kentucky.—*Eutsler v. Com.* (1913) 154 Ky. 35, 156 S. W. 855.

Louisiana.—*State ex rel. Lamarque v. Burthe* (1887) 39 La. Ann. 328, 1 So. 652; *State ex rel. Perilloux v. Wilder* (1898) 50 La. Ann. 388, 23 So. 203.

Michigan.—*People v. Leavitt* (1879) 41 Mich. 470, 2 N. W. 812; *Powell v. People* (1881) 47 Mich. 108, 10 N. W. 129; *Ishpeming v. Maroney* (1882) 49 Mich. 226, 13 N. W. 527 (fine paid by third person).

Minnesota.—*State v. People's Ice Co.* (1914) 127 Minn. 252, 149 N. W. 286, Ann. Cas. 1916C, 618. See also *State v. Chicago G. W. R. Co.* (1914) 125 Minn. 332, 147 N. W. 109.

Nevada.—*State v. Pray* (1908) 80 Nev. 206, 94 Pac. 218.

Oklahoma.—See *Sibenaler v. State* (1915) 11 Okla. Crim. Rep. 504, 148 Pac. 678.

Oregon.—*Washington v. Cleland* (1907) 49 Or. 12, 124 Am. St. Rep. 1013, 88 Pac. 305. Compare *State v. Swikert* (1913) 65 Or. 286, 132 Pac. 709.

Pennsylvania.—*Com. v. Gipner* (1888) 118 Pa. 379, 12 Atl. 306; *Com. v. Yocum* (1908) 37 Pa. Super. Ct. 237; *Com. v. Konas* (1914) 57 Pa. Super. Ct. 629; *Com. v. Shofnoski* (1896) 5 Pa. Dist. R. 784; *Com. v. Reeher* (1906) 17 Pa. Dist. R. 18, 33 Pa. Co. Ct. 472; *Com. v. Nickolson* (1908) 35 Pa. Co. Ct. 556.

South Carolina.—*Batesburg v. Mitchell* (1900) 58 S. C. 564, 37 S. E. 36. See also *Lexington v. Wise* (1885) 24 S. C. 163.

Texas.—*Payne v. State* (1882) 12 Tex. App. 160.

Utah.—*Madsen v. Kenner* (1884) 4 Utah, 3, 4 Pac. 992.

Virginia.—See *Com. v. Bass* (1912) 113 Va. 760, 74 S. E. 397.

England.—*Rex v. Justices of West Riding* (1815) 3 Maule & S. 493, 105 Eng. Reprint, 695.

Canada.—*Rex v. Neuberger* (1902) 9 B. C. 272; *Re Justices of York* (1863) 13 U. C. C. P. 159; *Rex v. Sing*, 32 West. L. Rep. 649. See also *Rex v. Tucker* (1905) 10 Ont. L. Rep. 506, 6 Ont. Week. Rep. 583.

As to the effect of the payment of

a fine on the right of the defendant to review by certiorari the proceedings against him, the court said, in *People v. Leavitt* (Mich.) *supra*: "Passing to the return made to the certiorari, which must be regarded as conclusive (*People ex rel. Sims v. Fire Comrs.* (1878) 73 N. Y. 437), we find that plaintiff, being charged with having disobeyed the ordinance, was convicted on his plea of not guilty, and simply fined \$5, without costs, and that he immediately satisfied the judgment by paying the fine. He voluntarily submitted to the conviction, and discharged the entire penalty without the award of process. . . . Nothing remained in which the plaintiff could have legal interest, or anything which could be affected practically by any judgment on certiorari. An order of reversal would be a fruitless thing." See to the same effect, *Powell v. People* (1881) 47 Mich. 108, 10 N. W. 129.

In *State v. Westfall* (1873) 37 Iowa, 575, the court said: "If the judgment in this case had been one of imprisonment, and the defendants had served out the period of imprisonment, it seems clear that they could not afterward prosecute an appeal from the judgment, for the reason that they could derive no benefit from a reversal. By voluntarily paying a fine imposed upon them they stand in the same relation to the law as they would have done if they had served their period of imprisonment. All that can be said for them is that they have paid money in mistake of their legal rights. If the money need not have been paid, they have clearly made a mistake of law. If, upon this appeal, the judgment should be reversed, they could not recover it, and hence they could derive no benefit from the appeal. The judgment of the court upon appeal would determine a mere abstraction. Besides, it is inconsistent to yield a voluntary obedience to a judgment of a court, and afterwards appeal therefrom."

In *Com. v. Konas* (1914) 57 Pa. Super. Ct. 629, it was said: "When a defendant is convicted in a summary proceeding before a magistrate, of an

offense of which the magistrate had jurisdiction, and is fined an amount within the limit authorized by the statute or ordinance creating the offense, and voluntarily pays the fine, that is an end of the case. Having voluntarily paid his fine, he has satisfied the law, and is no longer in a position to raise any question as to the validity of the payment. *Com. v. Gipner* (1888) 118 Pa. 379, 12 Atl. 306; *Com. v. Yocum* (1908) 37 Pa. Super. Ct. 237. When the fine has been thus voluntarily paid, any question as to the regularity of the proceedings becomes merely academic, and the state does not maintain her courts of record for the purpose of deciding questions of that character."

In *State v. People's Ice Co.* (1914) 127 Minn. 252, 149 N. W. 286, Ann. Cas. 1916C, 618, it appeared that the president of the defendant company requested a special term of court to withdraw a plea of not guilty and enter a plea of guilty. After the plea of guilty was entered, a fine was imposed and at once paid, and no further proceedings were taken until almost six months later, when an appeal was taken. The court held that the appeal should be dismissed, since the facts of the case clearly showed the payment of the fine to be voluntary.

An agreement that the amount of a fine should be held by the clerk of the court, pending the outcome of an appeal, has been held to be invalid, and not to alter the rule that the payment of the fine barred the defendant from prosecuting an appeal. *State v. Pray* (1908) 30 Nev. 206, 94 Pac. 218.

Payment not fully satisfying sentence.

Under the rule supported by the better reasoning, the payment of a fine does not bar a defendant's right to a review of his conviction unless the judgment of conviction is fully satisfied. *Sibenaler v. State* (1915) 11 Okla. Crim. Rep. 504, 148 Pac. 678; *State v. Swikert* (1913) 65 Or. 286, 132 Pac. 709.

In the case last cited it appeared that the defendant was sentenced to confinement in the penitentiary, a fine was imposed on him, and he was

paroled from the sentence of imprisonment on condition that he pay the fine. It was held that the payment of the fine did not bar his right of appeal, the court saying: "The payment of the fine was payment under duress, equivalent to a payment under protest. It was made to avoid being sent to the penitentiary, and was a satisfaction of the judgment only pro tanto, which still stands against him as to the imprisonment; and he has a right to question the legality of the judgment, which was beyond the jurisdiction of the court to render." So, in *Sibenaler v. State* (1915) 11 Okla. Crim. Rep. 504, 148 Pac. 678, the court said, with respect to a similar state of facts: "While the state has not traversed the allegation that plaintiff in error has so far complied with the condition of his pardon, yet there may be a breach of the condition before the \$500 has been fully paid. For this reason, the motion that the proceedings abate is overruled." The court held, however, that the defendant, by applying for a pardon, abandoned his appeal, which was then pending.

However, the payment of costs in a criminal case has been held to be a partial compliance with a judgment to pay a fine and costs and be confined in jail, and to deprive the defendant of the right to prosecute an appeal. *State v. Massa* (1913) 90 Kan. 129, 132 Pac. 1182.

In *Eutsler v. Com.* (1913) 154 Ky. 85, 156 S. W. 855, it appeared that the appellant was convicted under each of three indictments, and a judgment was entered under each, imposing both a fine and imprisonment. In holding that the payment of two of the fines and a part of the third barred him from prosecuting appeals from the judgments, the court said: "It is not claimed or pretended by appellant that the payment was made to prevent his property from being levied upon and sold in satisfaction of the judgments, or to prevent his confinement in jail under capiases, either in payment of the fines or to serve out the terms of imprisonment imposed as punishment by the judgments; for, pending the appeals, his property was protected

from sale and his person from imprisonment by the supersedeas bonds he had executed. Aside from these considerations, appellant cannot, in the event of a reversal of the judgments appealed from, recover of the commonwealth what he has paid on the judgments; nor could he, in the event of reversals, do so, had they not been superseded. The state cannot be sued by one of its citizens without an enabling act from the legislature. So, it cannot be claimed that the appellant paid the judgments with the expectation that the money would be refunded if the judgments are reversed. By his payment to the clerk of the Harlan circuit court of the amount shown by his response to the motion to dismiss the appeals, appellant deprived himself of a hearing on his appeals, as he thereby entirely satisfied two of the judgments appealed from and left unpaid of the third judgment only \$14, which reduced it to an amount of which this court has no jurisdiction. In other words, we cannot entertain the appeals, for two of the judgments have been satisfied and appellant's only liability on the third one is for an amount or fine less than \$50; therefore, § 347, Criminal Code, deprives us of jurisdiction. The imprisonment imposed by the judgments does not give us jurisdiction, for in each case it is less than the thirty days required by the section of the Code, *supra*, to confer such jurisdiction."

Payment to avoid imprisonment or levy.

Though a judgment is in the alternative, imposing a fine, or, in the case of nonpayment, incarceration, it has been held that a payment of the fine is voluntary, and bars the right to a review of the conviction by an appellate court. *White v. Tifton* (1907) 1 Ga. App. 569, 57 S. E. 1038; *State ex rel. Lamarque v. Burthe* (1887) 39 La. Ann. 328, 1 So. 652; *State v. Pray* (1908) 30 Nev. 206, 94 Pac. 218; *Washington v. Cleland* (1907) 49 Or. 12, 124 Am. St. Rep. 1013, 88 Pac. 305; *Madsen v. Kenner* (1884) 4 Utah, 3, 4 Pac. 992. Compare *State v. Swikert* (1913) 65 Or. 286, 132 Pac. 709, set out *supra*.

An order overruling a writ of cer-

tiorari has likewise been held to be proper where it appeared that the defendant paid a fine under an alternative sentence to pay the fine or work for thirty days on the streets or public works of the city. *Brown v. Atlanta* (1905) 123 Ga. 497, 51 S. E. 507. See to the same effect, *Kitchens v. State* (1908) 4 Ga. App. 440, 61 S. E. 736, wherein the right to a review by a writ of error was denied.

On the contrary, in *Com. v. Barbono* (1914) 56 Pa. Super. Ct. 637, a defendant who, after having been fined for the violation of a liquor regulation, was unlawfully sentenced to jail, was held not to be precluded by a payment of the fine from having his conviction reviewed by certiorari. The court said: "The Act of 1911 provides that the fine or penalty shall 'be recovered, as debts are by law recovered, in an action to be instituted in the name of the commonwealth.' It confers no express authority upon the justice to summarily sentence the defendant to imprisonment in jail, in default of payment, and, therefore, payment of the fine and costs, in order to obtain release from such imprisonment, cannot be regarded as a voluntary act which precludes him from having the lawfulness and regularity of his conviction reviewed by certiorari."

In *State v. Chicago G. W. R. Co.* (1914) 125 Minn. 332, 147 N. W. 109, it appeared that defendant paid his fine under protest, having been refused a stay of proceeding for the purpose of perfecting his appeal. The court said: "The trial court, after hearing the evidence, adjudged defendant guilty of the charge and imposed a fine of \$15. Though the record is not quite clear, it is apparent that defendant requested a stay of proceedings to enable it to perfect an appeal. This the court declined to grant, holding that, under the statute creating that court, a stay of proceedings after conviction of a criminal charge is prohibited until the fine imposed has been paid. Defendant thereupon, and under protest, paid the fine, and thereafter perfected this appeal. We are all agreed that the learned court was in error in applying

the provisions of the statute under which the court was organized, namely, § 5, chap. 48, p. 624, Sp. Laws 1887, for that statute, properly construed, applies only to prosecutions for municipal offenses, and not to violations of the state laws. But this is unimportant, since the majority hold that, by reason of the refusal of the court to grant the stay of proceedings, the payment was not voluntary within the rule holding that such a payment precludes the right of appeal from the judgment so paid."

In *Rex v. Tucker* (1905) 10 Ont. L. Rep. 506, 6 Ont. Week. Rep. 533, a judgment of a trial court directed that if a fine and costs imposed on the defendant were not paid forthwith, the same were to be collected by a levy on his goods and chattels. The defendant paid the fine and costs, and immediately thereafter gave notice that he would take an appeal. It was held that the payment was not voluntary, and did not preclude an appeal.

Payment under protest.

There is authority for the doctrine that though the defendant pays a fine under protest, he thereby waives his right to a review of the conviction. *State v. Conkling* (1894) 54 Kan. 108, 45 Am. St. Rep. 270, 37 Pac. 992; *Com. v. Nickolson* (1908) 35 Pa. Co. Ct. 556; *Batesburg v. Mitchell* (1900) 58 S. C. 564, 37 S. E. 36.

An appeal taken after the payment of a fine was dismissed in *State v. Conkling* (Kan.) *supra*, with the following explanation: "It appears that the sentence of the law has been executed, and nothing is left for further controversy. By his own act, Conkling has satisfied and discharged the judgment entered against him. His protest and attempt to reserve the right of appeal are unavailing. The statute does not provide for or contemplate an appeal from a discharged judgment. Neither payment nor protest was necessary to protect his rights. Under the statute, the judgment of conviction which was entered against him would have been stayed by the mere taking of an appeal, without any order of the court, or the giving of a

bond. Gen. Stat. 1889, § 5349. The appeal will be dismissed."

But in a case wherein it appeared that the defendants had offered bonds to abide the determination of their case on appeal, and had paid their fine under protest, when the bonds had been refused on the ground that they had no right to appeal, it was held that the payment was involuntary, and that the appeal should be allowed. *Lexington v. Wise* (1885) 24 S. C. 163. See also *State v. Chicago G. W. R. Co.* (1914) 125 Minn. 332, 147 N. W. 109, set out *supra*.

Giving of security for fine.

The giving of a mortgage for the amount of a fine has been held not to be a payment of the fine which prevents the defendant from taking an appeal under the following statute: "No appeals shall be taken from the judgment of a justice's court after it has been paid or collected, nor after sixty days from the rendition of the judgment." *Floyd v. State* (1877) 32 Ark. 200; *Schlieff v. State* (1882) 38 Ark. 522; *Hubbard v. State* (1903) 71 Ark. 467, 75 S. W. 853.

Likewise it has been held that the giving of a note is not a payment of a fine which satisfies a judgment or bars the defendant from a right of appeal, and it is immaterial that the docket of the trial justice may state that the fine has been paid. *Com. v. Bass* (1912) 113 Va. 760, 74 S. E. 397. In that case it was held to be also immaterial that the costs were paid before the judgment was actually entered.

b. Minority view.

There is authority, however, to support the view that the payment of a fine does not impair the right of a defendant in a criminal action to have his conviction reviewed by an appellate court. *Johnson v. State* (1911) 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E, 296; *Com. v. Fleckner* (1896) 167 Mass. 13, 44 N. E. 1053; *Barthelemy v. People* (1842) 2 Hill (N. Y.) 248; *People v. Marks* (1909) 64 Misc. 679, 120 N. Y. Supp. 1106.

In *Johnson v. State* (1911) 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E, 296, the court said: "A defendant who has

been convicted of a misdemeanor must, although he appeals, either give the bail prescribed by the statute or satisfy the judgment (if it can be satisfied), or be committed to jail. We find nothing in our statutes regulating appeals which might indicate that, where the punishment imposed is the payment of money, its payment by the defendant, before or pending appeal, is a waiver or relinquishment of that right. We are therefore free to adopt that rule which is most consonant with justice, and most in accord with the general principles of the law. . . . Nor do we conceive that the supposed inability of the defendant to recover, after reversal of the judgment, the sum paid by him for its satisfaction, as is predicted in some of the cases under criticism, is a matter of vital importance. Whether or not the defendant in this case might, by order of restitution, or by any other legal remedy, recover the money he has paid, is a question which is not before us, and which we need not now consider. The right to appeal and reverse an erroneous judgment in a criminal case cannot, we are satisfied, be grounded solely on that consideration, and we concur in the opinion of Cowen, J., in *Barthelmy v. People* (1842) 2 Hill (N. Y.) 255, where he says, in discussing this very question, in relation to a conviction for criminal libel: 'But the payment or satisfaction of an erroneous judgment against a party can never be allowed as a bar to a writ of error, even in a case where we must see that no restitution could follow the reversal as a legal consequence, and no costs be recovered. An erroneous judgment against him is an injury per se, from which the law will intend he is or will be damnified by its continuing against him unreversed. . . . A judgment on the merits is conclusive between the parties, and, if not by direct, it may be followed by remote, consequences actually injurious.' And this view has been quoted and approved by the supreme court of Illinois. Page v. *People* (1878) 99 Ill. 425. The motion to dismiss the appeal must, therefore, be overruled."

Justice Holmes, in delivering the

opinion of the court in *Com. v. Fleckner* (1896) 167 Mass. 13, 44 N. E. 1053, said: "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction, . . . merely because a wrongly convicted person has paid his fine or served his term."

In *People v. Marks* (1909) 64 Misc. 679, 120 N. Y. Supp. 1106, it was said: "But it is contended by the learned counsel for the people that 'payment of the fine concluded the action, and this appeal is purely academic.' If there is any force in this contention, the point should have been raised by counsel on the motion for allowance of appeal. Mr. Justice Rosalsky allowed the appeal, and I am of the opinion that his action renders it necessary for me to consider this case on its merits. But I do not agree with the learned counsel that the question is purely academic. I am of opinion that if the defendant had been unjustly compelled to pay a fine, his money should be returned to him. Of far more importance, however, is the defendant's right to be relieved of the odium and disgrace of a conviction."

In Ohio it has been held that the payment of a fine to avoid imprisonment is made under such duress as to leave unimpaired the defendant's right of appeal. *Hogue v. State* (1902) 23 Ohio C. C. 567; *Oberer v. State* (1904) 28 Ohio C. C. 620.

And a payment of a fine by the defendant to prevent the foreclosure of a mortgage given by him as security has been held to be an involuntary payment, entitling him to prosecute an appeal. *Johnson v. State* (1890) 2 Ohio C. D. 687, 4 Ohio C. C. 524.

II. *Serving sentence.*

The two decisions which have passed on the effect of the serving of the full term of a sentence of imprisonment on the right of the defendant to a review of his conviction have reached opposite conclusions.

In *Roby v. State* (1897) 96 Wis. 667, 71 N. W. 1046, the court said: "It appears by the record that the plaintiff in error was sentenced to one

year's imprisonment in May, 1896, and consequently that his term must now have expired. This fact, however, makes no difference with the disposition of the case. A person convicted of crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous. The mere payment of a judgment in a civil cause does not operate to bar or waive the right to appeal therefrom (*Sloane v. Anderson* (1882) 57 Wis. 123, 13 N. W. 684, 15 N. W. 21), and for stronger reasons the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation." There is a dictum to the same effect in *Com. v. Fleckner* (1896) 167 Mass. 13, 44 N. E. 1053. See *supra*, I. b.

On the other hand, in *Tropp v. State* (1920) — Okla. Crim. Rep. —,

186 Pac. 737, it was held that the defendants, after serving the full term of their sentences in jail, were not entitled to prosecute a joint appeal from their conviction, since any legal question involved in the appeal was moot. A dictum to the same effect in *State v. Westfall* (1873) 37 Iowa, 575, is set out *supra*, I. a.

III. Discharge on habeas corpus.

In the reported case (*STATE v. COHEN*, ante, 864) it is held that one who has served a part of a sentence of imprisonment, and has been discharged on a writ of habeas corpus, on the ground that the remainder of the sentence was illegal, cannot thereafter prosecute an appeal from his conviction, though the appeal was perfected and pending before he was released. The court states that the defendant's opportunity for vindication was lost by his failure to avail himself of the procedure providing for staying execution of judgment pending an appeal. A search has failed to disclose any other case on this point. W. S. R.

MRS. W. B. HIPPIE

v.

E. I. DUPONT DE NEMOURS & COMPANY et al., Appts.

North Carolina Supreme Court — September 14, 1921.

(— N. C. —, 108 S. E. 318.)

Husband and wife — wife's action for injury to husband.

1. A wife whose husband is mutilated by the negligence of another may recover from such other damages for injuries personal to herself from the accident, for which the husband could not have recovered, such as shock suffered by her when seeing his mutilated condition, and loss of consortium and support.

[See note on this question beginning on page 882.]

Pleading — demurrer — effect.

2. A demurrer admits all facts sufficiently pleaded.

[See 21 R. C. L. 506.]

Judgment — against husband — estoppel against wife.

3. A woman is not estopped to maintain an action against one negligently injuring her husband for the loss thereby caused to her, by a judgment

against the husband in his action to recover damages for the injury.

[See 15 R. C. L. 1022.]

Action — by one spouse for torts to other.

4. Neither husband nor wife can recover damages for torts inflicted by third persons upon the other.

[See 13 R. C. L. 1432, 1443; see note in 5 A.L.R. 1050.]

APPEAL by defendants from a judgment of the Superior Court for Mecklenburg County (Harding, J.) overruling a demurrer to the complaint in an action brought to recover damages for personal injuries to plaintiff's husband, alleged to have been caused by defendants' negligence. *Affirmed.*

Statement by Clark, Ch. J.:

The plaintiff, who is the wife of W. B. Hipp, brings this action, alleging that her husband, while working as an employee of the defendant company in Hopewell, Virginia, was "seriously, painfully, and permanently injured as a proximate result of the carelessness and negligence of the defendants," setting out the manner in which he was injured and the extent of such injuries and the expense, and that, under the law of Virginia, which is set out, the plaintiff was entitled, as a married woman, to sue and be sued as if she were unmarried, and to own and control her property as fully as if she had remained single, and that neither she nor her husband have received anything whatever from the defendants in the way of damages for the serious injuries inflicted on him; and that her husband brought action in Virginia, but, notwithstanding three separate jury verdicts afforded him, the court of appeals of that state rendered judgment against him upon demurrer to the evidence; that the plaintiff is entitled, notwithstanding, to recover in this jurisdiction, she having obtained service upon the defendants, for the personal injuries inflicted on her by the injury to her husband. The defendants demur upon the ground that it appears upon the face of the complaint that judgment has been rendered in Virginia, that her husband was not entitled to recover, and that it appears inferentially, therefore, that under the law of the state of Virginia she has no action for the loss of her husband's company, for damages to her consequent upon injury sustained by him, caused by the negligence of a third person, where the husband's right of action, if any, is barred. The judge overruled the demurrer, and the defendants appealed.

Messrs. W. S. Beam, V. S. Thomas, C. A. Cochran, and Clarkson, Taliaferro, & Clarkson, for appellants:

The complaint does not state a cause of action founded on any common-law right or any statutory right.

13 R. C. L. 1443; *Emerson v. Taylor*, 133 Md. 192, 5 A.L.R. 1045, 104 Atl. 538; *Brown v. Kistleman*, 177 Ind. 692, 40 L.R.A.(N.S.) 236, 98 N. E. 631; *Smith v. Nicholas Bldg. Co.* 93 Ohio St. 101, L.R.A.1916E, 700, 112 N. E. 204, Ann. Cas. 1918D, 206; *Kosciolek v. Portland R. Light & P. Co.* 81 Or. 517, 160 Pac. 132; *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459; *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Nieberg v. Cohen*, 88 Vt. 281, L.R.A. 1915C, 483, 92 Atl. 214, Ann. Cas. 1916C, 476; *Patelski v. Snyder*, 179 Ill. App. 24.

More than one person cannot have right of action for recovery of the same expenditures, loss of earnings, etc.

21 Cyc. 1530; *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459; *Brown v. Kistleman*, 177 Ind. 692, 40 L.R.A.(N.S.) 236, 98 N. E. 631; *Bernhardt v. Perry*, 276 Mo. 612, 13 A.L.R. 1320, 208 S. W. 462.

No right of action for consequential damages exists where there is no right of recovery for primary damages, or where compensation has been made to a person injured.

Kimberly v. Howland, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778; *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Kosciolek v. Portland R. Light & P. Co.* 81 Or. 517, 160 Pac. 132; *Gambino v. Manufacturers Coal & Coke Co.* 175 Mo. App. 653, 158 S. W. 77; *Stout v. Kansas City Terminal R. Co.* 172 Mo. App. 113, 157 S. W. 1019.

A right of action arising out of intentional interference with marital relations is fundamentally different from a right of action growing out of indirect damages sustained through negligent injury to other.

Clark v. Hill, 69 Mo. App. 541; *Gambino v. Manufacturers Coal &*

Coke Co. 175 Mo. App. 653, 158 S. W. 77; Gearing v. Berkson, 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785; Brown v. Kistleman, 177 Ind. 692, 40 L.R.A.(N.S.) 286, 98 N. E. 631; Bernhardt v. Perry, 276 Mo. 612, 13 A.L.R. 1320, 208 S. W. 462; Smith v. Nicholas Bldg. Co. 93 Ohio St. 101, L.R.A.1916E, 700, 112 N. E. 204, Ann. Cas. 1918D, 206; Emerson v. Taylor, 133 Md. 192, 5 A.L.R. 1045, 104 Atl. 588.

The complaint discloses no duty on the part of defendant toward plaintiff for the breach of which a cause of action exists.

1 Sedgwick, Damages, 219; Welch v. Morrison, 9 Ohio Dec. Reprint, 852.

There is no cause of action for mental suffering on account of another's mental or physical suffering.

Kimberly v. Howland, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778; Gulf, C. & S. F. R. Co. v. Overton, 101 Tex. 583, 19 L.R.A.(N.S.) 500, 110 S. W. 736; Dayvis v. Western U. Teleg. Co. 139 N. C. 79, 51 S. E. 898; Reaves v. Anniston Knitting Mills, 154 Ala. 565, 45 So. 702; Birmingham Waterworks Co. v. Martini, 2 Ala. App. 652, 56 So. 830; Chesapeake & O. R. Co. v. Robinett, 151 Ky. 778, 45 L.R.A.(N.S.) 433, 152 S. W. 976; Sanderson v. Northern P. R. Co. 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542; Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 Ann. Cas. 578; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 1 L.R.A. 728, 10 Am. St. Rep. 772, 9 S. W. 598; Connelly v. Western U. Teleg. Co. 100 Va. 51, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618.

Messrs. John M. Robinson and Hamilton C. Jones, for appellee:

Plaintiff's action can be maintained, inasmuch as, under identically the same circumstances, the husband would have a right of action.

Kimberly v. Howland, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778; Bailey v. Long, 172 N. C. 661, L.R.A.1917B, 708, 90 S. E. 809, 14 N. C. C. A. 49; 13 R. C. L. §§ 461, 462; 21 Cyc. 1527; Holleman v. Harward, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972; Flandermeyer v. Cooper, 85 Ohio St. 327, 40 L.R.A.(N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983; 1 Cooley, Torts, 3d ed. p. 477; Jaynes v. Jaynes, 39 Hun. 40; Bernhardt v. Perry, 276 Mo. 612, 13 A.L.R. 1320, 208 S. W. 468; Crowell v. Crowell, 180 N. C. 524, 105 S. E. 206; Flandermeyer v. Cooper, 26 Ann. Cas. 990, note.

Plaintiff may recover damages for shock and fright suffered by her when seeing her husband brought home to her a crippled and mangled invalid.

Kimberly v. Howland, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778; Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927.

Clark, Ch. J., delivered the opinion of the court:

The demurrer admits all facts sufficiently pleaded, and therefore we must take it that the plaintiff's husband was "seriously, painfully, and permanently injured as the proximate result of the carelessness and negligence of the defendants," and that by reason thereof the plaintiff has suffered shock, which has impaired her nervous system, impaired and permanently injured and weakened her physical and mental condition, and that she has suffered greatly from loss of sleep, worry, and anxiety on account of the condition of her husband, in watching over and caring for him, causing her to devote her entire time to nursing and caring for him, while at the same time the burden of maintaining the family fell upon her, entailing heavy cost and expense, and that she has been forced to pay out large sums of money to hospitals, doctors, nurses, and medical expenses, and that by reason of said injuries she has been deprived of the support and maintenance which her husband would have given her, and has suffered mental anguish by being forced to witness the suffering endured by her husband, whereby her own nerves and health have been seriously and permanently shocked, weakened, and impaired; and that by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid, and society of her said husband, and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and has been required to remain at home for long

periods of time, denying herself to friends and relatives, and, besides, has had entailed upon her the fatigue of nursing and caring for him, and incurred expenses, and has paid large sums on that account. These matters are set out more at length in the complaint, but this is a summary of the grounds of her action—all of which allegations of facts are admitted as pleaded by the demurrer. The demurrer in effect presents two questions of law upon these facts:

(1) The first is that the judgment against her husband in Virginia (*E. I. Dupont de Nemours & Co. v. Hipp*, 123 Va. 49, 96 S. E. 280) bars any right of action which she might have for damages for grief, mental anguish, labor, and expense devolving upon her by the disability of her husband and the loss and comfort of his society.

(2) The second is that, upon the facts admitted, the wife is not entitled to maintain this action.

As to the first ground of demurrer, if the wife has a cause of action we do not think the demurrer can be sustained. She was not a party to the action brought by her husband, and she is not estopped by the

Judgment—
against husband
—estoppel
against wife.

judgment as to any relief she might be entitled to. It may be that upon the trial of this action an entirely different state of facts as to the manner in which the husband was injured might be developed, either by additional evidence or by the estimate placed upon the evidence by the jury. She was neither a party nor a privy to that action.

In *Laskowskj v. People's Ice Co.* 203 Mich. 186, 2 A.L.R. 586, 168 N. W. 940, it was held that "a judgment in favor of a woman in an action to recover damages for injuries to her person is not conclusive upon the question of defendant's negligence, and absence of her contributory negligence, in an action by her husband for the damages resulting to him from such injuries."

Of course, the reverse must be

true, since, as held in that case, under the Married Woman's Act, he was not a necessary or proper party to the action by his wife to recover damages for injuries to her person, and was not, in fact, a party. See notes to that case (2 A.L.R. 592) citing many cases that neither the judgment in such cases nor a settlement by compromise on the part of the wife would affect the husband's right to recover for the damages sustained by him, quoting, among others, *Louisville & N. R. Co. v. Kinman*, 182 Ky. 597, 206 S. W. 880.

But the second ground of demurrer presents an entirely different question. At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave, or any other property; that is to say, by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative, and the wife could not maintain an action for injuries sustained by her husband. The reason is thus frankly stated by Blackstone: "We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties [husband] related by the breach and dissolution of either the relation itself, or, at least, the advantages accruing therefrom; while the loss of the inferior [the wife] by such injuries is totally unregarded. One reason for which may be this: That the inferior hath no kind of property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." 3 Bl. Com. 143.

By the married women's provision in the Constitution of 1868, art. 10, § 6, this conception of ownership by the husband, whereby upon marriage all the personal property of

the wife became the property of the husband, and he became the owner of her realty during his lifetime, was abolished. The courts in this state continued for a long while, notwithstanding, to hold that the husband could recover his wife's earnings and the damages for injuries done her; but by Acts 1913, chap. 13, now Consol. Stat. § 2513, it was provided that her earnings and damages for torts inflicted upon her were her sole and separate property, for which she could sue alone.

It follows, therefore, that the husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that, if the husband could maintain an action to recover damages for torts on the wife, she should be able to maintain an action on account of torts sustained by the husband. Such right of action, if it existed in favor of the husband, should exist in favor of the wife. It

Action—by one spouse for torts to other.

should be in favor of both or neither, but, in view of the Constitution of 1868 and our statute on the subject, we think that such action cannot be maintained by either on account of the injury to the other.

So far as injuries to the husband are concerned and the damages he has sustained, whether the plaintiff recovers or fails to do so, the verdict and judgment are conclusive. The wife certainly cannot recover a second time for the injuries of the husband, who alone can sue for them (or, in case of wrongful death, his personal representative); but the action of the wife is not for the injuries to the husband, though formerly the husband was allowed to recover damages for the injuries sustained by the wife because they were his property. Price v. Char-

lotte Electric R. Co. 160 N. C. 450, 76 S. E. 502. That is now swept away.

The cause of action for the wife in this case is not for the injuries to the husband, but for the injuries to herself, which are thus summed up in the brief for the plaintiff in this action: (1) Expenses paid by her, made necessary by her husband's injuries. (2) Services performed in nursing and caring for him. (3) Loss of support and maintenance. (4) Loss of consortium. (5) Mental anguish.

Though the husband can no longer recover for the damages which his wife has sustained as property belonging to himself, he may still recover for the damages sustained by him by reason thereof, which have been held to include expenses incurred, deprivation of society, and loss of aid and comfort.

In Kimberly v. Howland, 143 N. C. 398, 405, 7 L.R.A. (N.S.) 545, 55 S. E. 781, the plaintiff's wife received a serious injury by reason of the defendant's negligence. The court said: "It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name."

In Bailey v. Long, 172 N. C. 661, L.R.A.1917B, 708, 90 S. E. 809, 14 N. C. C. A. 49, decided since chapter 13, Laws 1913, the plaintiff had taken his wife to the defendant's hospital. By reason of the defective condition and construction of said hospital, his wife contracted pneumonia and died. The plaintiff brought the action for damages suffered by him. Mr. Justice Brown, for a unanimous court, held that the plaintiff could recover for expenses which accrued to him for nursing and otherwise, and said: "In addition, we think plaintiff can recover

damages for the mental suffering and injury to his feelings in witnessing the agony and suffering of his said wife while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom."

We do not think that the husband could now recover compensatory damages for her physical and mental anguish, or for the value of her services, which are matters purely personal to her, and for which she alone could recover, though formerly these were the basis for an action by the husband. As he can no longer sue for her earnings, of course he is not entitled to recover the value of her services. But the great weight of authority sustains the proposition that, under the modern statutes enlarging the rights of married women, the husband is not deprived of his right to recover the damages which he himself sustains, and which are the direct consequences of the injury to the wife. He cannot sue for the injuries she sustained, but for those which accrued to himself as the direct and not the remote consequences of such wrongful act of the defendant. 13 R. C. L. § 642; 21 Cyc. 1527.

In *Holleman v. Harward*, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972, where the defendant had sold the plaintiff's wife laudanum or similar drugs despite the plaintiff's protests, the court held that the husband could recover for loss of companionship and loss of services resulting therefrom. While the statute now does not permit the husband to recover for loss of services, which must be recovered solely by the wife, the loss of the companionship of his wife is a loss purely personal to him, and the direct consequence of the wrong of the defendant. For this the wife could not recover, and, being the direct and not remote consequence of the wrongful act, the husband is entitled to his action.

In *Flandermeyer v. Cooper*, 85 Ohio St. 327, 40 L.R.A. (N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983,

where the defendant had sold drugs to the husband over the wife's protests, it was held, in exact analogy to the above case from this court, that she could recover for the damages thus resulting to her. The court said: "A statutory right cannot change except by action of the lawmaking power of a state. But it is the boast of the common law that 'its flexibility permits its ready adaptability to the changing nature of human affairs.' So that, whenever, either by the growth or development of society, or by the statutory change of the legal status of any individual, he is brought within the principles of the common law, then it will afford to him the same relief that it has theretofore afforded to others coming within the reason of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should withhold from her the remedies it affords to the husband."

The court in that case aptly cited from *Cooley on Torts*, 3d ed. 477: "Upon principle, this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. . . . The gist of the action is the loss of consortium, which includes the husband's society, affection, and aid."

And also uses this language: "There can be no reasonable contention but that the wife suffers the same injury from the loss of consortium as the husband suffers from that cause. His right is not greater than hers. Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract, and in the very nature of things must be mutual, and, while this was always true of the marriage relation, yet there was a time in the history of our jurisprudence when the legal status of the wife was such that she could not,

at common law, maintain an action of this character. Now her legal status is the same as that of her husband. She has the same right to the control of her separate property, the same right to sue in her own name, and, in a word, is in the full enjoyment of every right that her husband enjoys, so that she comes clearly within the principles of the common law that allow a right of action by the husband for damages for the loss of the consortium of his wife. Either we must hold that the common law is fixed, unchangeable, and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that, when every reason and every theory for denying the wife the same rights as the husband have entirely disappeared from our jurisprudence, she is now equally entitled with her husband to every remedy that the common law affords; and we have no hesitation in adopting the latter view."

To the same purport is *Jaynes v. Jaynes*, 39 Hun, 40. The plaintiff's counsel adds: "Why should the husband be allowed a recovery in cases of this character, and the wife, who suffers in the identical same way, be denied a recovery? They stand before the same altar; they enter into the same contract."

Necessarily their rights are the same at the bar of justice.

In *Bernhardt v. Perry*, 276 Mo. 612, 208 S. W. 462, in discussing this identical question, it was said by the able Chief Justice Bond of that court, as follows, in speaking of the rights of the wife: "She could have had no recovery when she occupied the status of a married woman at common law; for then her legal existence was merged in that of her husband. But under the Married Woman's Acts in this state, beginning in 1875 and culminating in 1889, with slight amendments thereafter, a wife is to all intents and purposes a legal entity distinct from her husband and capable of contracting and being con-

tracted with, and suing and being sued, as fully as if she were an unmarried woman and *sui juris*. While the principles of the common law, previous to her statutory emancipation, debarred the wife from any legal redress in cases like the present, they nevertheless recognized fully the injury to her personal rights caused by the acts set forth in the petition, and they affirmed such rights to be the same as those which the husband would have been deprived of had the injury in question been inflicted upon the wife (*Flantermeyer v. Cooper*, 85 Ohio St. 327, 40 L.R.A.(N.S.) 360, 98 N. E. 102, Ann. Cas. 1913A, 983; *Holleman v. Harward*, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972; 13 R. C. L. ¶ 509, p. 1460); and, though sanctioning a full right to recover in such cases on the part of the husband, they denied it to the wife, although an equal sufferer, because feudalism had decreed that she was a legal nonentity and incapable of maintaining any action for the violation of her rights as a wife, caused by wrongful injuries inflicted upon her husband."

Further he says: "The injury suffered by a husband from the loss of the consortium of his wife is no more direct and immediate than that sustained by her from the loss of his society, aid, and affection. Hence, there is no logical basis for the reason, upon which some of the adverse rulings are based, that in such cases the injury sustained by the wife is not directly and proximately caused by the wrongful act preventing her husband from giving her the means of a livelihood—which it is his duty to provide—and from performing his conjugal duties."

And again: "The reasons given in the decisions against the right of a wife to recover from the material injury inflicted on her by a negligent act destroying the power of her husband to labor for her support, and thereby imposing on her the task of supporting him, and which renders him unable to perform the

duties of a consort, are utterly inadequate to support the conclusions reached. It will be noted in all of these cases that they are rested upon the lack of suable capacity of the wife, or upon the rules of the common law disabling her, as against her husband, to acquire title to the money awarded as damages for wrongful injury to him, wherefore the hobgoblin of a foolish consistency impelled the common law to adjudge she could not recover for an injury to her personal rights, so caused, since the instant a recovery was had it would belong to the husband. Neither of these reasons can exist under the specific provisions of the law governing married women; for, as has been shown, the wife may now sue as a feme sole, and the awards for any violation of her personal rights belong to her and not to her husband."

It is true that these citations from the distinguished chief justice are in a dissenting opinion (in which Judge Williams concurred), but the decisions in other courts than ours are not authority, and are entitled only to the persuasive weight given them on account of the force and correctness of the reasoning therein, and therefore, if there is correct and forceful reason in a dissenting opinion from another state, it should command exactly the same consideration as if it were made in the majority opinion.

One of the chief grounds for the plaintiff's recovery is the loss of consortium, which was formerly pleaded by the phrase, "per quod consortium amisit." This formerly lay only in behalf of the husband, but now the term has been extended to give the wife, and with more reason, the same ground of action. The present state of the law is thus fully stated under the heading of "Consortium;" 12 C. J. 532, with full citations in the notes. "In its original application the term was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all those duties

and obligations in respect to him which she took upon herself when she entered into it; the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation; fellowship and assistance of the wife; comfort in her society in that respect in which a husband's right is peculiar and exclusive; conjugal society, affection, and assistance of the wife. The term, however, has developed to include the right of the wife to the society and comfort of the husband, and is now used interchangeably to denote the affection, aid, assistance, companionship, and society of either spouse; and, as thus employed, the term has been defined as those duties and obligations which by marriage both husband and wife take upon themselves toward each other in sickness and health; conjugal affection; conjugal fellowship; conjugal society and assistance; the conjugal society arising by virtue of the marriage contract; the consort's affection, society, or aid; the person's affection, society, or aid; the person, affection, assistance, and aid of the spouse. Loss of services as well as society and affection is included in the legal meaning of the loss of consortium."

There are decisions from other courts denying relief to the wife in cases of this character. Such decisions are necessarily dependent upon two factors: (1) The legislation in reference to the rights of married women in the particular jurisdiction; (2) the attitude of the court in giving either a liberal or restricted construction to new legislation of the nature of that in this state. As was well said by Chief Justice Bond in the above case: "So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women."

The reasons formerly advanced for a denial to the wife of a recovery for damages sustained by her as a direct result of the injury to him;

and which are over and above and distinct from the damages which could be recovered by the husband in an action by himself, were three-fold: (1) The merger of her identity into that of her husband; (2) her incapacity to sue; (3) the right of her husband to recover full damages for his diminished earning capacity, with no corresponding right possessed by her.

Neither of the first two grounds is now valid in this state. It is urged, however, that the plaintiff, after he had obtained a recovery, is presumed to have obtained full pecuniary compensation for all the injuries sustained by him, and of course, if he failed to recover, no action can be maintained by the wife. This proposition is correct if the action of the wife is for the damages for which the husband could maintain an action, but the facts as admitted by this demurrer are that he was injured by the negligence of the defendants, and that the wife sustained damages, which, though flowing from the injuries to her husband, are purely injuries to herself, and for which the husband could not have maintained an action. She is, therefore, not barred by the judgment, favorable or unfavorable, in the action brought by her husband. A judgment in an action is not effective as a bar or estoppel in any other action, unless between the same parties and for the same cause of action. The present action is not between the same parties, or for the same cause of action, as in the litigation between the husband and the defendants.

It has always been held that the husband's action for damages sustained by him on account of injuries to her is not barred by judgment in favor of the same defendant in an action brought by the wife. See cases cited in the note to 2 A.L.R. 592. Of course, the reverse of the proposition is true. 13 R. C. L. § 461.

As already stated, the rights which the wife is asserting in this action are entirely separate and dis-

tinct from the grounds of recovery asserted by the husband in his action. In ¶ 12 of the complaint is the following allegation, which is admitted by the demurrer to be true: "That, by reason of the sudden and fearful injury of her husband as above stated, and by reason of being forced to look upon him in his horribly mutilated condition, she was shocked and frightened to such an extent that her entire nervous system was impaired and undermined, and left permanently injured and weakened, and her physical and mental condition was permanently injured and impaired."

In *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A. (N.S.) 545, 55 S. E. 778, the court said: "We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

This was cited and approved (*Walker, J.*) in *May v. Western U. Teleg. Co.* 157 N. C. 422, 37 L.R.A. (N.S.) 912, 72 S. E. 1059.

While the wife cannot recover for any damages for which the husband might have recovered (or his personal representative in the case of a wrongful death), we think that she could recover for those injuries which were sustained by her, and, being personal to her, for which the husband could not have recovered in his action. 15 Am. & Eng. Enc. Law, 2d ed. 861, which is cited in *May v. Western U. Teleg. Co.* 157 N. C. 423, 37 L.R.A. (N.S.) 912, 72 S. E. 1059.

Husband and wife—wife's action for injury to husband.

We will not go more fully into the elements of damages which can be considered by the jury when the action goes back for a new trial.

It is objected by the defendant in this case that, if such action can be maintained by the wife, it can be sustained on the part of the children or other dependent relatives. That

plea has never been found good when the action has been brought by the husband, and of course it cannot avail when the action is by the wife upon the same state of facts. The wife's cause of action arises from the nature of the relationship created by the contract of marriage as now recognized by our Constitution, and the laws replacing the former status, under which, by the common law, the husband was the sole personage. Such plea has not been held valid in an action for criminal conversation or for alienation of affections, or in any other case in which an action by either husband or wife has been brought for injury to the plaintiff (whether husband or wife), which were personal to the plaintiff therein, and for which the other party

could not maintain an action. It does not depend upon the fiction of loss of services of the other party to the marriage, but is based upon the ground that the party bringing the action (whether husband or wife) has been directly injured by the wrongful conduct of the defendant.

It is sufficient to say that the plaintiff has a cause of action for those injuries which were sustained by her, and which are personal to herself, and the direct and not the remote consequences of the negligence of the defendants, which is admitted by the demurrer in this case; and the judgment overruling the demurrer must, therefore, be affirmed.

Stacy, J., concurs in result only.

Allen, J., concurs in result.

ANNOTATION.

Wife's right of action for loss of consortium.

The earlier cases on this question are discussed in the note in 5 A.L.R. 1049; and see *Bernhardt v. Perry*, a later case on the subject reported in 13 A.L.R., at page 1320, referred to in the note in 5 A.L.R.

Since the date of these notes the question has been passed upon in but one case other than the reported case (*HIPP v. E. I. DUPONT DE NEMOURS & Co.* ante, 873). In *Tobiassen v. Polley* (1921) — N. J. L. —, 114 Atl. 153, the court adopted the rule, which is sustained by the majority of courts, as shown in the earlier note, that the wife cannot recover for loss of con-

sortium due to negligent injury of the husband. According to this court, "the weight of authority to be gleaned from the reported cases in our sister states is that a wife cannot maintain an action in her own name for the loss of her husband's services, including the right of consortium, resulting from personal injury to him caused by the negligence of a stranger, and not the result of a malicious interference with the society, companionship, and right of consortium of her husband." Compare with the reported case. W. A. E.

GEORGE C. GRIFFITH, Appt.,

v.

JOHN T. HICKS.

Arkansas Supreme Court — October 17, 1921.

(— Ark. —, 233 S. W. 1086.)

Account stated — what is.

1. Where parties have had mutual dealings, and one renders to the

other a statement purporting to set forth all the items of indebtedness on the one side and credit on the other, and the account so rendered is not objected to within a reasonable time, it becomes an account stated, and cannot afterwards be impeached, except for fraud or mistake.

[See note on this question beginning on page 887.]

Conflict of laws — account stated — what law governs.

2. Whether or not an account rendered by mail becomes an account stated is governed by the laws of the state where it is mailed and received.

— **explanation of retention of account.**

3. The retention of an account rendered, apparently beyond the reasonable time which will make it an account stated, is open to explanation.

[See 1 R. C. L. 214.]

— **form of objection.**

4. The objection to an account rendered which will prevent its becoming

an account stated must be something more than a mental operation on the part of the person receiving the account.

— **objections to supposed agent of one rendering account.**

5. One receiving an account rendered cannot avoid its becoming an account stated by making objections to one whom he mistakenly believes to be the agent of the one rendering the account, without taking steps to ascertain the extent of the authority of the supposed agent within a reasonable time.

APPEAL by defendant from a judgment of the Circuit Court for White County (Jackson, J.) in favor of plaintiff in an action upon an account stated. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. John E. Miller and C. E. Yingling, for appellant:

There is nothing mysterious or mythical about an account stated, and it is not of itself conclusive, but is open to rebuttal by competent testimony.

2 Jones, Ev. § 287.

A jury might have found under proper instructions that, on account of the action of the defendant, he had impliedly consented that the account was correct, but this is a question that the jury should have passed upon.

1 R. C. L. p. 211, § 9.

The retention of an account for an unreasonable length of time only has the effect of shifting the burden of proof.

1 R. C. L. p. 214, § 12.

The weight to be given to an account which has been retained for a length of time without objection is for the consideration of the jury, under all the circumstances of the case.

1 R. C. L. p. 215, § 13; Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; White v. Hampton, 10 Iowa, 238; Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co. 80 Ark. 438, 97 S. W. 284; Lane & B. Co. v. Taylor, 80 Ark. 469, 7 L.R.A. (N.S.) 924, 97 S. W. 441; May & E. Co. v. Farmers Union Mercantile Co. 120 Ark. 316, 179 S. W. 490.

The law raises a strong presumption against the validity of plaintiff's claim.

Beneke v. Beneke, 119 Minn. 441, 138 N. W. 689, Ann. Cas. 1914B, 381.

Mr. J. N. Rachels, for appellee:

An itemized account, rendered by one and assented to by the other of the parties thereto, becomes an account stated, and is a new cause of action.

St. Louis, I. M. & S. R. Co. v. Camden Bank, 47 Ark. 541, 1 S. W. 704; Barr v. Lake, 147 Mo. App. 252, 126 S. W. 757; Cape Girardeau & S. L. R. Co. v. Kimmel, 58 Mo. 83; Koegel v. Givens, 79 Mo. 77; Patillo v. Allen-West Commission Co. 65 C. C. A. 508, 131 Fed. 688; Mine & S. Supply Co. v. Park & L. Co. 47 C. C. A. 34, 107 Fed. 881; Patillo v. Allen-West Commission Co. 47 C. C. A. 637, 108 Fed. 726; Yount v. Spain, — Mo. App. —, 180 S. W. 19; Harris v. Janisch, — Mo. App. —, 226 S. W. 610.

Assent may be given either expressly (verbally or in writing) or impliedly (by compliance or silent acquiescence).

St. Louis, I. M. & S. R. Co. v. Camden Bank, 47 Ark. 541, 1 S. W. 704; Powell v. Pacific R. Co. 65 Mo. 661; Alexander v. Scott, 150 Mo. App. 213, 129 S. W. 994; Adam Roth Grocery Co. v. Hotel Monticello Co. 183 Mo. App.

429, 166 S. W. 1126; Niehaus v. Gillanders, — Mo. App. —, 184 S. W. 951; Locke v. Woodman, — Mo. App. —, 216 S. W. 1009; Patillo v. Allen-West Commission Co. 65 C. C. A. 508, 131 Fed. 688; Mine & S. Supply Co. v. Parke & L. Co. 47 C. C. A. 34, 107 Fed. 881; Cooper v. Coates, 21 Wall. 105, 22 L. ed. 481; Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319; Crawford v. Hutchinson, 38 Or. 578, 65 Pac. 84; Bloss v. Aurora Mill. Co. 207 Mo. App. 402, 229 S. W. 833; Memphis, D. & G. R. Co. v. Atlas Powder Co. 123 Ark. 620, 185 S. W. 786; Wood v. Green, 131 Tenn. 583, 175 S. W. 1140.

When an account rendered has been assented to, the question of liability is one of law for the court, not one of fact for the jury.

St. Louis, I. M. & S. R. Co. v. Camden Bank, 47 Ark. 541, 1 S. W. 704; Lane & B. Co. v. Taylor, 80 Ark. 469, 7 L.R.A. (N.S.) 924, 97 S. W. 441; Schwanner v. Winn Boiler Compound Co. 19 Mo. App. 534; Powell v. Pacific R. Co. 65 Mo. 661; Koegel v. Givens, 79 Mo. 77; Adam Roth Grocery Co. v. Hotel Monticello Co. 183 Mo. App. 429, 166 S. W. 1126; Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319; Crawford v. Hutchinson, 38 Or. 578, 65 Pac. 84.

Whether an account rendered and not objected to within a reasonable time, and not assailed for fraud or mistake, has become an account stated, is a question of law, not one of fact.

Lane & B. Co. v. Taylor, 80 Ark. 469, 7 L.R.A. (N.S.) 924, 97 S. W. 441; Powell v. Pacific R. Co. 65 Mo. 661; Koegel v. Givens, 79 Mo. 77; Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319; Crawford v. Hutchinson, 38 Or. 578, 65 Pac. 84.

An account stated is final and unimpeachable, except for fraud, accident, or mistake.

Godfrey v. Hughes, 114 Ark. 312, 169 S. W. 958; Roberts v. Totten, 13 Ark. 609; Pulliam v. Booth, 21 Ark. 421; Wilcox v. Boothe, 19 Ark. 684; Lawrence v. Ellsworth, 41 Ark. 502; Weed v. Dyer, 53 Ark. 155, 13 S. W. 592; Hamilton-Brown Shoe Co. v. Choc-taw Mercantile Co. 80 Ark. 438, 97 S. W. 284; Lane & B. Co. v. Taylor, 80 Ark. 469, 7 L.R.A. (N.S.) 924, 97 S. W. 441; May & E. Co. v. Farmers Union Mercantile Co. 120 Ark. 316, 179 S. W. 490; 1 C. J. 292, § 277; Patillo v. Allen-West Commission Co. 47 C. C. A. 637, 108 Fed. 726; Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319;

Elmore-Schultz Grain Co. v. Stonebraker, 202 Mo. App. 81, 214 S. W. 221.

The doctrine of account stated applies to the relationship of attorney and client.

Lane & B. Co. v. Taylor, 80 Ark. 469, 7 L.R.A. (N.S.) 924, 97 S. W. 441; Crawford v. Hutchinson, 38 Or. 578, 65 Pac. 84.

Smith, J., delivered the opinion of the court:

This is a suit filed by appellee, Hicks, against appellant, Griffith, upon a statement of an account which is alleged to have become an account stated.

Hicks was a resident of this state until 1916, when he removed to St. Louis, where he has since resided. Griffith is also a resident of that city. Hicks was for many years the attorney in this state for Griffith, whose interests here were varied and valuable. The professional relation was mutually satisfactory, and the personal relation was close and cordial, as shown by the correspondence between the parties offered in evidence.

Griffith is shown to be a man of large affairs, and from time to time loaned Hicks considerable sums of money. One such loan was evidenced by a note dated February 23, 1913, for the sum of \$1,781.25, due one year after date. This note was executed jointly by Hicks and one E. A. Robbins, of Searcy, Arkansas.

Finally an estrangement grew up between Hicks and Griffith, and on November 19, 1917, Hicks rendered Griffith what Hicks testified was a complete statement of the account between them, in which he embraced all the items of professional service for which charges had been made, and credited the account with payments received and also with the note signed by himself and Robbins. Griffith received the account the day after it was mailed. No objection of any kind to the account was made by him, except as hereinafter stated.

Griffith saw Robbins in Searcy and demanded payment of the note, and Robbins communicated that fact to Hicks in July, 1919. When

advised of this demand on Robbins, Hicks told Robbins that he would attend to the note, as that was an affair between himself and Griffith. This assurance satisfied Robbins, and he gave the matter no further attention. Robbins died in August, 1919, and some months thereafter Griffith filed the note with the administrator of Robbins's estate for allowance and classification. This proceeding was had in the probate court of White county, the county in which Robbins lived and in which the administration on his estate was pending.

On January 5, 1920, which was immediately after Hicks had been advised that the note had been filed as a claim against Robbins's estate, Hicks brought this suit. On January 20, 1920, Griffith filed an answer, denying liability for the items comprising Hicks's account. At the same time he filed a counterclaim and prayed judgment against Hicks.

In the direct examination of Griffith in the trial from which this appeal comes, he was asked if he had talked with anyone about the statement he had received from Hicks. He answered that shortly after he got the statement he had a talk with Mr. Cornwell, who was Hicks's law partner. This conversation occurred in Griffith's office, where Cornwell had come as the representative of Hicks to discuss a matter of business between Hicks and Griffith, but which had no relation to the items covered in the account which Hicks had mailed to Griffith. Griffith was asked: "What, if anything, did Cornwell represent to you about the contract; I mean about the statement, and about the amount due, or claimed to be due, Mr. Hicks?"

An objection to this question was sustained. Griffith was further asked: "Did Cornwell come there to see you as the representative of Hicks?"

And also: "Did Cornwell state to you that he wanted to talk to you about the account which Hicks had rendered to you?"

Objections were sustained to both these questions. Thereupon Griffith offered to show that "Mr. Cornwell, the law partner of Mr. Hicks, came to see Mr. Griffith about the account, and asked to talk to him about it, and at that time he denied owing Mr. Hicks anything on the items charged to him."

This offer of proof was by the court refused, and Griffith excepted.

Griffith gave testimony sufficient to raise an issue for the jury as to the correctness of Hicks's account, if the account was not in fact an account stated.

Hicks denied that Cornwell had any authority to represent or act for him in adjusting or settling his account against Griffith.

The court directed the jury to return a verdict in favor of Hicks, and this appeal is prosecuted to review that action.

The statement of the account was mailed and received in Missouri, and we must therefore look to the law of Conflict of laws —account stated —what law governs. that state to determine whether the

account became stated. The case of *Bloss v. Aurora Mill. Co.* 207 Mo. App. 402, 229 S. W. 833, is said to be the latest expression of an appellate court of that state on the question of an account stated. This decision is by the Springfield court of appeals, and, in defining an "account stated," the court quotes from the case of *Powell v. Pacific R. Co.* 65 Mo. 658, the following language of the supreme court of that state: "An account settled between the debtor and creditor therein in which a sum of money or balance is agreed on, and an acknowledgment by one in favor of the other of a balance or sum certain to be due, and an express or implied promise to pay the sum by one to the other."

Continuing, Cox, P. J., speaking for the court, said: "To constitute an account stated, the debtor and creditor must both agree to the correctness of the account, and, in addition thereto, the debtor must agree to pay or satisfy the amount agreed

upon, and the creditor must agree to accept the payment of the agreed sum in satisfaction of the account.

"The agreement may be proven by evidence, either direct or circumstantial, as any other fact may be proven, or, if the party to whom the account is rendered retains it without objection for an unreasonable length of time, his so retaining it will justify the inference that he has approved it, and in such a case other proof of his acceptance and agreement to pay is not required. *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 135, 70 S. W. 173; *Missouri P. R. Co. v. Coombs & Bro. Commission Co.* 71 Mo. App. 299."

Under this test, the majority are of the opinion that the account rendered became an account stated, for the following reasons:

Where parties have had mutual dealings, and one renders to the other a statement, purporting to set forth all the items of indebtedness on the one side and credit on the other, the account so rendered, if not objected to in a reasonable time, becomes an account stated, and cannot afterwards be impeached except for fraud or mistake. *Lawrence v. Ellsworth*, 41 Ark. 502, and *Dunavant v. Fields*, 68 Ark. 534, 60 S. W. 420.

The law requires an objection within a reasonable time. The retention of the account apparently beyond a reasonable time is open to explanation, and Griffith might have explained his waiting for a time by showing that he thought the law partner of Hicks was the latter's agent in the premises. The objection, however, must be something more than a mental operation on the part of the person receiving the account. The objection must be made to the party rendering the account,

or his duly authorized agent. Hence Griffith could not excuse his delay of two years in failing to object to the account, by showing that he thought he had made objection to a duly authorized agent of Hicks.

In determining what was a reasonable time within which to object, the court might permit Griffith to explain the delay by showing that he made objection to Hicks's law partner, thinking he was Hicks's agent. He could not excuse himself indefinitely on this account. It was his duty to ascertain the authority of Hicks's law partner in the premises within a reasonable time, and he could not retain the account for twenty months without objection, and excuse his delay by showing that he thought he had objected to a duly authorized agent of Hicks. This would be to allow his mental attitude in the premises to govern, and would excuse the communication of his objection to the other party for an indefinite length of time. This is not the law. The objection must be made to the party rendering the account, or his duly authorized agent, within a reasonable time.

It is the opinion of the chief justice and the writer that the excluded testimony of Griffith should have been admitted, and that the actual agency and authority of Cornwell is not of controlling importance. An account rendered becomes an account stated only by the admission of its correctness by the debtor. This admission may be made expressly, or it may arise by implication from the circumstances of the case. But an account cannot become an account stated unless the debtor, expressly or by implication, admits its correctness. The proper inquiry, therefore, is: What did Griffith do? Was his conduct such as that it must be said that he has impliedly assented to the correctness of the account? The assent of the debtor is ordinarily implied from the length of time during which the account is retained by

—objections to supposed agent of one rendering account.

Account stated—
what is.

Conflict of laws
—explanation
of retention of
account.

—form of
objection.

the debtor without objection made. The courts therefore hold that the debtor may show any fact or circumstance which repels the implication that he has assented to the correctness of the account.

So, here, we think the question of Griffith's assent was for the jury. In determining whether Griffith has, by implication, assented, we view the circumstances from his perspective, for it is his acquiescence or nonacquiescence that we seek to determine. Did he believe, and was it reasonable for him to believe, that, in his conversation with Cornwell, the law partner of Hicks, he had denied liability; it being borne in mind that Griffith supposed that Cornwell had been sent to him by Hicks to discuss the account, and that no further communication between Hicks and Griffith occurred after the receipt of the account through the mails, and Griffith's re-

pudiation of liability for any of the items covered by it in his conversation with Cornwell? Or, to state the proposition conversely, must we say, as a matter of law, that, because of the lapse of time herein shown, Griffith must be held to have assented to the correctness of the account, notwithstanding his denial of liability to Cornwell and the absence of any further communication on the subject from Hicks? We think the question of Griffith's assent is one of fact which should have been submitted to the jury.

As has been said, Griffith gave testimony questioning the accuracy both of the charges and credits on Hicks's account; but if the account is, in fact, an account stated, these last questions pass out of the case.

As before stated, the majority are of the opinion that the account rendered became an account stated. The judgment is therefore affirmed.

ANNOTATION.

What is a reasonable time within which to object to an account so as to prevent its becoming an account stated.

I. In general, 887.

II. As question for court or jury, 895.

I. In general.

What is a reasonable time within which objection must be made to an account rendered, in order to preclude a presumption of acquiescence therein, will depend upon the circumstances, among which may be enumerated the nature of the transaction, the relation of the parties, their distance from each other and the means of communication between them, and the usual course of their business.

United States. — *Bainbridge v. Wilcocks* (1832) *Baldw.* 536, *Fed. Cas.* No. 755.

Florida. — *Martyn v. Arnold* (1895) 36 *Fla.* 446, 18 *So.* 791.

Idaho. — *Lewis v. Utah Constr. Co.* (1904) 10 *Idaho*, 214, 77 *Pac.* 336.

Illinois. — *Moran v. Gordon* (1889) 33 *Ill. App.* 46.

Iowa. — *White v. Hampton* (1859)

10 *Iowa*, 238; *Millard v. Bennett* (1913) 161 *Iowa*, 242, 139 *N. W.* 914.

Louisiana. — *Freeman v. Howell* (1849) 4 *La. Ann.* 196, 50 *Am. Dec.* 561; *Darby v. Lastrapes* (1876) 28 *La. Ann.* 605.

Missouri. — *Dameron v. Harris* (1920) 281 *Mo.* 247, 219 *S. W.* 954.

New York. — *Lockwood v. Thorne* (1858) 18 *N. Y.* 288, s. c: on former hearing (1852) 12 *Barb.* 487, reversed on other grounds in (1854) 11 *N. Y.* 170, 62 *Am. Dec.* 81; *Harris v. Ely*, (1852) *Seld. Notes*, 37; *Postal Teleg. Cable Co. v. Newman* (1918) 172 *N. Y. Supp.* 228.

Oklahoma. — *Lamont Mercantile Co. v. Piburn* (1915) 51 *Okla.* 618, 152 *Pac.* 112.

Oregon. — *Howell v. Johnson* (1901) 38 *Or.* 571, 64 *Pac.* 659.

Pennsylvania. — *Porter v. Patterson* (1850) 15 *Pa.* 229; *Colket v. Ellis* (1875) 1 *W. N. C.* 246.

Washington. — *Ault v. Interstate*

Sav. & L. Asso. (1896) 15 Wash. 627, 47 Pac. 13; *Merritt v. Mersenneheimer* (1915) 84 Wash. 174, 146 Pac. 370.

There is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or consent to the correctness of the account thus rendered; but it is merely competent evidence, subject to be rebutted by circumstances from which counter inferences may be drawn. *Lockwood v. Thorne* (1858) 18 N. Y. 288.

The presumption arising from the lapse of time must be measured with reference to the business capacity of the parties, their customary dealings, their business methods, their intelligence or want of intelligence, and all other circumstances attending them in their dealings and in the rendition of the account. *Merritt v. Meisenheimer* (Wash.) supra.

The retention of an account without objection, apparently beyond a reasonable time, is open to explanation. The reported case (*GRIFFITH v. HICKS*, ante, 882).

Thus, the question of reasonable time may be affected by the fact that the person to whom the account was rendered was ignorant of his rights. See *Mastell v. Salo* (1919) 140 Ark. 408, 215 S. W. 583.

And the circumstance that the person to whom the account is rendered is absent from the place where the transaction was carried on will be considered in determining whether timely objection to the statement was made. *Dameron v. Harris* (1920) 281 Mo. 247, 219 S. W. 954.

The failure of the defendants to object to the account within a reasonable time may be explained by evidence that objection was made to one who claimed to be the representative of the plaintiff, even though this unidentified person was, as a matter of fact, a stranger to the plaintiff, as in such case the purpose of the evidence is not to bind the plaintiff, but to explain the failure of the defendants to communicate their objections to the plaintiff. *Postal Teleg. Cable Co. v. Newman* (N. Y.) supra. This decision seems

preferable to the contrary view expressed in the reported case (*GRIFFITH v. HICKS*).

The fact that the person to whom the account was rendered frequently met members of the firm rendering it, at lunch time and at lodge meetings, without objecting thereto, is a circumstance to be considered in determining whether objection was made within a reasonable time, but is not conclusive. *Merritt v. Meisenheimer* (Wash.) supra. The court said: "We would not be inclined to hold, as a matter of law, that men who are accustomed to meet at a lodge, or take lunch together at a club, are in duty bound to challenge an account rendered at such times and at such places, and that if they do not they are forever concluded to thereafter question it. If it were incumbent upon defendant to speak at such times and places, by the same token it was the duty of plaintiffs to remind defendant of the fact that an account had been rendered and had not been paid. It cannot be put forth as an abstract statement of law that men who have mutual dealings, and who meet in social and fraternal intercourse, are bound to speak under the pain of suffering the penalty of estoppel. We cannot say that there is a legal duty to carry the burdens and distractions of business into the hours of relaxation and refreshment. A man cannot be held to a rule that would hazard his digestion by a self-reminder of his debts and business troubles. There is a place for work and a place for play."

Less than one month.

See also cases under heading, "As between parties in particular relations," infra.

In *Freas v. Truitt* (1874) 2 Colo. 489, it was held no error to give an instruction that if defendant, after having received accounts rendered, allowed several mails to pass after he examined the same, without making any objection to their correctness, then the plaintiff had a right to infer that the defendant admitted the correctness of the accounts.

In *Atkinson v. Golden Gate Tile Co.*

(1913) 21 Cal. App. 170, 131 Pac. 107, it was held that proof that an account for goods, wares, and merchandise, sold and delivered, was rendered twenty-five days prior to the commencement of the suit, and that no objection was made thereto, was sufficient to support a finding of fact that the account was an account stated.

In *Mulford v. Caesar* (1893) 53 Mo. App. 263, it was held that evidence of defendant's silence for a period of two weeks after receiving an account, of his several payments on account thereafter, and of his statement that he would pay as he could, and that he owed the balance, all tended to show an account stated.

More than one month and less than a year.

See also cases under heading, "As between parties in particular relations," *infra*.

In *Gorman v. McGowan* (1904) 44 Or. 597, 76 Pac. 769, where it appeared that the defendant had kept the accounts rendered for a full month without apparent objection thereto, and that no such objection was made or offset claimed until he was drawn upon, it was held that there was sufficient legal evidence upon which to base a finding for an account stated.

But an account rendered and detained without objection for more than a month cannot be said, as a matter of law, not to have been assented to. *Little v. McClain* (1909) 134 App. Div. 197, 118 N. Y. Supp. 916.

And a retention for thirty-five days of an account involving tax transactions running through nine consecutive years, involving in the aggregate between six and seven hundred thousand dollars, is insufficient to raise a presumption of acquiescence in its correctness. *Lott v. Mobile County* (1885) 79 Ala. 69.

In *Donald v. Gardner* (1899) 44 App. Div. 235, 60 N. Y. Supp. 668, where it appeared that an account rendered had been retained without objection from July 30th till September 11th, when the action was com-

menced, it was held to be no error to refuse defendant's request to go to the jury on the question as to whether the account had been stated definitely between the parties.

In *Dows v. Durfee* (1850) 10 Barb. (N. Y.) 213, where no objection was shown to have been made to an account as rendered, except by defending the suit thereon commenced about two months thereafter, it was held that the referee was justified in treating such account as an account stated.

The retention of an account from October 14 to December 23 is said, in *W. A. Parkinson Co. v. Tullgren* (1913) 177 Ill. App. 295, to warrant a finding of account stated.

In *Pickham v. Illinois, I. & M. R. Co.* (1910) 153 Ill. App. 281, the court said: "When parties are located in the same city,—as, for instance, here in Chicago,—where they can readily communicate with each other, the time required for an account rendered to ripen into an account stated is comparatively short. In the case now before us, and under the circumstances therein, the time from May 31, 1905, to August 25, the same year, was more than sufficient to give the defendant the opportunity to examine the statement in question and to inform the plaintiff of the objections thereto, if any there were. Certainly the only objection which was finally offered, namely, that the item of extras as covered by the written contract, could and should have been made long before it was made. We are of the opinion that there was an account stated between the parties, owing to defendant's unreasonable delay of nearly three months before making any objection to the statement rendered."

Failure to object to an account during a period of three months will be regarded as an admission of its correctness by the party charged. *Hawkins v. Long* (1876) 74 N. C. 781.

But in *Follansbee v. Parker* (1873) 70 Ill. 11, it was said that a failure to object to an account rendered until nearly three months thereafter would not preclude defendant from disput-

ing it, where he was in ignorance of the real facts.

In *Gurnett v. J. H. Flick Constr. Co.* (1916) 163 Wis. 574, 158 N. W. 325, where it appeared that the plaintiff, who was engaged in carrying on work for defendant under a contract, had an understanding with the defendant that the latter should purchase for the plaintiff certain camp supplies, which, as delivered, were accompanied by statements of account disclosing the prices charged for the supplies, which were O. K'd by the plaintiff; that the plaintiff retained these statements, which were rendered monthly, beginning with the month of February and including the month of August; and that, upon the completion of the work in August, a final and complete statement of account was made, when plaintiff promptly objected to the prices charged, it was held that the delay was, under the circumstances, at most only prima facie evidence of correctness, and that the jury were therefore warranted in finding in favor of the plaintiff in an action for the balance due on the contract.

Where an account was made up and presented to one who went over it and made no objection to it from the time it was presented in August until after suit was brought, which was on November 25th, there was a sufficient acquiescence from which to imply an assent. *Hendy v. March* (1888) 75 Cal. 566, 17 Pac. 702.

In *Colket v. Ellis* (1875) 1 W. N. C. (Pa.) 246, it was held that a delay of four months in objecting to an account rendered, on which were credited the proceeds of certain collateral, consisting of stock the market value of which had greatly risen in the meantime, was unreasonable.

In *Brown v. Kimmel* (1878) 67 Mo. 430, it was held that where plaintiff testified that he mailed an account to defendant in December, that no objection had been made thereto until the following May, about a week before the trial, and that plaintiff and defendant saw each other three or four times a week, it was error to sustain a demurrer to the evidence as insufficient to establish the account.

In *Crane v. Stansbury* (1916) 173 Cal. 631, 161 Pac. 7, it was held that a delay of six months, if unsatisfactorily explained, was, as a matter of law, unreasonable; and that the debtor's acquiescence would be presumed and the account would become an account stated, if no objections were made within that time.

In *Fleischner v. Kubli* (1891) 20 Or. 328, 25 Pac. 1086, where an account was rendered nearly six months before any objections were heard on the subject, and after its rendition the party charged made a remittance to be applied on account, without any objections to the account, it was held that the assent of the party charged to the account as rendered must be presumed, and that it was the duty of the court to inform the jury that such was the law.

It has been held that eight months is an unreasonable length of time, in which to hold an account without objection thereto, and the account so held becomes an account stated. *Riley v. Mattingly* (1914) 42 App. D. C. 290.

One who has retained an account rendered in the month of February, till the fall of the following year, without objection to the prices charged therein for supplies, or without having questioned its correctness, must be held to have waived the right to make such objection. *Dudoit v. Spencer* (1860) 2 Haw. 493.

In *Lockwood v. Thorne* (1854) 11 N. Y. 170, 62 Am. Dec. 81, it is said that the lapse of nine months after receiving an account, before the commencement of the action, there having been made in the meantime no objection or complaint, would have been abundant to authorize the legal inference of acquiescence; particularly as the proximity of the parties to each other secured them a daily opportunity of communication by mail.

In *Dickerson v. Scheuer* (1888) 24 Jones & S. 605, 1 N. Y. Supp. 419, where it appeared that a bill rendered at least nine months before was never disputed, though payment thereof had been often requested, it was held that there was sufficient evidence to call for the submission of the case to

the jury as one upon an account stated.

In *I. L. Elwood Mfg. Co. v. Betcher* (1898) 72 Minn. 103, 75 N. W. 113, where it appeared that defendant kept the account rendered at the time of the sale, without questioning its correctness, for nearly one year, it was held to be evident that the objection thereto was not made within a reasonable time.

One year or longer.

See also cases under heading, "As between parties in particular relations," *infra*.

Where an account was rendered to the defendant, and no objection was ever made to it in respect to the amount, or otherwise, prior to the commencement of the action, which was more than a year, and the trial was had over two years, after such presentation, the account was properly regarded as an account stated. *Case v. Hotchkiss* (1867) 37 How. Pr. (N. Y.) 283.

In *Marye v. Strouse* (1880) 6 Sawy. 204, 5 Fed. 483, 2 Mor. Min. Rep. 294, where it appeared that an account rendered had been retained more than a year without objection, such delay was held to warrant fully a presumption of acquiescence therein.

But in *McKay v. Myers* (1897) 168 Mass. 312, 47 N. E. 98, it was held that a silence of eighteen months after receiving an account did not preclude the recovery of an amount shown to have been credited thereon without authority.

In *Rich v. Eldredge* (1860) 42 N. H. 153, it was held not to be improper to instruct the jury that if they should find that the creditor exhibited to the debtor his books, and presented to him a detailed statement of the accounts between them, and that this statement was received and examined by the debtor without objection, and retained by him for a year and a half afterward, they might find that he had assented to the correctness of the account.

In *Holstcomb v. Rivers* (1669) 1 Ch. Cas. 127, 22 Eng. Reprint, 726, it was held, where fourteen years had elapsed since an account was ren-

dered, and there was no clear proof of any exception to it until two years after its rendition, although a request was made that any exception should be immediately taken, "that the account should not be raveled into."

In *Lutcher & M. Lumber Co. v. Eells* (1903) 108 Ill. App. 156, evidence showing that statements were sent by mail from time to time during a period of three years, which were received and retained without objection for some three years longer, was held sufficient to justify a court in finding in favor of the plaintiff as on an account stated.

In *Raub v. Nisbett* (1898) 118 Mich. 248, 76 N. W. 393, it was held that where an account rendered was retained without objection during a period of nearly three years, for nearly one year of which both parties were residents of the same town, there was a strong presumption of the accuracy of the account, which, when taken in connection with fact that no distinct error in the account was shown, should be held controlling.

Keeping the rendered account three or four years after receiving it, without objection, will make it a stated account. *Bruen v. Hone* (1848) 2 Barb. (N. Y.) 586.

In *White v. Macon* (1827) 3 Cranch, C. C. 250, Fed. Cas. No. 17,553, the court instructed the jury that, if they believed from the evidence that defendant received an account rendered about three years before the commencement of the suit, and there was no evidence that he objected to its amount, they might infer that it was correct.

Retention of an account rendered for nearly four years, without objection, was held sufficient, in *O'Hanlon Co. v. Jess* (1920) 58 Mont. 415, 14 A.L.R. 237, 193 Pac. 65, to render it an account stated.

Leaving an account with the defendant five years before trial, and repeatedly importuning him for payment, he at no time making any objection to any item in the account, and finally going out of business, is sufficient to justify a finding of account stated. *House v. Beak* (1892) 43 Ill. App. 615.

In *Murray v. Toland* (1818) 3 Johns. Ch. (N. Y.) 569, it was held that chancery would not decree an account to be taken, after the lapse of five years from the rendition of an account to which no objection was offered, but would leave the party to his remedy at law.

In *Towsley v. Denison* (1866) 45 Barb. (N. Y.) 490, where it appeared that an account rendered was retained without objection for nearly six years before the commencement of the action, it was held that the referee should have held the account rendered a stated account.

In *Parkinson v. Hanbury* (1865) 2 DeG. J. & S. 450, 46 Eng. Reprint, 449, it was held that where an account was delivered to a person entitled to take out administration, who raised questions upon it which were answered at the time, and she became administratrix seven years afterwards, and filed her bill for an accounting seven years after taking out administration, equity would not entertain the bill.

In *Baker v. Biddle* (1831) Baldw. 394, Fed. Cas. No. 764, it was held that equity would not compel an accounting ten years after the rendition of an account which had been acquiesced in.

Equity will not compel an accounting, where a statement of account had been retained without the least objection by plaintiff's ancestor for ten years, after the lapse of twenty years more since his decease. *Tharp v. Tharp* (1843) 15 Vt. 105.

As between parties in particular relations — attorney and client.

In *Ault v. Interstate Sav. & L. Assn.* (1896) 15 Wash. 627, 47 Pac. 13, where it appeared that an attorney mailed to his client a statement of account, to which the client replied about twenty days later by calling for information in reference thereto, it was held that in view of the course of business between the parties such delay was not, in itself, so unreasonable as to warrant the assumption that the account had been approved.

It cannot be said as a matter of law that a presumption of acquies-

cence in an account rendered by a firm of attorneys to a client arises from a failure to object thereto for eleven months. *Merritt v. Meisenheimer* (1915) 84 Wash. 174, 146 Pac. 370.

In *Harris v. Drenning* (1917) 101 Kan. 711, 168 Pac. 1106, the failure of a client to object to the amount of an attorney's charge at the time, or for eighteen months thereafter, was held as a matter of law to constitute an account stated.

In the reported case (*GRIFFITH v. HICKS*, ante, 882), a delay of twenty months in objecting to an account rendered to a client by an attorney was held as a matter of law to render it an account stated, though the client sought to explain the delay by showing that he had made objection to the attorney's law partner, thinking that he was the attorney's agent in the matter, where he took no steps to ascertain whether such was in fact the case.

— banks.

In *Union Bank v. Planters' Bank* (1837) 9 Gill & J. (Md.) 439, 31 Am. Dec. 113, where it appeared that no objection had been made to an account rendered by one bank to another for a period of over five years, and that it was the usage of the banks to notify one another at once of any discrepancy in accounts, it was held error to refuse to instruct the jury that they were at liberty to infer from the silence of the defendants their acquiescence in the correctness of the account rendered.

— bank and depositor.

In *Kenneth Invest. Co. v. National Bank* (1903) 103 Mo. App. 613, 77 S. W. 1002, it is said that, while ten days may not be arbitrarily fixed in every case as the time within which a depositor is bound to examine his bank book after it has been balanced, it is a reasonable time in which to make the examination, when the depositor resides in the same town or city in which the bank is located.

In *Citizens Bank & T. Co. v. Hinkle* (1916) 126 Ark. 266, 189 S. W. 679, where it appeared that a complete statement of account was furnished

by a bank to the attorneys for a depositor in the latter part of February, and suit was not commenced until September 25th, but that a conference of the depositor's attorneys with one who was a director of and the general attorney for the bank, and a member of its auditing committee, was held in the latter part of February, at which the correctness of the account was challenged, it was held that it should be said as a matter of law that no such time had elapsed between the date when the full statement of account was furnished, and the date when the bank's attorney was notified that the account was not correct, as to make the statement so furnished an account stated.

In *American Nat. Bank v. Bushey* (1881) 45 Mich. 135, 7 N. W. 725, it was held that, where a depositor was notified by a bank of a balance in his favor, and without inquiry or objection drew out the admitted balance, and for nearly two years made no claim of error in his account, there was such a presumption in favor of its correctness as would throw upon the depositor the burden of impeaching it.

In *Harley v. Eleventh Ward Bank* (1877) 7 Daly (N. Y.) 476, affirmed without opinion in (1879) 76 N. Y. 618, it was held that, where a bank received a check for collection and forwarded it to its correspondent, from which it received a notification of its payment, and credited the amount to its customer, but was afterward informed that the check was not paid, and attempted to charge it back to the customer, who would not permit it, and accounts were then rendered for two years without any mention of it, there was an account stated, which precluded the bank from afterwards looking to the customer for the amount.

In *Shepard v. Bank of State* (1851) 15 Mo. 143, it was held that, where the account of a depositor in a bank was shown to have been balanced from time to time during the period of four years, that a memorandum had been made by the parties of the fact of the correctness of the account,

and that no objection had been made to its correctness for more than three years after the account was closed, the court below was justified in finding that an account had been stated.

In *Hutchinson v. Market Bank* (1867) 48 Barb. (N. Y.) 302, where a bank depositor failed to object for nearly six years after a statement of account, to a failure to allow him a certain credit, it was held to be so plainly a stated account that it was not, under the evidence, a question proper for consideration by the jury whether the delay was sufficiently accounted for.

In *Nodine v. First Nat. Bank* (1902) 41 Or. 386, 68 Pac. 1109, where it appeared that, when a depositor's bank book was first balanced, he insisted that the bank had failed to give him certain credits, but the officers of the bank contended that he was mistaken, and refused to make any change in the account; that for the succeeding ten years the bank continued to render him monthly or bimonthly statements of his account, which were received and retained by him without objection; and that he retained without objection for nearly six years a statement rendered when his account was closed, it was held that the account must be regarded as an account stated.

— broker and customer.

In *Knickerbocker v. Gould* (1889) 115 N. Y. 533, 22 N. E. 573, where brokers on December 26th mailed an account to a customer, with notice that if it was not paid by December 31st they would bring suit, and suit was brought January 14th, it was held that the account had become stated.

In *McMullin v. Reid* (1906) 213 Pa. 338, 62 Atl. 924, where it appeared that a statement was sent by a stock-broker to his customer, with a demand for payment, and notice that collateral held by the broker would be sold in fifteen days, and that the defendant had made no answer to the statement when suit was brought, twenty-five days thereafter, it was held that there was evidence from which the jury were warranted in finding an account stated.

— commission merchants or factors, and their principals.

Where the parties lived in the same city and were in the habit of almost daily intercourse, the retention of the account for upwards of five weeks without objection, coupled with the fact of the principal's dealing with the factor upon the old footing, estops him from going into the question whether the sales had or had not been made at an inadequate price. *Smedley v. Williams* (1849) 1 Pars. Sel. Eq. Cas. (Pa.) 359.

A principal who received the account current of his factors in February, and retained it without objection until the time his bill for an accounting was exhibited in January of the following year, must be deemed impliedly to have admitted the correctness of the account, although such admission will not operate so conclusively against him as to prevent him from surcharging and falsifying. *Langdon v. Roane* (1844) 6 Ala. 518, 41 Am. Dec. 60.

In *Hall v. Sloan* (1873) 9 Phila. (Pa.) 138, it was held that where a commission merchant rendered an account of sales to his consignor, who drew upon him for the proceeds, the silence of the consignor for more than six months thereafter raised a legal presumption of his assent.

In *Allen-West Commission Co. v. Patillo* (1898) 33 C. C. A. 194, 61 U. S. App. 94, 90 Fed. 628, it was held that a failure for two years to object to a statement of account rendered by a factor, which included a charge for commissions on property not shipped to him, but on which he claimed commissions under his contract, rendered the account a stated one.

— master and servant.

In *Schneider v. Oakman Consol. Min. Co.* (1918) 38 Cal. App. 338, 176 Pac. 177, it was held that proof that a statement of account between a mining company and its manager was mailed by him in California, to the company at its office in Massachusetts, on or about August 1, and that the officers of the company, in letters written from time to time thereafter,

the latest being under date of December 28 following, referred to his claim against the company without making any objection to his account, was sufficient to support an action on account stated.

In *J. S. Phelps & Co. v. Plum* (1895) 17 Ky. L. Rep. 817, 32 S. W. 753, where the employer of several agents to solicit shipments of tobacco, the agents to agree among themselves what statements should be credited to each, delivered to one of them in the presence of the others a statement showing the amount of commissions due him, it was held that his failure for nearly four and one-half years to make any objection thereto should be treated not only as an estoppel, but as conclusive evidence of the correctness of the account.

— merchants.

Between merchants at home, an account which has been presented, and to which no objection has been made after the lapse of several posts, is treated, under ordinary circumstances, as being by acquiescence a stated account. *Brown v. Vandyke* (1853) 8 N. J. Eq. 795, 55 Am. Dec. 250.

In *Sherman v. Sherman* (1692) 2 Vern. 276, 23 Eng. Reprint, 778, it was held that equity will not entertain a bill for an accounting, where there has been an acquiescence for several years after the dealings ceased, the court saying: "Amongst merchants, it is looked upon as an allowance of an account current if the merchant that receives it does not object against it in a second or a third post."

In *Pratt v. Weyman* (1825) 6 S. C. Eq. (1 M'Cord) 156, it is said that in some cases, where an account is sent by one merchant to another, with a balance stated against him, and he keeps it by him for two or three years, it is considered as a settled account between them.

An account current sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept

it without objection. *Freeland v. Heron* (1812) 7 Cranch (U. S.) 147, 3 L. ed. 297.

In *Tickel v. Short* (1750) 2 Ves. Sr. 239, 28 Eng. Reprint, 154, it was said by the Lord Chancellor: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself; the other keeps it by about two years without objection; the rule of this court and of merchants is that it is considered as a stated account."

— **mortgagor and mortgagee.**

Assent on the part of a mortgagor to the correctness of an account stated by the mortgagee cannot be implied from the circumstances that no objection was made for about three years thereafter, where it appears that the principals are both dead, the mortgagee dying within forty days after he prepared the account, and that when the first effort was made by his executor to collect the account, objection was duly made. *Wilbur v. Win* (1918) 89 N. J. Eq. 278, 103 Atl. 985.

— **partners.**

In *Atwater v. Fowler* (1833) 1 Edw. Ch. (N. Y.) 417, it was held that if a partner in a single partnership transaction receives from the other partner a statement of accounts between them, and is silent for thirteen years afterward, it amounts to an acquiescence.

II. As question for court or jury.

In some jurisdictions it is held that what is a reasonable time is, where the facts are clear, always a question exclusively for the court; and that, where the proofs are conflicting, the question is a mixed one of law and fact.

United States. — *Toland v. Sprague* (1838) 12 Pet. 309, 9 L. ed. 1097; *Wiggins v. Burkham* (1870) 10 Wall. 129, 19 L. ed. 884; *Standard Oil Co. v. Van Etten* (1883) 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178; *McLaughlin v. United States* (1901) 36 Ct. Cl. 138, s. c. on subsequent appeal (1902) 37 Ct. Cl. 150; *Talcott v. Chew*

(1885) 27 Fed. 273; *Edwards v. Hoeflinghoff* (1889) 38 Fed. 635; *Charlotte Oil & Fertilizer Co. v. Hartog* (1898) 29 C. C. A. 56, 42 U. S. App. 716, 85 Fed. 150; *Long-Bell Lumber Co. v. Stump* (1898) 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574.

California. — *Crane v. Stansbury* (1916) 173 Cal. 631, 161 Pac. 7; *Cusick v. Boyne* (1905) 1 Cal. App. 643, 82 Pac. 985.

District of Columbia. — *Riley v. Mattingly* (1914) 42 App. D. C. 290.

Florida. — *Martyn v. Arnold* (1895) 36 Fla. 446, 18 So. 791; *Daytona Bridge Co. v. Bond* (1904) 47 Fla. 136, 36 So. 445.

Illinois. — *State v. Illinois C. R. Co.* (1910) 246 Ill. 188, 92 N. E. 814; but see, *contra*, *Moran v. Gordon* (1889) 33 Ill. App. 46.

Missouri. — *Brown v. Kimmel* (1878) 67 Mo. 430; *McKeen v. Boatmen's Bank* (1898) 74 Mo. App. 281; *Kansas City Commercial Photo View Co. v. Kansas City Bridge Co.* (1921) — Mo. App. —, 233 S. W. 947.

Oregon. — *Fleischner v. Kubli* (1891) 20 Or. 328, 25 Pac. 1086; *Howell v. Johnson* (1901) 38 Or. 571, 64 Pac. 659; *Crawford v. Hutchinson* (1901) 38 Or. 578, 65 Pac. 84; *Nodine v. First Nat. Bank* (1902) 41 Or. 386, 68 Pac. 1109; *Carlson v. First Nat. Bank* (1916) 80 Or. 539, 157 Pac. 809.

Washington. — *Ault v. Interstate Sav. & L. Asso.* (1896) 15 Wash. 627, 47 Pac. 13, which is, however, overruled in *Merritt v. Meisenheimer* (1915) 84 Wash. 174, 146 Pac. 370, in which it is said that the case "declares one rule and applies another, and is inconsistent with *Baxter v. Waite* (1883) 2 Wash. Terr. 228, 6 Pac. 429; *Shaw v. Lobe* (1910) 58 Wash. 219, 29 L.R.A.(N.S.) 333, 108 Pac. 450."

On the other hand, it has been held in a number of cases that the question is ordinarily one for the jury.

Idaho. — *Lewis v. Utah Constr. Co.* (1904) 10 Idaho, 214, 77 Pac. 336.

Illinois. — *Moran v. Gordon* (1889) 33 Ill. App. 46, but see, *contra*, *State v. Illinois C. R. Co.* (1910) 246 Ill. 188, 92 N. E. 814.

Iowa.—Hollenbeck v. Ristine (1898) 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; Millard v. Bennett (1913) 161 Iowa, 242, 139 N. W. 914; Marks Hat Co. v. Slatnick (1915) 178 Iowa, 370, 154 N. W. 757.

Michigan.—Peter v. Thickstun (1883) 51 Mich. 589, 17 N. W. 68.

Minnesota.—Western Newspaper Union v. Segerstrom Piano Mfg. Co. (1912) 118 Minn. 230, 136 N. W. 752.

New Hampshire.—Austin v. Ricker (1881) 61 N. H. 97.

New York.—Little v. McClain (1909) 134 App. Div. 197, 118 N. Y. Supp. 916; Curtis-Blaisdell Co. v. Lederer (1913) 82 Misc. 444, 143 N. Y. Supp. 1074.

Oklahoma.—Lamont Mercantile

Co. v. Piburn (1915) 51 Okla. 618, 152 Pac. 112; Oklahoma Hay & Grain Co. v. T. D. Randall & Co. (1917) — Okla. —, 168 Pac. 1012.

Washington.—Merritt v. Meisenheimer (1915) 84 Wash. 174, 146 Pac. 370 (where it is said that the question is one for the jury, save in the absence of all circumstances except the lapse of time).

In *Ottoby v. Winsor* (1909) 137 Mo. App. 272, 119 S. W. 40, it is said to be a question for the jury whether an account rendered was retained by the debtor without objection a sufficient length of time to give it the status of an account stated; but the context plainly shows that the opposite was meant. E. S. O.

MARIE E. ZIESEL, Respt.,

v.

WILLIAM ZIESEL, Appt.

New Jersey Court of Errors and Appeals—November 14, 1921.

(— N. J. —, 115 Atl. 435.)

Parent and child — expense of boarding school.

1. Where the father and mother are divorced, and the custody, maintenance, and education of the son have been committed by the court of chancery to the mother, and where the father's annual net income is only \$4,500, an order requiring him, against his objection, to pay to the mother \$520 annually for the support and maintenance of such sixteen-year-old son, and \$980 annually for his board and tuition in a boarding school, is excessive, and will be reversed in so far as it represents expenses of education in a boarding school rather than in a public high school, in view of the fact that the father believes, with some showing of reason, that attendance at a public high school is adequate, and preferable for his son for present purposes, and in view of the further fact that the father has a second wife and daughter to support.

[See note on this question beginning on page 899.]

— education — authority to determine.

2. A father, unless his parental authority has been taken away by the courts, is the one to decide the extent of the education of his child, beyond

what is required and provided by the school system of the state, and is under no legal duty to send his son to a boarding school, no matter what his financial circumstances may be.

[See 20 R. C. L. 626.]

Headnotes by TRENCHARD, J.

APPEAL by defendant from an order of the Court of Chancery (Leaming, Vice Ch.) requiring him to pay for the support, maintenance, and education of his minor son, in a proceeding by complainant for a greater allowance for his support. *Reversed.*

The oral opinion delivered by Vice Chancellor Leaming was as follows:

"I am a little in doubt. It seems to me that an allowance of \$1,500 a year, under all the circumstances, would not be very far from right. That ought to be sufficient to provide for the board of the boy, and a fairly liberal expenditure for his education. If \$10 a week were allowed for the support of the boy, it would be \$520, and then if \$800 were allowed for the education, in addition, it would be a total of \$1,320 which would be only a little less than \$1,500. Eight hundred dollars is cutting down education to a pretty small amount, as charges are made at this time by most colleges, and I do not believe there is any doubt that Dr. Ziesel can afford to pay \$1,500 without crippling him. I think that the net income of the doctor is not far from \$4,500. I think this item of \$2,400 for money borrowed could be excluded from the gross receipts, and in like manner the item of \$1,847.29 for repairs and alterations could be excluded from the expenditures, which would leave him approximately the amount I stated, \$4,500. With that, and the expenses he must bear, I should think \$1,500 for the support and education of the son would be reasonable. It may not be as much as would be desirable, and it may be more than the doctor cares to pay, but it would not be far from right. In making expenditures for the boy's education the doctor is building a monument for himself that is more desirable even than the pursuits in scientific investigation that he is following. However commendable that research may be, there can be nothing in the nature of a legally imposed duty—and should be a corresponding pleasure—greater than that of the support of your own issue, and that word 'support' should, in all appropriate circumstances, include appropriate education. I think the doctor himself, on mature reflection touching the duties of a parent to his offspring, would be inclined to concede

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that \$1,500 a year allowance is not too much. The income of his wife—his first wife—is limited; she might not have anything left after her own year's expenditures are made. I do not think \$1,500 is an unreasonable amount. I will make the allowance. I think it was reasonable to employ an accountant by counsel for complainant, and to make the investigation which was made, and that the expense thus incurred should be paid by the defendant, as well as the master's costs, of course. And I think \$75 counsel fee will be proper."

Mr. Lewis Starr for appellant.

Messrs. Leap, Sharpless, & Way for respondent.

Trenchard, J., delivered the opinion of the court:

This, as will be seen, is an appeal from an order of the court of chancery requiring the appellant to pay for the support, maintenance, and education of his minor son, Edward Ziesel.

The facts and circumstances giving rise to the order under review are these:

The parties to the action, Dr. and Mrs. Ziesel, were married January 27, 1889. Three children were born, of whom Edward, the one concerned here, is the youngest. They were divorced in Pennsylvania December 21, 1914. No provision was made in that decree for the support and maintenance of Edward. Apparently the parties removed to Wildwood, New Jersey, and in the early part of 1916 Mrs. Ziesel filed a bill in the court of chancery for the support of Edward, the minor child, and no question was raised as to the jurisdiction of the court. On July 10th of that year a decree was entered in that proceeding, awarding the care, custody, and education of Edward to Mrs. Ziesel, and requiring Dr. Ziesel to pay \$5 per week to Mrs. Ziesel for his support, maintenance, and education, and leave was granted by the decree, to either party, to apply thereafter for such variance or modification thereof as

changing circumstances might render equitable and just. In November, 1920, Mrs. Ziesel petitioned for a greater allowance, saying that Edward had attained the age of sixteen years, and was a "second-year high school student;" that his father's income was from \$10,000 to \$15,000 per year; that she desired to send the boy to a preparatory school, which she named, where the board and tuition were \$1,000 per year. It was on that petition that the court of chancery made the order now under review, requiring Dr. Ziesel to pay to Mrs. Ziesel for the support and maintenance of Edward \$10 per week, and an additional sum of \$980 annually for his education. We are of the opinion that such order cannot be sustained.

It appears that Dr. Ziesel is a dentist, having offices in Wildwood in this state and in Philadelphia, Pennsylvania; that he is doing much research work in connection with his profession; that, prior to the divorce, he settled upon Mrs. Ziesel approximately \$40,000 of property in Wildwood, from which she has an income of about \$2,600 a year; and that the other two children of the marriage are of age and self-supporting. It further appears that after the parties were divorced the doctor married again, and has one child by that marriage; and, while he is not living with his second wife, he is obliged to support her and his daughter by that marriage.

The learned vice chancellor found as a fact, and we think rightly, that the annual net income of Dr. Ziesel was approximately \$4,500, out of which, of course, he had to pay for the support of his second wife and his daughter, and also such sum as may be awarded in this proceeding for the support and education of his son Edward.

Now Dr. Ziesel seems to find no fault with the order so far as it relates to support and maintenance. His objection is to that part of the order relating to allowance for education, and his objection really is to the expense of board and tuition

at a boarding school, his contention being that attendance at a high school is adequate and preferable for his son for present purposes. The doctor testifies that he has always insisted upon a public school education for his children; that "this preparatory school (selected by the mother) does not rank as high as the average public high school;" and in this connection it is to be noted that he further testifies that Edward had "voluntarily" left another boarding school, in which, quite recently, he had been placed by his mother, but whether with or without the consent of his mother does not appear.

It is not questioned that the court of chancery has power to make a proper order touching the education of the son, such as "the circumstances of the parties and the nature of the case" shall render "fit, reasonable, and just." 2 C. S. p. 2035, § 25.

The order under review seems to be predicated upon some legal duty of a father to send his son to a boarding school, if he can do so without "crippling him," and this the vice chancellor thought the present order would not do, and hence he required an expenditure of one third of the father's income for the support and education of this one son, made up in large part of boarding-school expenses.

But a father is under no legal duty to send his son to a boarding school, no matter what his financial circumstances may be. True, many a father does it at a sacrifice to himself and other members of his family, but he does so voluntarily. That may be a commendable thing to do. No doubt the vice chancellor had such instances in mind. But, after all, if a father sees fit to content himself with a common public school and high school education for his son, the law ordinarily will require no more of him. If Edward, the son, were living with his father instead of the mother, no court

Parent and child
—education—
authority to
determine.

would compel him to send the son to any boarding school, or even a private day school. He would be compelled by statute (4 C. S. p. 4775, § 153), and those administering it, to educate the child, but the state provides free schools, where all its sons and daughters may be thus educated, and the law ordinarily requires no more than this. A father, unless his parental authority has been taken away by the courts, is the one to decide the extent of the education of his child, beyond what is provided by the school system of the state. *Streitwolf v. Streitwolf*, 58 N. J. Eq. 570, 45 L.R.A. 842, 43 Atl. 904. If the father were dead and the minor son had property, his education would be paid for out of his income under the direction of the court of chancery, on a basis of what was proper and customary for one in his station in life; but that is not this case.

A case somewhat in point is that of *Streitwolf v. Streitwolf*, supra. There, in a suit brought by the wife for a limited divorce on the ground of extreme cruelty, alimony pendente lite was awarded her. She subsequently applied for additional alimony pendente lite, to enable her to meet the expenses for tuition and books, at a law school, of her son, then in his twentieth year, who lived with her, and was chiefly supported by her. No order had been made giving the custody of the son to either parent. The application was granted, against the objection

of the husband, who testified that he thought his son unfitted for the law, and wished him to go into business. On appeal to this court it was held that the order giving additional alimony pendente lite to enable the wife, against the judgment of her husband, to secure for the son a professional education, should be reversed.

Of course, in the present case, it appears that the father and mother were divorced, and that the custody, maintenance, and education of the son had been committed by the court to the mother. But where, as here, it appears that the father's annual net income was only \$4,500, we think that an order requiring him, against his objection to pay to the mother \$520 annually for the support and maintenance of such sixteen-year-old son, and \$980 annually for his board and tuition in a boarding school, is excessive in so far as it represents

expenses for education in a boarding school rather than in a public high school, in view of the fact that the father believes, with some showing of reason, that attendance at a public high school is adequate, and preferable for his son for present purposes, and in view of the further fact that the father has a second wife and daughter to support.

The decree will be reversed, and the record remitted to the Court of Chancery for further proceedings in accordance with the views herein expressed.

ANNOTATION.

Allowance in decree against parent for education of child.

Allowances, in a decree against a parent for education of a child, are generally combined with the child's support; that is, the allowance is usually made for "support and education." Very few cases take up the matter of education as a separate item.

It will be seen that in the reported

case (*ZIESEL v. ZIESEL*, ante, 896) it is held that a decree should be reversed which ordered the divorced father of a boy sixteen years old in his mother's custody, to pay \$900 annually for his education at a boarding school, when the boy was already at high school, and the father was content with a high school education for

him, the decree further ordering him to pay for the boy's support \$10 per week.

Streitwolf v. Streitwolf (1899) 58 N. J. Eq. 570, 45 L.R.A. 842, 43 Atl. 904, is sufficiently set out in the reported case (*ZIESEL v. ZIESEL*). In the *Streitwolf* Case, where the boy was nineteen years of age, the court said: "It appears that the application to the court of chancery was virtually for an order compelling the husband, against his own judgment, by way of supporting his wife pending suit, to make a grown-up son a lawyer and to pay the expense of his professional education. We do not find that the husband had committed himself to this course by his own conduct, or that he had become bound to take it by any previous adjudication. For reasons already stated, we think that the order appealed from was an undesirable extension of a power that exists primarily for the protection of the wife. The son's ambition in the direction of a liberal education is in itself commendable, but upon the facts now before us, and at this stage of the suit, the father cannot be forced to gratify that ambition without making an unwise exception to a good rule."

In the English case of *Blandford v. Blandford*, L. R. [1892] Prob. (Eng.) 148, under a statute authorizing the court, in or after a final decree of dissolution of marriage, to make such provision as it may deem just and proper with respect to the custody, maintenance, and education of the children of the marriage, the court, on an application by the divorced wife for maintenance of a son nineteen years old, said: "It is perfectly clear, on principle and authority, that if I were dealing with the first of the matters mentioned in the sections—that is, with custody—I should have no power to make an order as to the custody of a child who had attained the age of sixteen years. When we come to the next matter—education—the sections can only be intended to apply to the education of young persons, and certainly are not intended to apply to the educa-

tion of a child as long as he or she may live. Am I to put a different interpretation on the sections in regard to maintenance? My own opinion is that the sections dealing with the custody, maintenance, and education of children apply only to infants, and deal with all these matters exactly in the same way. It is clear, therefore, I think, on the authorities, that there is no jurisdiction in the court to make such an order as that asked for."

In *Mack v. Mack* (1919) 91 Or. 514, 179 Pac. 558, the court, in modifying a decree, said and held: "The statute authorizes the court, when the marriage is dissolved, to provide for the nurture and education of the *minor* children of the marriage. When such a child reaches the age of majority he is no longer a ward of the court, and such provision should cease to be effective."

But where, by contract embodied in a decree of divorce, the defendant had agreed to give his son and daughter a college education, the court, in holding that this duty continued after the minority of the children, and in sustaining a decree in an action to modify and construe the earlier decree, held that \$675 per year for the college education of each child was proper, and said: "We think that, by the contract and decree defendant having agreed to give his daughter a college education, this duty and contract continue until performed, whether he dies, or whether the daughter reaches majority. This applies to both the children in this case." *Dunham v. Dunham* (1920) — Iowa, —, 178 N. W. 551.

In *Tribe v. Tribe* (1921) — Utah, —, 202 Pac. 213, where a decree of divorce required the defendant (the husband), *inter alia*, to pay the sum of \$20 per month "for the support, care, maintenance, and education of said minor child, George Vernon Tribe, for a period of ten months in each year of his minority, beginning September 1st and ending June 30th," the court in a contempt proceeding refused to modify the decree on the ground that such minor

was earning a living and did not attend school continuously during the ten-month period. It appeared that said minor, as the court states it, "was desirous of adapting himself for what he calls an automobile engineer; that, in view that the defendant failed to pay the \$20 per month alimony, he could not accomplish his purpose without earning additional sums of money. It was also made to appear that for the purpose aforesaid he paid his matriculation fee to the University of Utah, but in view that the expenses were so far in excess of his means, he soon had to leave that institution, and when he left it he was indebted, and thus was compelled to earn money to pay those debts. . . . It was also shown that he could not accomplish his purpose of becoming an automobile engineer by merely attending the common schools of Ogden; that for a time, while he was employed at \$80 per month, he took a training course under a special teacher. . . . The evidence is also to the effect that, in view of the mother's inability to help George Vernon Tribe, and that the defendant refuses to pay the amount due under the original decree, the boy was compelled to work to earn a livelihood. It is then shown that he could obtain employment, and that he worked only a little in excess of nine months between the time the

original decree was entered and this proceeding was commenced; that he had saved about \$60, which, as he says, 'was put away so that I could go to school.' The boy also testified that he attended school at Ogden a few months after the original decree was entered, and before this proceeding was commenced."

In *Hillard v. Anderson* (1902) 197 Ill. 549, 64 N. E. 326, the court held that it was proper that a father, on being divorced from his wife for his fault, should be required by decree to pay sufficient for the education of his daughter, fourteen years of age, until her educational course was completed at the boarding school to which he had sent her prior to the divorce.

It may be noted that, in *Cline v. Cline* (1918) 183 Iowa, 1255, 166 N. W. 698, where a divorce decree had been modified so as to take the custody of a girl six or seven years old from its mother, giving it to a third party, and requiring the child to be placed at a school or institution to be designated by the court, and, providing that the father pay \$40 per month for her maintenance and education, the appellate court struck out the provisions changing the custody of the child and committing it to a school, etc., and reduced the monthly sum to \$30 to be charged on the father's estate, he having died pending the appeal. B. B. B.

MARY H. EMORY et al., Plffs. in Err.,

v.

W. H. BAILEY et al.

Texas Supreme Court—November 2, 1921.

(— Tex. —, 234 S. W. 660.)

Evidence — copy of ancient deed — effect of affidavit of forgery.

1. Under a statute permitting the use in evidence of a certified copy of the record of a lost deed if the original would be admissible, such copy may be admitted after the deed has been on record for more than thirty years, if it is free from anything suspicious on its face, notwithstanding the filing of an affidavit charging the original to be forged.

[See note on this question beginning on page 908.]

— of seal on corporate deed — scroll on record copy.

2. That a corporate deed was under seal, as required by statute, is shown by the fact that the copy in the public record has a scroll opposite the signature to represent such seal.

— corporate seal as evidence of authenticity of act.

3. The presence of the corporate seal upon an instrument purporting to be a deed of a corporation is prima facie evidence that the instrument was the duly authorized act of the corporation.

[See 7 R. C. L. 668.]

— registration of deed — production from proper custody.

4. The prompt registration of a deed is not less efficacious upon the question of its admissibility in evidence than its production from proper custody.

— proof that instrument was ancient.

5. A certified copy from a record of a deed made more than thirty years before the copy is offered in evidence shows conclusively that the instrument was in existence for the period necessary to make it an ancient instrument.

ERROR to the Court of Civil Appeals for the First Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Harris County (Masterson, J.), in favor of defendants in an action brought to try title to certain land. *Reversed.*

The facts are stated in the opinion of the court.

Mr. L. C. Kemp, for plaintiffs in error:

Where a deed has been recorded, in the absence of anything to rebut the presumption, it will be presumed that the deed is properly of record.

Crain v. Huntington, 81 Tex. 615, 17 S. W. 243; Catlett v. Starr, 70 Tex. 489, 7 S. W. 844; Ballard v. Perry, 28 Tex. 364; Hines v. Thorn, 57 Tex. 98; Ballaster v. Mann, 86 Tex. 645, 26 S. W. 494; Trimble v. Edwards, 84 Tex. 497, 19 S. W. 772.

In executing a sealed instrument by a corporation, it is not necessary that the instrument recite that the seal has been affixed, but it is sufficient that it should appear otherwise that the seal has been affixed.

Webb v. Huff, 61 Tex. 677; Mitcheney v. Holmes, 117 Mo. 185, 22 S. W. 1076; 10 Cyc. 1012.

Where a county clerk has recorded an instrument, and has placed on the record, in the proper place for a seal, a scroll, it will be presumed, in favor of the act of the clerk who recorded the instrument, that the instrument bore the proper seal to entitle it to record.

Ballard v. Perry, 28 Tex. 364; Crain v. Huntington, 81 Tex. 615, 17 S. W. 243; Stephens, v. Motl, 81 Tex. 115, 16 S. W. 731; Chamberlain v. Pybas, 81 Tex. 511, 17 S. W. 50; Webb v. Huff, 61 Tex. 677; Caudle v. Williams, — Tex. Civ. App. —, 51 S. W. 560; Catlett v. Starr, 70 Tex. 489, 7 S. W. 844; Hines v. Thorn, 57 Tex. 98; Ballaster

v. Mann, 86 Tex. 643, 26 S. W. 494; Trimble v. Edwards, 84 Tex. 497, 19 S. W. 772; Monroe v. Arledge, 23 Tex. 481; Mitcheney v. Holmes, 117 Mo. 185, 22 S. W. 1076.

Where a deed has been executed in behalf of a corporation by the proper officer or officers, it will be presumed that the device annexed, whatever it may be, is the common seal of the corporation.

10 Cyc. 1012; 4 Thomp. Corp. § 5073.

Where it appears in the body of a deed that a corporation is the grantor, the deed will be regarded as the deed of the corporation although the officers signed their names with their official additions instead of signing the name of the corporation, by themselves as president and secretary.

Muller v. Boone, 63 Tex. 93; Ballard v. Carmichael, 83 Tex. 368, 18 S. W. 734; 3 Cook, Corp. 7th ed. § 722, p. 2549.

Where the officers of a corporation are the proper officers to execute a deed, and have executed a deed purporting to be the act of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation.

Adams v. Dignowity, 8 Tex. Civ. App. 201, 28 S. W. 373; Quinlan v. Houston & T. C. R. Co. 89 Tex. 356, 34 S. W. 738; National Bank v. Goolsby, 12 Tex. Civ. App. 362, 35 S. W. 713; Brownwood Ice Co. v. York Mfg. Co.

— Tex. Civ. App. —, 37 S. W. 339; Catlett v. Starr, 70 Tex. 489, 7 S. W. 844; Magee v. Paul, — Tex. Civ. App. —, 159 S. W. 330; Houston Oil Co. v. Payne, — Tex. Civ. App. —, 164 S. W. 886; Coleman v. Luettcke, — Tex. Civ. App. —, 164 S. W. 1120; 10 Cyc. 1003.

Where a deed is executed by the proper officers of a corporation, and the seal of the corporation is affixed, the authority of the officers acting to execute the deed will be presumed.

Catlett v. Starr, 70 Tex. 489, 7 S. W. 844; Magee v. Paul, — Tex. Civ. App. —, 159 S. W. 330; 10 Cyc. 1003.

Where a deed is admissible in evidence as an ancient instrument, the power under which it purports to have been executed will be presumed.

Simmonds v. Simmonds, 35 Tex. Civ. App. 151, 79 S. W. 632; Harris v. Nations, 79 Tex. 413, 15 S. W. 262; Jones v. Neal, 44 Tex. Civ. App. 412, 98 S. W. 420; Arthur v. Ridge, 40 Tex. Civ. App. 137, 89 S. W. 17; Hill v. Conrad, 91 Tex. 341, 43 S. W. 789.

Where a certified copy of a properly recorded instrument which has been recorded more than thirty years is offered in evidence, it is an ancient instrument and proves itself; and such certified copy is not rendered inadmissible by the filing of an affidavit of forgery.

Holmes v. Coryell, 58 Tex. 688; Cox v. Cock, 59 Tex. 524; Robertson v. Du Bose, 76 Tex. 6, 13 S. W. 300; Warren v. Fredericks, 76 Tex. 652, 13 S. W. 643; Rudolph v. Tinsley, — Tex. Civ. App. —, 143 S. W. 213; Crosby v. Ardoin, — Tex. Civ. App. —, 145 S. W. 713.

Where a certified copy of a duly recorded instrument is offered in evidence, the statutory affidavit of loss of the original is sufficient, and it is not necessary to prove search for the original.

Williamson v. Work, 33 Tex. Civ. App. 369, 77 S. W. 267; Butler v. Brown, 77 Tex. 345, 14 S. W. 186; Foot v. Silliman, 77 Tex. 268, 13 S. W. 1032.

Mr. McDonald Meachum also for plaintiffs in error.

Mr. S. H. Brashear, for defendants in error:

The evidence was insufficient to prove execution of the paper in question, or to admit it as an ancient instrument.

Joske v. Irvine, 91 Tex. 582, 44 S. W. 1059; Belcher v. Fox, 60 Tex. 527; Baldwin v. Goldfrank, 88 Tex. 249, 31 S. W. 1066; Holmes v. Coryell, 58 Tex.

688; Vandergriff v. Piercy, 59 Tex. 372; Hill v. Taylor, 77 Tex. 295, 14 S. W. 367; Luckie v. Watt, 77 Tex. 262, 13 S. W. 1035; Craddock v. Merrill, 2 Tex. 496.

Where plaintiffs' title depended upon a deed from the Washington County Railroad Company, and an affidavit of forgery of said paper was filed by defendants, and plaintiffs offered only a certified copy in evidence, without showing any search or inquiry for the original, or its loss or destruction, it was not error for the court to sustain an objection to said deed upon these grounds, and to instruct a verdict for defendants.

Vandergriff v. Piercy, 59 Tex. 372; Hill v. Taylor, 77 Tex. 295, 14 S. W. 367; Luckie v. Watt, 77 Tex. 262, 14 S. W. 1037.

The testimony does not show that the paper was sealed by the corporate seal of the supposed corporation, or that it was sealed by any seal whatever. Nor does it show that a certain mark appearing on the record was anything more than an indication that the seal was lacking, or that such record was intended to represent a faithful copy of what appeared on the original.

Texas Consol. Compress & Mfg. Asso. Co. v. Dublin Compress & Mfg. Co. — Tex. Civ. App. —, 38 S. W. 409; Stooksbury v. Swan, — Tex. Civ. App. —, 21 S. W. 696, affirmed in 85 Tex. 563, 22 S. W. 963; Taylor v. Harrison, 47 Tex. 458, 26 Am. Rep. 304; Holliday v. Cromwell, 26 Tex. 194; Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Todd v. Union Dime Sav. Inst. 118 N. Y. 337, 23 N. E. 301; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Isham v. Bennington Iron Co. 19 Vt. 230.

The instrument not having been executed under the seal of the supposed corporation, and not being shown to have been executed by its president, and not having been acknowledged or proven, as required by law, was not entitled to record, and a certified copy of the record was not admissible in evidence.

Den ex dem. Osborne v. Tunis, 25 N. J. L. 633.

Ever presuming that the seal of the supposed corporation was attached to the paper, a further presumption of an authorization by the governing body to execute the same cannot be built upon such first presumption.

Baldwin v. Goldfrank, 88 Tex. 249,

31 S. W. 1064; Missouri P. R. Co. v. Porter, 73 Tex. 304, 11 S. W. 324.

The instrument, not being signed by and in the name of the supposed corporation, and not purporting to be signed by it, will not be considered as the act or deed of such supposed corporation.

Brinley v. Mann, 2 Cush. 337, 48 Am. Dec. 669; Isham v. Bennington Iron Co. 19 Vt. 230; Clark v. Hodge, 116 N. C. 761, 21 S. E. 562; Taft v. Brewster, 9 Johns. 334; Hatch v. Barr, 1 Ohio, 390; Elliott, Contr. 3895, 3898; 10 Cyc. 1037-1079.

The certified copy of the instrument was inadmissible, in the absence of evidence showing, or tending to show, an authorization thereof by the board of directors or other governing body of the supposed corporation, or of evidence from which an authorization might be presumed.

Mt. Sterling & J. Turnp. Road Co. v. Looney, 1 Met. (Ky.) 550, 71 Am. Dec. 491; Mathias v. White Sulphur Springs Asso. 19 Mont. 359, 48 Pac. 624; Des Moines Mfg. & Supply Co. v. Tilford Mill. Co. 9 S. D. 542, 70 N. W. 839; Lyndon Mill Co. v. Lyndon Literary & Biblical Inst. 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

Greenwood, J., delivered the opinion of the court:

Plaintiffs in error brought an action against defendants in error to try the title to 640 acres of land in Montgomery county, being section 11, patented by the state of Texas to the Washington County Railroad Company.

Plaintiffs in error, having introduced in evidence a patent to the land from the state to the Washington County Railroad Company, or its assigns, dated April 3, 1877, offered in evidence a certified copy of a deed, dated March 7, 1862, to the land certificate on which the patent issued, from the Washington County Railroad Company to G. R. Healy, which was signed by "J. W. McDade, Prest." and by "A. G. Comp-ton, Secty.," and which was filed for record March 22, 1862, and recorded March 24, 1862. The certified copy disclosed a circular scroll to the left of the signatures at the end of the deed, and it was proven that

the scroll appeared in like manner on the deed record. The certified copy had been filed among the papers of the suit for more than three days, and due notice of its filing had been given, and plaintiffs in error had caused to be filed an affidavit of loss of the original deed.

The defendants in error objected to the admission in evidence of the certified copy of the deed on grounds which may be summarized as follows: First. That the deed was invalid to convey the title of the railroad company, because it did not bear the company's seal, and no authority for its execution was shown from the board of directors or other governing board of the company. Second. That the certified copy was not admissible as a copy of a deed duly recorded, because the deed, being without the seal of the railroad company, was not properly authenticated for record, and because, the defendants in error having filed an affidavit charging that the original was forged, the certified copy was not admissible without proving the execution of the original, in the absence of evidence that the deed had been so acted on as to furnish corroboration of its genuineness. The trial court sustained the objections and refused to admit the certified copy in evidence, and excluded evidence that plaintiffs in error were the heirs of G. R. Healy, the grantee in the deed. The trial court thereupon instructed a verdict for defendants in error.

The honorable court of civil appeals at Galveston affirmed the trial court's judgment, deciding that there was no error in excluding the certified copy of the deed, because there was no proof of authority from the railroad company to its president and secretary for the execution of the deed, and because there was no proof that the grantee or his heirs had asserted any claim under the deed. — Tex. Civ. App. —, 181 S. W. 831.

The principal question for our determination is as to the correctness of the conclusion that there was no

error in refusing to admit in evidence the certified copy of the deed, which was an essential link in the title of plaintiffs in error. The special act of the legislature for the incorporation of the Washington County Railroad Company, with power to construct and operate a railroad, provided that "all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under the seal of the company, and in pursuance of a vote of the directors, shall be valid and binding." 4 Gammel's Laws of Texas, p. 349.

The Act of February 2, 1858, which dispensed with the necessity for scrolls or private seals, to give validity to conveyances and other written instruments, excepted from its operation such conveyances or other instruments as might be made by corporations. Paschal's Dig. art. 5087. The Act of 1905 provided that all conveyances theretofore made by a corporation by deed, sealed with the common seal of the corporation, and signed by the president or presiding member or trustee of the corporation, or in common form, without seal, by its attorney in fact, where the instrument constituting the attorney in fact had been executed in the manner mentioned, should be held valid in so far as regards the manner of their execution. Vernon's Sayles's Civil Stat. (Tex.) art. 1173. Beyond any doubt a deed from the Washington County Railroad Company, under its corporate seal, and signed by its president and secretary, was in the form required to pass the company's title, under the special act creating the corporation, and the general law.

We cannot sustain the contention that the certified copy offered in evidence failed to disclose that the deed to Healy was under seal. The copy does not reasonably admit of any other interpretation than that the deed bore the seal of the corpora-

tion. The scroll which the clerk put on the record, to the left of the signatures to the deed, was a proper representation of the corporate seal, and as clearly shows its presence on the original instrument as would the word "Seal" or the letters "L. S." The United States Supreme Court made the observation that one would not expect to find an impression where a seal had been copied, but "merely a scroll, representing the original seal." *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 519, 40 L. ed. 521, 16 Sup. Ct. Rep. 381. With our law dispensing with individual seals and requiring corporate seals, we could not presume otherwise than that the seal attached was that of the corporation, instead of the individuals whose signatures were appended to the deed.

The seal was prima facie evidence that the deed was the duly authorized act of the railroad company. It implied that the board of directors had empowered the president and secretary to make the very sale and transfer which were evidenced by the instrument on which it was impressed. *Catlett v. Starr*, 70 Tex. 489, 7 S. W. 844; *Ballard v. Carmichael*, 83 Tex. 367, 18 S. W. 734; *Quinlan v. Houston & T. C. R. Co.* 89 Tex. 380, 34 S. W. 738; 3 Cook, Corp. § 722, and note 1.

Thompson says: "It [the seal] is presumptive or prima facie evidence that the deed is the deed of the corporation, and that the officers who signed, sealed, and acknowledged it were duly authorized so to do, and the instrument is therefore admissible in evidence, if otherwise relevant. In other words, the seal carries with it prima facie evidence of the assent of the corporation to the deed." 4 Thomp. Corp. § 5105.

It is to be noted that the presumption that the deed of a corporation, signed by the president, under the corporate seal, is authorized, may

Evidence—of
seal on cor-
porate deed—
scroll on record
copy.

—corporate seal
as evidence of
authenticity of
act.

be overcome by proof, as was done in the case of *Fitzhugh v. Franco-Texas Land Co.* 81 Tex. 311, 16 S. W. 1078. The deed here tendered in evidence was attacked by no extrinsic evidence. It was presumptively the act of the corporation, and it carried on its face that which entitled it, in the absence of opposing proof, to be regarded as the binding act and deed of the railroad company.

Under the express language of the Act of April 6, 1861, as supplemented by the Act of January 14, 1862, the deed was regularly authenticated for record. The language of the act was: "That when any deed, transfer, or other instrument of writing, executed by the president of any railroad company, which has or may be incorporated by the laws of this state, shall be attested by the seal of said company, it shall be considered sufficiently authenticated to authorize the clerk of the county court to record the same." 5 Gam-mel's Laws of Texas, pp. 373, 501.

Hence the certified copy was that of a deed duly recorded for more than thirty years. Defendants in error insist that to render such a certified copy admissible in evidence, against an affidavit charging the original to be forged, it must be accompanied by some corroborative proof of the genuineness of the original.

The making and filing of the affidavit of forgery did not deprive plaintiffs in error of the right, expressly conferred by article 3700 of the Revised Statutes, to have "a certified copy of the record . . . admitted in evidence in like manner as the original could be," on filing proper affidavit of loss of, or inability to procure, the original deed, and after proper filing and notice of filing of the certified copy.

An original deed is admissible in evidence as an ancient instrument when the following requirements are satisfied: First, when it comes from the proper custody; second, when it is free from suspicion; and,

third, when it is shown to have been in existence more than thirty years.

The decision in *Ammons v. Dwyer*, 78 Tex. 649 to 651, 15 S. W. 1049, established the rule that when the foregoing requirements are fulfilled, it is not necessary, in order to secure the admission of the ancient deed, to go on and adduce other proof in corroboration of the deed's genuineness, such as possession or claim thereunder. The rule, as laid down in *Ammons v. Dwyer*, supra, has been frequently and properly followed. *Holt v. Maverick*, 5 Tex. Civ. App. 650, 23 S. W. 752; *Ken-nard v. Withrow*, — Tex. Civ. App. —, 28 S. W. 227; *Timmony v. Burns*, — Tex. Civ. App. —, 42 S. W. 134; *Woodward v. Keck*, — Tex. Civ. App. —, 97 S. W. 854.

Since the original deed would have been admissible, on its production from proper custody, free from anything suspicious on its face, on proof of its existence for more than thirty

—copy of ancient deed—effect of affidavit of forgery.

years, we think no sufficient reason can be given for refusing to admit in like manner the certified copy, offered by plaintiffs in error.

Coming from proper custody tends to establish the genuineness of a written instrument: First, because possession of the instrument by those claiming thereunder indicates that it was actually delivered to the grantee; and, second, because care taken to preserve an instrument indicates that it had real value. The prompt

—registration of deed—production of instrument cannot be held less efficacious in these respects than production from proper custody.

registration of an instrument cannot be held less efficacious in these respects than production from proper custody. As said by Chief Justice Stayton, in *Holmes v. Coryell*, 58 Tex. 688: "The fact that it was recorded raises the presumption that it was delivered."

And it would be hard to adduce better evidence of care to have and keep an instrument available as a muniment of title than that afforded by its registration.

With an original deed lost, a certi-

fied copy is the best evidence of what was disclosed on the face of the deed, and when a certified copy discloses no notation by the recorder, or anything else to excite suspicion, no other presumption would be warranted than that the deed exhibited "an honest face;" and thus the test is met that the certified copy is of an instrument free from suspicion.

The record of a deed affords conclusive evidence of its existence at the date of its registration. Hence the certified copy from a record made more than thirty years before the trial shows beyond question the

deed's existence for the period requisite to make it an ancient instrument. So we hold that where an instrument was duly recorded soon after its date, and has remained of record for more than thirty years, and where nothing is disclosed upon its face, as recorded, to impeach its genuineness, article 3700 of the Revised Statutes requires that a certified copy thereof be admitted in evidence, under the statutory affidavit, filing, and notice of filing, without the necessity of further proof of the original's execution or genuineness. This is in accord with the conclusion announced by this court in *Brown v. Simpson*, 67 Tex. 231, 2 S. W. 646. For, it is there declared that "a record of an instrument properly registered for thirty years, having been made upon acknowledgment of the grantor, or by proof of one of the subscribing witnesses, before an officer charged with the duty of taking such acknowledgment or proof, would seem to possess a higher degree of authenticity than an original deed offered as an ancient document at common law, upon which no such acknowledgment or proof appeared. . . . If the record had been shown by any competent evidence to have been made more than thirty years before the trial, then there would

have been evidence of an ancient document, with the corroborative proof derived from the certificate of acknowledgment, and we would have had a case, as we think, covered by the statute cited. . . . In order for the copy to take the place of the original when the latter is lost, the registration must be shown to be ancient, just as the deed must appear to be ancient, where the deed itself is offered."

Of course, it can make no difference that another method than acknowledgment by the grantor or proof by a witness was used to authenticate a deed. The deed here offered, being that of a corporation, executed by the president, was required to be authenticated, not by acknowledgment or proof, but by the seal of the corporation. The gist of the decision in *Brown v. Simpson*, supra, is that no further proof of the original's genuineness should be exacted, to render admissible a certified copy of a deed duly recorded for more than thirty years, unimpeached by anything appearing on the face of the record, than is furnished by the deed's authentication for record and by the ancient record. See also *Holmes v. Corryell*, 58 Tex. 687; *Galveston, H. & S. A. R. Co. v. Stealey*, 66 Tex. 470, 1 S. W. 186; *Schunior v. Russell*, 83 Tex. 95, 18 S. W. 484; *Wacaser v. Rockland Sav. Bank*, — Tex. Civ. App. —, 172 S. W. 738.

The trial court should have admitted the certified copy in evidence, and should not have directed a verdict for defendants in error on the evidence introduced by the plaintiffs in error.

The judgments of the District Court and of the Court of Civil Appeals are reversed, and the cause is remanded to the District Court for a new trial.

Petition for rehearing denied December 7, 1921.

ANNOTATION.

Effect of filing affidavit of forgery against ancient deed.

I. Admissibility of deed in evidence:

a. Rule in Texas, 908.

b. Rule in Georgia:

1. Original deed, 911.

2. Copy of deed, 912.

II. Burden of proof as to genuineness of deed, 912.

I. Admissibility of deed in evidence.

a. Rule in Texas.

The rule in Texas seems to be that an ancient deed is admissible in evidence without proof of execution in spite of the fact that an affidavit has been filed attacking it for forgery, and this seems to be true whether the instrument offered is an original deed or a copy thereof. *Holmes v. Coryell* (1883) 58 Tex. 680; *Shinn v. Hicks* (1887) 68 Tex. 277, 4 S. W. 486; *Parker v. Chancellor* (1889) 73 Tex. 475, 11 S. W. 503; *Stooksbury v. Swan* (1893) 85 Tex. 563, 22 S. W. 963; *McWhirter v. Allen* (1892) 1 Tex. Civ. App. 649, 20 S. W. 1007; *Chamberlain v. Showalter* (1893) 5 Tex. Civ. App. 226, 23 S. W. 1017; *Timmony v. Burns* (1897) — Tex. Civ. App. —, 42 S. W. 133; *Crosby v. Ardoin* (1912) — Tex. Civ. App. —, 145 S. W. 709; *Wacaser v. Rockland Sav. Bank* (1914) — Tex. Civ. App. —, 172 S. W. 737; *Conrad v. Hughes* (1917) — Tex. Civ. App. —, 195 S. W. 1181. And see the reported case (*EMORY v. BAILEY*, ante, 901). Compare *Cox v. Cock* (1883) 59 Tex. 521; *Houston v. Blythe* (1883) 60 Tex. 506.

In *Holmes v. Coryell*, supra, an action of trespass to try title, it appeared that one of the defendants had filed an affidavit of forgery against a copy of a deed more than thirty years old, which was one of the links in the plaintiff's chain of title. The court pointed out that, according to statute, any recorded instrument, on compliance with certain circumstances, may be admitted in evidence without proof of its execution, unless an affidavit of forgery is filed against the instrument by the opposite party, or by some per-

son for him. The affidavit of forgery, it was said, simply remitted the party offering the copy to the common-law method of proving the execution of the instrument before it might be used as evidence. But an ancient deed, coming from the proper custody, free from suspicion, etc., would, it was remarked, be admitted in evidence without proof of its execution. After reciting the facts surrounding the copy of the deed introduced in evidence in the case at bar, facts which tended to establish its claim to the prerogatives of an ancient deed, the court said: "The certified copy of the deed, coming surrounded with such facts, was properly admitted in evidence, for, under the common-law rules of evidence, the deed would prove itself; and under given circumstances the statute of this state, as before said, declares that 'a certified copy of the record of any such instrument shall be admitted in like manner as the original could be.' When offered, being more than thirty years old, it stood as would a deed of less age after it had been proved by one or more of the subscribing witnesses, and upon those who sought to attack its genuineness rested the burden of proof."

In *Shinn v. Hicks* (1887) 68 Tex. 277, 4 S. W. 486, an affidavit was filed alleging that one of the plaintiffs believed that certain words, found on the face of a certificate forming part of a chain of title, were forged. The court considered that the instrument, by virtue of its age and the circumstances under which it was produced, was admissible in evidence as an ancient deed without proof of its execution. It was said: "It stood before the court, under the rules of the common law, as though its execution had been proved; and had there been no evidence before the court, other than the instrument itself, we are of the opinion that an inspection of it would have required the

court to admit it, notwithstanding the affidavit of forgery, made by a person who had no knowledge of the instrument, on which a reasonable belief that it was not, in its entirety, genuine, could have been based, and who was unable to prove a single fact tending to show that the entire instrument was not, when offered, just as it was nearly half a century before, when it left the hands of the Secretary of War. The certificate was properly admitted in evidence."

In *Parker v. Chancellor* (1889) 73 Tex. 475, 11 S. W. 503, wherein an affidavit was made that a certain deed was believed to be a forgery, the court said: "Such an affidavit cannot in any wise control or affect the admissibility of an ancient instrument. With or without such an affidavit any proper evidence may be introduced to contest its validity."

In *McWhirter v. Allen* (1892) 1 Tex. Civ. App. 649, 20 S. W. 1007, it was shown that a transfer of a portion of a certificate locating land was dated 1848, and that it was recorded in 1853, and filed in the land office the same year. The court considered that the admission of the transfer in evidence as an ancient instrument was authorized by these facts, even though an affidavit had been made, impeaching the genuineness thereof.

In *Stooksbury v. Swan* (1893) 85 Tex. 563, 22 S. W. 963, it was pointed out that the question of admissibility was, in all cases, for the court, and it was said: "It is true, where a deed is offered as an ancient instrument, that an affidavit of forgery does not make it necessary, in order to entitle it to admission, that proof other than such as is requisite in such cases should be made."

In *Chamberlain v. Showalter* (1893) 5 Tex. Civ. App. 226, 23 S. W. 1017, an action of trespass to try title to certain land, the court said: "The defendant had in evidence no documentary title to the land in question unless the transfer of March 23, 1854, was properly admitted as an ancient instrument, and the other transfer duly proved." It appeared in

that case that an affidavit of forgery had been made against these instruments, the statutory effect of which would ordinarily be to require proof of their execution as at common law. The court held, however, that, in case of an ancient instrument, it would be held to prevail over the affidavit of forgery, and to be admissible notwithstanding.

In *Timmony v. Burns* (1897) — Tex. Civ. App. —, 42 S. W. 133, an action decided in 1897, the plaintiff and appellant urged that a certain transfer in the appellee's chain of title, made in 1846, should not have been admitted as an ancient instrument. It was held, however, that the affidavit of forgery, made as to the transfer in question, could not prevent the introduction thereof as an ancient instrument.

Crosby v. Ardoin (1912) — Tex. Civ. App. —, 145 S. W. 709, was an action of trespass to try title. The appellant filed an affidavit of forgery, attacking the authenticity of a certain transfer, a certified copy of which was offered in evidence. The instrument was dated 1839, purported to have been acknowledged in 1853, and was recorded, apparently, sometime in 1859 or 1860. The court said: "As affecting the question of the admissibility of this certified copy in evidence, the affidavit of forgery merely imposed upon appellees the burden of proving the instrument as at common law; it being an ancient instrument, recorded in El Paso county for over fifty years, and its authenticity corroborated by the acknowledgment certificate, the instrument proved itself, and the certified copy was admissible in evidence."

In *Wacaser v. Rockland Sav. Bank* (1914) — Tex. Civ. App. —, 172 S. W. 737, the instrument in question, against which an affidavit of forgery was filed, was a certified copy of a deed of trust of certain realty, dated and filed for registration in 1873. A statute was cited providing for the admission of certain recorded instruments without proof of execution, under certain circumstances, unless an affidavit of forgery was filed,

with reference thereto. The court cited *Holmes v. Coryell*, supra, to the effect that the result of an affidavit of forgery, when filed against a certified copy of an ancient deed, was simply to remit the party to the common-law method of proving the execution of the instrument in order to permit of its introduction as evidence.

In *Conrad v. Hughes* (1917) — Tex. Civ. App. —, 195 S. W. 1181, it was considered that the record of a certain instrument or certified copy thereof was admissible without proof of execution of the instrument, by virtue of the provisions of a certain statute, and since the record was more than thirty years old, it was held that its admissibility was not affected by an affidavit of forgery filed by one of the defendants.

In *Cox v. Cock* (1883) 59 Tex. 521, an action to recover land, it appeared that, following the plaintiff's offer of what purported to be a deed, dated some forty years prior to the action, the defendant filed an affidavit charging that the instrument was a forgery. The lower court charged that the burden of proving the deed to be a forgery rested on the defendant. This was considered to be technically incorrect, although not erroneous under the facts as shown. The deed, it was said, was sufficiently proved to admit of its introduction in evidence as an ancient instrument. The court continued as follows: "When the proper affidavit is filed, as was done in this case, attacking the deed offered in evidence as a forgery, such a deed cannot be received in evidence without the usual proof of its execution; but when such proper proof is made, as was done in this case, it is not error to allow the deed to go to the jury as prima facie a genuine instrument. The impeaching affidavit has served its purpose. It has compelled the party claiming under the deed to prove its execution in accordance with the rules of evidence, and thus remove the suspicion cast on it by the affidavit of forgery. It throws upon the shoulders of the party offering the deed the burden of proving its execution in accordance with the rules of common law."

In the reported case (*EMORY v. BAILEY*), on the objection of the defendant, who had filed an affidavit of forgery, a certified copy of a deed, against which the affidavit was filed, was refused admission as evidence. This deed had been recorded for more than thirty years, but it was insisted by the defendant that, to make a certified copy thereof admissible against an affidavit of forgery, there must be proof of the genuineness of the original. It was pointed out, however, that, under the statute, the plaintiff was entitled, under certain circumstances, to have a certified copy of the record admitted in like manner as the original could be. The court says that the original was considered to be an ancient instrument, and that an ancient instrument, when coming from the proper custody, and free from suspicion, was admissible without further proof to corroborate its genuineness. So it is held that the trial court erred in refusing to admit the certified copy of the deed in evidence.

In *Houston v. Blythe* (1883) 60 Tex. 506, the defendant attempted to attack a title by offering in evidence a "testimonio copy," or second original of the title, bearing a date which it was claimed would invalidate it, as having been granted after the closing of the land office. This paper was assailed as a forgery by the sworn statements of the plaintiffs and the depositions of many witnesses. The instrument in question bore the date 1835; but the court did not speak of the deed as an ancient document. There was objection to the introduction in evidence of this testimonio. It was held that, even after so great a lapse of time, evidence of some kind should, when demanded, be offered to explain the nonproduction of assisting witnesses. It was said: "This matter, together with proof as to the death, and the signature of the officer executing the instrument, and some explanation of the interlineations and erasures, if there be any of a serious character, should always be required by the court when specially demanded and insisted on, as in this case, before

the instrument that is charged to be forged should be allowed to be exhibited and read as part of the evidence in the case, and then with full and proper explanations to the jury from the court that the mere admission of the instrument in evidence, under such circumstances, did not relieve the jury from the duty of passing, with all the evidence before them, upon the question of its genuineness, and deciding, under all the facts in the case, whether it was in fact a forged instrument or not."

b. Rule in Georgia.

1. Original deed.

In Georgia an ancient deed, when offered in the original, is admissible in evidence without proof of its execution, regardless of an affidavit of forgery filed against it. Thus, in *Matthews v. Castleberry* (1871) 43 Ga. 346, an action of ejectment, the defendant relied on a deed which was more than thirty years old at the time of the trial. The plaintiff made an affidavit that it was a forgery. An issue was thereupon made up and tried as to the genuineness of the alleged deed. The court pointed out that it was provided in the Code that "a deed more than thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of execution," and also that "the subscribing witness must be produced in all cases except the following: (1st.) Ancient writings which prove themselves." It was held that if the deed in question was an ancient deed, it was not subject to the application of the section providing for an issue on the affidavit of parties that a registered deed is a forgery to the best of their knowledge and belief.

Hill v. Nisbet (1877) 58 Ga. 587, involved a deed more than thirty years old, which, however, showed on its face signs of erasure and alteration. An affidavit of forgery was filed against this deed, but it was objected that the statute providing for the trial of an issue following such an affidavit did not apply to a

deed over thirty years old. It was said: "We think that the act applies to all registered deeds . . . and that it puts the party offering such a deed upon proof that it is genuine. Certainly, where the deed itself shows on its face that it is not genuine,—where it bears the marks of a material alteration,—we hold that the section does apply. And this ruling is not in conflict with the decision of this court in *Matthews v. Castleberry* (1871) 43 Ga. 352; for there the deed appeared genuine on its face."

McArthur v. Morrison (1899) 107 Ga. 796, 34 S. E. 205, was an action of ejectment decided in 1899. At the trial the plaintiff offered in evidence a certain deed dated 1809, to which the defendant tendered an affidavit of forgery. The case was then continued, but, when it came on again for trial, objection was made to the offer in evidence of the same deed on the ground that its execution had not been proved. The plaintiff contended that the instrument in question was an ancient deed, coming from proper custody, that possession had been consistent therewith, and that the paper was free from suspicion. The court below apparently ruled that, since the deed had been recorded, the affidavit of forgery resulted in imposing on the plaintiff the burden of proving its execution, despite its age. On appeal it was held that the court erred in refusing to admit the deed in evidence without proof of its execution. It was pointed out that, if the deed possessed the requisites demanded by the statutes, viz., age, genuine appearance, production from the proper custody, and possession consistent therewith, it was entitled to the presumption which the law conclusively raised in its behalf, from its age; that the witnesses to its execution were dead. It was said: "To arrest it on its way to the jury by an affidavit of forgery would be to require the proof which the plain letter of the law has dispensed with as to such instruments." The court cited *Matthews v. Castleberry*, *supra*, to the effect that the issue provided by the Code did not apply to such an instrument. It was true, said the

court, that in the case of *Patterson v. Collier* (1885) 75 Ga. 419, 58 Am. Rep. 472, there had been a remark as follows: "That an ancient deed may be attacked, like any other deed, for forgery, is well settled." But the court pointed out that in that case a certified copy, and not an original deed, was involved, and that it was doubtful whether the instrument could have been considered as an ancient document. So the court held that, with respect to an ancient instrument offered in evidence, no special issue of its genuineness could be raised by tendering an affidavit of forgery.

2. *Copy of deed.*

In Georgia, where the instrument offered in evidence is not the original ancient deed, but a copy or record thereof, it is not admissible without proof of execution if it has been attacked by an affidavit of forgery, the burden of proving the execution of the instrument being cast on the party offering it in evidence.

In *McCall v. Bentley* (1902) 114 Ga. 752, 40 S. E. 768, it was held that a certified copy of an ancient deed, when offered in evidence, may be met by an affidavit of forgery, whereupon the burden is on the party offering the copy to show the execution of the original.

In *Bentley v. McCall* (1904) 119 Ga. 530, 46 S. E. 645, the question for determination was whether the court had erred in admitting in evidence a certified copy of a deed under which the defendant claimed, and against which one of the plaintiffs had filed an affidavit of forgery. It was held that the result was to place on the defendant the burden of proving the execution of the original. It was pointed out that while the existence, etc., of a lost deed, may be proved by a certified copy of the record, this rule does not apply in case an affidavit of forgery is filed. In such a case the recording is of no effect, and actual proof of the genuineness of the original, as well as of its existence, must be made if a certified copy is offered. Nor is

this affected by the fact that the original of the certified copy is more than thirty years old, for, said the court: "The rule in reference to ancient documents applies only to original papers, not to copies." It was held that the defendant had not carried the burden imposed by the filing of the affidavit of forgery, and that the court erred in admitting as evidence the certified copy.

In *Chatman v. Hodnett* (1907) 127 Ga. 360, 56 S. E. 439, the defendant offered in evidence the official record of a deed which seemed to have been made some forty years before it was recorded. In a headnote, the court quoted *Bentley v. McCall*, *supra*, to the effect that the burden of showing the existence of the original deed is on a party whose offer in evidence of a certified copy of a recorded deed is met by an affidavit of forgery, and this even though the original of the copy appears to be more than thirty years old.

II. *Burden of proof as to genuineness of deed.*

There seems to be a difference of opinion, in Texas, as to where lies the burden of proof of the genuineness of an ancient deed which has been assailed by an affidavit of forgery. There are several cases which hold that not only is an ancient deed admissible in evidence despite such an affidavit, but also that on those who attack its genuineness rests the burden of proof of their claim. There is some dissent from this principle, as will be seen from the cases of *Stooksbury v. Swan*, *Crosby v. Ardoin*, and *Gann v. Roberts* (Tex.), set out *infra*.

Holmes v. Coryell (1883) 58 Tex. 680, was an action of trespass to try title. The plaintiff tendered in evidence a copy of a deed more than thirty years old, against which was filed, by one of the defendants, an affidavit stating a belief that the original thereof was a forgery. Speaking of this copy, the court said: "When offered, being more than thirty years old, it stood as would a deed of less age after it had been proved by one or more of the sub-

scribing witnesses, and upon those who sought to attack its genuineness rested the burden of proof."

In *Shinn v. Hicks* (1887) 68 Tex. 271, 4 S. W. 486, regarding a certificate which was considered an ancient instrument, the court was asked to charge as follows: "The plaintiffs have filed an affidavit of forgery to the words, 'by his attorney, T. D. Tomkins,' inserted in the certificate of George W. Lemoyne, and say that the same is a forgery, and were inserted without the authority of the said George W. Lemoyne, and the burden of proof is on the defendants to show that the said words were inserted therein by the said George W. Lemoyne or his authority; and unless you find from the evidence that the words were inserted in said certificate by the authority of said George W. Lemoyne, then you cannot presume that there was a power of attorney or authority from Lemoyne to T. D. Tomkins to secure and transfer his certificate, and you will find for plaintiffs." It was held that this charge was correctly refused, and that the jury were properly instructed that if the words were inserted by the Secretary of War, who issued the instrument in question, the presumption would be, after such a great lapse of time, and in the absence of evidence to the contrary, that he acted within the scope of his authority; and that in such case the burden of proving that the words had been inserted through fraud, etc., was on the plaintiffs.

In *Masterson v. Todd* (1894) 6 Tex. Civ. App. 131, 24 S. W. 682, an affidavit of forgery was interposed to a deed dated 1850, recorded in 1887, and offered by the plaintiff in the chain of title introduced by him. It was held that if the instrument was admitted as an ancient instrument, the burden of proof to establish the forgery rested on the defendants notwithstanding the affidavit.

But in *Stooksbury v. Swan* (1893) 85 Tex. 563, 22 S. W. 963, the rights of the parties depended on the genuineness of a certain deed through which the defendants claimed, and

against which an affidavit of forgery had been filed. The court below charged the jury, in part, as follows: "In determining whether or not the signature of Robert W. Hamilton to such deed is a forgery, you are charged that a deed over thirty years old is admitted as evidence before the jury without any other proof of its execution, and the affidavit of forgery filed herein does not require defendants to prove such deed to be genuine, but the burden of proving it to be a forgery is on the plaintiffs; but the fact that the deed is thirty years old, or over is not conclusive of its genuineness, but it can be shown to be a forgery by evidence, as could any other instrument; and the jury are to determine, from all the facts and circumstances in evidence, whether or not such deed is in fact genuine or a forgery." On appeal the court was particularly concerned with whether the following portion of the charge was calculated to mislead the jury: "The affidavit of forgery filed herein does not require defendants to prove such deed to be genuine, but the burden of proving it to be a forgery is on the plaintiffs." It was remarked that where evidence is introduced by the respective parties to a case, tending to prove and to disprove an issue of fact, there is no occasion to declare on whom the burden rests, since the question becomes one of preponderance of evidence, which is for the jury. It was held that by charging that the burden of proof that the deed was not genuine was on the plaintiffs, who opposed the instrument, the court below exercised the power to weigh the evidence, which was a violation of the statute. Such a declaration was tantamount to a holding that the evidence introduced on the admissibility of the deed proved, *prima facie*, its genuineness. It was said: "It is true, where a deed is offered as an ancient instrument, that an affidavit of forgery does not make it necessary, in order to entitle it to admission, that proof other than such as is requisite in

such cases should be made; but the question of admissibility is, in all cases, for the court, while the weight to be given to the evidence on which it is admitted, as well as to the instrument itself, in so far as the question of genuineness goes, where there is a conflict in the evidence on this point, must in all cases ultimately be left to the decision of the jury."

In *Crosby v. Ardoin* (1912) — Tex. Civ. App. —, 145 S. W. 709, the appellant questioned the action of the court in refusing to submit to the jury the question whether the transfer of a certain certificate was genuine or a forgery. It was said: "While the burden of proof at all times rests upon the party claiming under the impeached instrument, yet the jury, in the absence of all proof sustaining the plea of forgery, could not find against the validity of the deed, and

should be so instructed, where its genuineness has been prima facie established in some mode prescribed by common law."

Gann v. Roberts (1903) 32 Tex. Civ. App. 561, 74 S. W. 950, was an action of trespass to try title, decided in 1903. The defendant offered in evidence a copy of a deed, dated 1839. The plaintiff filed an affidavit of forgery in reply to the notice of the filing of the copy of the deed, together with an affidavit of the loss of the original. The court said: "An affidavit of forgery having been filed, it was error for the court to hold that the age of the record, a copy of which was offered in evidence, was conclusive evidence of the execution of the deed. The question of the genuineness of the deed should have been submitted to the jury under proper instruction." R. S.

ANTONIO CARPIO, Appt.,

v.

STATE OF NEW MEXICO.

New Mexico Supreme Court — July 20, 1921.

(— N. M. —, 199 Pac. 1012.)

Homicide — killing bystander — malice.

1. In a homicide case, where A shoots at B, and the bullet strikes C and kills him, the malice or intent follows the bullet.

[See note on this question beginning on page 917.]

Evidence — proof of murder.

2. A charge that murder was done wilfully, deliberately, and premeditatedly, and of malice aforethought, is sustained by proof that it was committed with a mind imbued with these qualities, though they were directed

against a person other than the one killed.

[See 13 R. C. L. 745, 746.]

Appeal — review of instructions.

3. Instructions given by the court to the jury, not objected to in the court below, will not be reviewed upon appeal.

[See 2 R. C. L. 75; 14 R. C. L. 808.]

Headnotes by ROBERTS, Ch. J.

APPEAL by defendant from a judgment of the District Court for Grant County (Mechem, J.), convicting him of murder in the first degree. *Affirmed.*

The facts are stated in the opinion of the court.

(— N. M. —, 199 Pac. 1012.)

Mr. David E. Grant, for appellant:
Variance in any material matter is fatal, and entitles defendant to an acquittal.

State v. Crogan, 8 Iowa, 523; Cronin v. State, 30 Tex. App. 278, 17 S. W. 410; Stone v. State, 115 Ala. 121, 22 So. 375; State v. McWhirter, 141 N. C. 809, 53 S. E. 734; State v. Ray, 92 N. C. 810.

An indictment in its allegations must state the actual facts, and not conclusions of law, intendments, or implications.

Territory v. Hubbell, 13 N. M. 579, 86 Pac. 747, 13 Ann. Cas. 848; State v. Graham, 38 Ark. 519, 4 Am. Crim. Rep. 276; Rank v. People, 80 Ill. App. 40; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; People v. Kane, 161 N. Y. 380, 55 N. E. 946; State v. Meysenburg, 171 Mo. 1, 71 S. W. 229; State v. Fitts, 44 N. H. 621; Lasindo v. State, 2 Tex. App. 59; State v. Gallagher, 123 Iowa, 378, 98 N. W. 906; Gage v. State, 67 Ark. 308, 55 S. W. 165; 22 Cyc. 293.

Malice aforethought, deliberation, and premeditation must be proved as charged to convict the defendant.

People v. Knapp, 71 Cal. 1, 11 Pac. 793; State v. Walker, 9 Houst. (Del.) 464, 33 Atl. 227; State v. Greenleaf, 71 N. H. 606, 54 Atl. 38; State v. Johnson, 40 Conn. 136; State v. Reddington, 7 S. D. 368, 64 N. W. 170; 21 Cyc. 726.

And, where the name of a third person is a necessary and essential part of the description of an offense, a material variance is fatal.

McFarland v. State, 154 Ind. 442, 56 N. E. 910, 13 Am. Crim. Rep. 715; Wolf v. State, — Tex. Crim. Rep. —, 85 S. W. 8; Haygood v. State, 51 Tex. Crim. Rep. 618, 103 S. W. 890; Southern Exp. Co. v. State, 23 Ga. App. 67, 97 S. E. 550; People v. Anderson, 267 Ill. 75, 107 N. E. 840; Mitchell v. State, 63 Ind. 276; State v. Williams, 68 Ark. 241, 82 Am. St. Rep. 288, 57 S. W. 792; Jacobs v. State, 46 Fla. 157, 35 So. 66, 13 Am. Crim. Rep. 712; Hankins v. State, 57 Tex. Crim. Rep. 152, 122 S. W. 21.

The indictment, in the light of the proof submitted by the state, was defective and prejudicial to defendant.

Territory v. Hubbell, 13 N. M. 579, 86 Pac. 747, 13 Ann. Cas. 848; United States v. Medina, 15 N. M. 204, 103 Pac. 976; Wingard v. State, 13 Ga. 396; State v. Dougherty, 4 Or. 200; United States v. Burns, 54 Fed. 351; United

States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Harney v. State, 39 Md. 552; Com. v. Terry, 114 Mass. 263; State v. McGinnis, 126 Mo. 564, 29 S. W. 842; 22 Cyc. 295.

Mr. Harry S. Bowman, Attorney General, for the State:

Proof that the premeditation, deliberation, and malice, charged in the indictment to have been directed toward the deceased, were in fact directed at a person other than the deceased, does not constitute a variance and is not a ground for reversal.

State v. Brown, 4 Penn. (Del.) 120, 53 Atl. 354; Wheatley v. Com. 26 Ky. L. Rep. 436, 81 S. W. 687; People v. Suesser, 142 Cal. 354, 75 Pac. 1093; People v. Trebilcox, 149 Cal. 307, 86 Pac. 684; State v. Bell, 5 Penn. (Del.) 192, 62 Atl. 147; Brown v. State, 147 Ind. 28, 46 N. E. 34; State v. Williams, 122 Iowa, 115, 97 N. W. 992; Thompson v. Com. 28 Ky. L. Rep. 642, 90 S. W. 221; State v. Payton, 90 Mo. 220, 2 S. W. 394; State v. Bectsa, 71 N. J. L. 322, 58 Atl. 933; State v. Cole, 132 N. C. 1069, 44 S. E. 391; Thornton v. State, — Tex. Crim. Rep. —, 65 S. W. 1105; State v. Briggs, 58 W. Va. 291, 52 S. E. 218; 21 Cyc. 840; Wharton, Homicide, 3d ed. § 359; Ryan v. People, 50 Colo. 99, 114 Pac. 306, Ann. Cas. 1912B, 1232; Brooks v. State, 141 Ark. 57, 216 S. W. 705; State v. Clark, 147 Mo. 20, 47 S. W. 886; Fooshee v. State, 3 Okla. Crim. Rep. 666, 108 Pac. 554; State v. Foster, 136 Mo. 653, 38 S. W. 721; People v. Patini, 208 N. Y. 176, 101 N. E. 694.

The instructions upon murder in the first and second degrees correctly stated the law as applied to the facts.

People v. Patini, supra; Territory v. Edie, 6 N. M. 555, 30 Pac. 851; Miera v. Territory, 13 N. M. 192, 81 Pac. 586; Reed v. Com. 98 Va. 817, 36 S. E. 399; Ryan v. People, 50 Colo. 99, 114 Pac. 306, Ann. Cas. 1912B, 1232; People v. Suesser, 142 Cal. 354, 75 Pac. 1093.

Roberts, Ch. J., delivered the opinion of the court:

Appellant was tried and convicted of the crime of murder in the first degree, and appeals. On August 4, 1919, appellant attended a dance at the town of Central, Grant county, New Mexico. Appellant had asked a young lady, one Julia Olguin, to dance with him, and she had refused. Thereupon he told her that, if she would not dance with him,

she could not dance with any other person. Later she was dancing with one Casamero Lucero, whereupon appellant caught hold of Lucero and told him that he could not dance with Miss Olguin. Lucero slapped or pushed appellant, and some other men pushed him outside the door and closed the door. Later Enfren Rios entered the ballroom, and told Lucero that Carpio, the appellant, wanted to see him outside. Lucero went out, followed by Rios, and approached appellant, and when he got to within 14 or 15 paces of appellant, appellant told him to stop; whereupon appellant fired at Lucero, and the bullet struck Rios and killed him. A second shot was fired at Lucero, wounding him, but not fatally.

The first point made upon which appellant relies for a reversal is that there was a variance between the allegation of the indictment and the proof adduced upon the part of the state, in that the indictment alleged that the defendant feloniously, wilfully, deliberately, premeditatedly, of his malice aforethought, and from a deliberate and premeditated design, then and there, unlawfully and maliciously to effect the death of Enfren Rios, did assault and shoot the said Enfren Rios, from the effects of which assault and shot said Rios died; whereas the proof showed that the malice and deliberation were directed against Lucero, and not Rios. There is no merit in this argument, however, because under the law the malice and deliberation were transferred from Lucero to Rios. In other words, the malice followed the bullet. In Wharton on Homicide, 3d ed. § 359, the author says: "The rule is nearly, if not quite, universal that one who kills another, mistaking him for a third person whom he intended to kill, is guilty or innocent of the offense charged the same as if the fatal act had killed the person intended to be killed. . . . And a charge that a

Evidence—proof of murder.

murder was done wilfully, deliberately, and premeditatedly, and with malice aforethought,

is sustained by proof that it was committed with a mind imbued with these qualities, though they were directed against a person other than the one killed."

In the case of *Brooks v. State*, 141 Ark. 57, 216 S. W. 705, a very late case, having been decided December 1, 1919 (reversed on other grounds), the defendant had been indicted for the murder of a girl named Irene Crawford, although the shot was directed at one John Law. It was insisted by the appellant that the indictment was defective, because it charged the defendant with killing Irene Crawford, with "the wilful, malicious, premeditated and deliberate intent then and there to kill and murder her, the said Irene Crawford."

The court held that there was no error in the indictment, stating: "An indictment for homicide in a case like this must allege the assault as made on the person killed. Where the accused shoots at one man and kills another, malice will be implied as to the latter; and a felonious intent is transferred, on the same ground, as where poison is laid to destroy one person and is taken by another. Hence, the felonious intent is thus transferred, and the indictment must be drawn accordingly. That is to say, it must allege that the assault was made on the party murdered, etc., in all respects just as if the party killed had been the party shot at."

In the case of *State v. Clark*, 147 Mo. 20, 47 S. W. 886, a question similar to that raised in the case of *Brooks v. State*, supra, was before the supreme court of Missouri; one count of the indictment charging that the design to kill was directed against one Lizzie Williamson, alias Lizzie Clark, while the person killed was Lizzie Hatch. The court held that count in the indictment was bad, upon the ground that the malice was transferred, and therefore that the indictment should have alleged the design to kill to have been directed against the deceased. This court said: "Where the party shoots at one man and kills another,

malice will be implied as to the latter; and the felonious intent is transferred, on the same ground, where poison is laid to destroy one person and is taken by another.' . . . And where the felonious intent is thus transferred, the indictment must be drawn accordingly; to wit, it must allege that the assault was made on the party murdered, and so on, in all respects, just as if the party killed had been the party shot at. So are all the precedents in this state and elsewhere."

We know of no cases to the contrary. It follows that there is no merit in this contention.

The court gave to the jury instructions as to murder in the first and second degrees which followed the allegations of the indictment, that is to say, as to first degree; charged the jury that, if appellant deliberately and with malice aforethought shot at Rios intending to kill him, he would be guilty of murder in the first degree, and if the shooting was done without deliberation, but with malice aforethought,

it would be murder in the second degree. The instructions were proper, as the malice was transferred, or followed the bullet. It would have been proper for the court to have explained in his instructions this principle to the jury.

The third point urged is that the indictment was defective in that it charged that the deliberation and

malice aforethought were directed at Enfren Rios instead of Lucero, whom the appellant intended to kill. What we have said under the first proposition disposes of this point.

It is lastly urged that the court was in error in giving instruction No. 26 to the jury. This instruction, in effect, told the jury that if appellant shot at Lucero unlawfully, wilfully, and feloniously, not in his necessary or apparently necessary self-defense, and killed Rios, he would then be guilty

of murder in the first degree. No objection was made to this instruction in the court below; consequently, it is not open to review here. This has been the uniform holding of this court. *State v. Eaker*, 17 N. M. 479, 131 Pac. 489; *State v. Lucero*, 17 N. M. 484, 131 Pac. 491; *State v. Klasner*, 19 N. M. 479, 145 Pac. 679, Ann. Cas. 1917D, 824; *State v. Johnson*, 21 N. M. 432, 155 Pac. 721; *State v. Orfanakis*, 22 N. M. 107, 159 Pac. 674; *State v. Starr*, 24 N. M. 180, 173 Pac. 674; *State v. Whitener*, 25 N. M. 20, 175 Pac. 870; *State v. Parks*, 25 N. M. 395, 183 Pac. 433.

David E. Grant, Esq., who so ably briefed and presented the case in this court, did so at the request of this court, and had no connection with the case in the court below.

The judgment will be affirmed, and it is so ordered.

Reynolds and Parker, JJ., concur.

ANNOTATION.

Homicide by unlawful act aimed at another.

I. General rule, 917.

II. Illustrative cases:

a. Murder:

1. In general, 920.

2. Exceptions, 923.

b. Manslaughter, 927.

c. Justifiable homicide, 927.

d. Careless homicide, 928.

1. General rule.

With the exception of a very few courts, which, in interpreting local

statutes, hold that the malice necessary to constitute murder in the first degree does not exist when a homicide is actually committed upon one person by a blow aimed at another, there is a singular unanimity among the decisions to the effect that such a homicide partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been, had the blow

fallen upon the intended victim instead of the bystander. Under this rule, the fact that the bystander was killed instead of the victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the result intended had been accomplished. The following cases hold that the degree of guilt is the same, whether the blow falls on the intended victim, or on the bystander:

United States.—*United States v. Hart* (1908; U. S. C. C. Fla.) 162 Fed. 192.

Alabama.—*Isham v. State* (1862) 38 Ala. 213; *Tidwell v. State* (1881) 70 Ala. 33; *Wills v. State* (1883) 74 Ala. 21; *Gater v. State* (1904) 141 Ala. 10, 37 So. 692; *Bradberry v. State* (1911) 170 Ala. 24, 54 So. 431.

Arkansas.—*Ringer v. State* (1905) 74 Ark. 262, 85 S. W. 410; *Brooks v. State* (1919) 141 Ark. 57, 216 S. W. 705.

California.—*People v. Suesser* (1904) 142 Cal. 354, 75 Pac. 1093; *People v. Trebilcox* (1906) 149 Cal. 307, 86 Pac. 684.

Colorado.—*Ryan v. People* (1911) 50 Colo. 99, 114 Pac. 306, Ann. Cas. 1912B, 1232; *Henwood v. People* (1913) 54 Colo. 188, 129 Pac. 1010.

Delaware.—*State v. Evans* (1893) 1 Marv. 477, 41 Atl. 136; *State v. O'Niel* (1875) *Houst. Crim. Rep.* 468; *State v. Brown* (1902) 4 Penn. 120, 53 Atl. 354; *State v. Bell* (1904) 5 Penn. 192, 62 Atl. 147.

Florida.—*Pinder v. State* (1891) 27 Fla. 370, 26 Am. St. Rep. 75, 8 So. 837.

Georgia.—*McPherson v. State* (1857) 22 Ga. 478; *Durham v. State* (1883) 70 Ga. 264; *Butler v. State* (1893) 92 Ga. 601, 19 S. E. 51; *Charlon v. State* (1899) 106 Ga. 400, 32 S. E. 347; *Hamilton v. State* (1907) 129 Ga. 747, 59 S. E. 803; *Godbee v. State* (1914) 141 Ga. 515, 81 S. E. 876; *Strickland v. State* (1911) 9 Ga. App. 552, 71 S. E. 919.

Illinois.—*Butler v. People* (1888) 125 Ill. 641, 1 L.R.A. 211, 8 Am. St. Rep. 423, 18 N. E. 338.

Iowa.—*State v. Williams* (1904) 122 Iowa, 115, 97 N. W. 992; *State v. Mathews* (1906) 133 Iowa, 398, 109

N. W. 616; *State v. Huston* (1919) — Iowa, —, 174 N. W. 641.

Kentucky.—*Golliher v. Com.* (1865) 2 Duv. 163, 87 Am. Dec. 493; *King v. Com.* (1900) — Ky. —, 55 S. W. 685; *Trabue v. Com.* (1902) 23 Ky. L. Rep. 2135, 66 S. W. 718; *Wheatley v. Com.* (1904) 26 Ky. L. Rep. 436, 81 S. W. 867; *Com. v. Moore* (1905) 121 Ky. 97, 2 L.R.A. (N.S.) 719, 123 Am. St. Rep. 189, 88 S. W. 1085, 11 Ann. Cas. 1024; *Shelton v. Com.* (1911) 145 Ky. 543, 140 S. W. 670.

Louisiana.—*State v. Salter* (1896) 48 La. Ann. 197, 19 So. 265; *State v. Williams* (1911) 129 La. 795, 56 So. 891.

Michigan.—*People v. Gordon* (1894) 100 Mich. 518, 59 N. W. 322; *People v. Hodges* (1917) 196 Mich. 546, 162 N. W. 966.

Missouri.—*State v. Payton* (1886) 90 Mo. 220, 2 S. W. 394; *State v. Gilmore* (1888) 95 Mo. 554, 8 S. W. 359, 912; *State v. Renfrow* (1892) 111 Mo. 589, 20 S. W. 299; *State v. Pollard* (1897) 139 Mo. 220, 40 S. W. 949; *State v. Clark* (1898) 147 Mo. 20, 47 S. W. 886; *State v. Cavin* (1906) 199 Mo. 154, 97 S. W. 573; *State v. Solan* (1918) — Mo. —, 207 S. W. 783; *State v. Baker* (1908) 209 Mo. 444, 108 S. W. 6.

Nevada.—*State v. Raymond* (1876) 11 Nev. 98.

New Jersey.—*State v. Bectsa* (1904) 71 N. J. L. 322, 58 Atl. 933.

New Mexico.—*CARPIO v. STATE* (reported herewith) ante, 914.

New York.—*People v. Miles* (1894) 143 N. Y. 389, 38 N. E. 456; *People v. Molineux* (1901) 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *People v. Loose* (1910) 199 N. Y. 505, 92 N. E. 100.

North Carolina.—*State v. Fulkerson* (1867) 61 N. C. (Phill. L.) 233; *State v. Lilliston* (1906) 141 N. C. 857, 115 Am. St. Rep. 705, 54 S. E. 427.

Ohio.—*Wareham v. State* (1874) 25 Ohio St. 601.

Oregon.—*State v. Johnson* (1879) 7 Or. 210; *State v. Murray* (1884) 11 Or. 413, 5 Pac. 55; *State v. Taylor* (1913) 65 Or. 266, 132 Pac. 713.

Pennsylvania.—*Com. v. Breyessee* (1894) 160 Pa. 451, 40 Am. St. Rep.

729, 28 Atl. 824; *Com. v. Johnson* (1907) 219 Pa. 174, 68 Atl. 53; *Com. v. Flanigan* (1869) 8 Phila. 430.

South Carolina.—*State v. Smith* (1847) 33 S. C. L. (2 Strobbh.) 77, 47 Am. Dec. 589; *State v. Kennedy* (1910) 85 S. C. 146, 67 S. E. 152.

Texas.—*Clark v. State* (1885) 19 Tex. App. 495; *Lankster v. State* (1900) 41 Tex. Crim. Rep. 603, 56 S. W. 65; *Powell v. State* (1902) — Tex. Crim. Rep. —, 70 S. W. 218; *Hjeronymous v. State* (1904) 47 Tex. Crim. Rep. 366, 83 S. W. 708; *Ricks v. State* (1905) 48 Tex. Crim. Rep. 264, 87 S. W. 1036; *Nelson v. State* (1905) 48 Tex. Crim. Rep. 274, 87 S. W. 143; *McCullough v. State* (1911) 62 Tex. Crim. Rep. 126, 136 S. W. 1055; *Gaines v. State* (1912) 67 Tex. Crim. Rep. 325, 148 S. W. 717; *Whiten v. State* (1913) 71 Tex. Crim. Rep. 555, 160 S. W. 462; *Hill v. State* (1914) 74 Tex. Crim. Rep. 481, 168 S. W. 864; *Spannell v. State* (1918) 83 Tex. Crim. Rep. 418, 2 A.L.R. 593, 203 S. W. 357.

Washington.—*State v. McGonigle* (1896) 14 Wash. 594, 45 Pac. 20.

West Virginia.—*State v. Briggs* (1905) 58 W. Va. 291, 52 S. E. 218; *State v. Clifford* (1906) 59 W. Va. 30, 52 S. E. 981.

England.—*Mansell & Herbert's Case* (1555) 1 Dyer, 128, pl. 60, 73 Eng. Reprint, 279; *Gore's Case* (1611) 9 Coke, 81, 77 Eng. Reprint, 853; *Rex v. Plummer* (1701) J. Kelyng, 109, 84 Eng. Reprint, 1103; 12 Mod. 627, 88 Eng. Reprint, 1565; *Williams's Case* (1639) Wm. Jones, 432, 82 Eng. Reprint, 227; *Rex v. Conner* (1836) 7 Car. & P. 438; *Reg. v. Saunders* (1576) 2 Plowd. 473, 75 Eng. Reprint, 706, 1 Hale, P. C. 466.

Where a party, on their way at night to ship goods in violation of the revenue laws, were intercepted by government officers, and a fusee in the hands of one of the party was discharged, killing his companion, he was held not guilty because it was not found that the discharge was not a mere accident; but Holt, Ch. J., in the opinion, says that if he intended to discharge the weapon against an officer, though he had not killed the person intended, but another, the

offense would be in the same degree as if he intended to kill the person killed. *Rex v. Plummer* (1701) J. Kelyng, 109, 84 Eng. Reprint, 1103, 12 Mod. 627, 88 Eng. Reprint, 1565.

The grade of the offense of one who, in shooting at one, accidentally kills another, is the same as it would have been had he killed his intended victim. *State v. Raymond* (1876) 11 Nev. 98.

In *State v. Clark* (1898) 147 Mo. 20, 47 S. W. 886, where the court was considering the sufficiency of the indictment, it states that, where an accused shoots at one man and kills another, malice will be implied as to the latter.

Where one kills a person by a shot aimed at another who is attempting to hide behind the one killed, the criminality of the act may be determined with reference to the conduct of accused toward his intended victim. In other words, his guilt or innocence may be made to depend upon the same considerations that would have governed had the shot which was fired killed the intended victim instead of the actual one. *State v. Williams* (1904) 122 Iowa, 115, 97 N. W. 992.

Where one, in shooting at an intended victim, killed a constable who was in the vicinity, the court held that if a person, in an attempt to kill one, by mistake accidentally kills another, the law transfers the intent to the person so killed, and a homicide thus committed will be of that grade which it would have been had the intention of the assailant been accomplished. *State v. Renfrow* (1892) 111 Mo. 589, 20 S. W. 299.

A ball fired at one person, with an intent to wound or kill him, carries with it the ingredient of malice when it strikes another and different person. Malice goes with the ball, and gives character to the act. *State v. Brown* (1902) 4 Penn. (Del.) 120, 53 Atl. 354.

The guilt of a person who shoots at one man and kills another depends on whether his intention, at the time he fired the shot, was to do an act made criminal by law. If the act he intended to do was criminal, then by the law he is responsible for what he did, even though such result was not intended. On the other hand, if he in-

tended only a lawful act, he will not be punished for a result that he did not intend, if he acted with due care. *Ringer v. State* (1905) 74 Ark. 262, 85 S. W. 410.

In *Tidwell v. State* (1881) 70 Ala. 38, the court, in considering a requested instruction that if the deceased was killed by a shot fired at another person, "accused should be acquitted, says it is scarcely necessary to say the proposition cannot be supported. The guilt or innocence in such state of facts would depend on an inquiry whether accused would have been guilty or innocent, and, if guilty, of which degree of homicide, if the fatal bullet had fallen upon and killed the person against whom it was directed.

Where a shot, fired at a man, killed his wife, the court said that if a blow is intentionally or voluntarily given with a deadly weapon, without excuse, and the result be the death of a human being, even though not the person aimed at, this cannot be less than manslaughter in the first degree, and may be murder. The depraved heart or unlawful will with which the instrument of death is hurled at one accompanies and characterizes the fatal blow which falls on another by misadventure. *Wills v. State* (1883) 74 Ala. 21.

In considering the question of liability of rioters for death of a person accidentally killed by the police officers in attempting to quell the riot, the court says it may be regarded as a well-settled principle of law that a man will be held guilty of murder or manslaughter who, in the attempt to kill one person, by mistake, kills a third person, although there was no intent or design to kill such third person. *Butler v. People* (1888) 125 Ill. 641, 1 L.R.A. 211, 8 Am. St. Rep. 423, 18 N. E. 338.

In *Hjeronymous v. State* (1904) 47 Tex. Crim. Rep. 366, 83 S. W. 708, it was held error to charge on manslaughter, where, in a prosecution for homicide, the evidence showed that accused killed his mother-in-law in an attempt to shoot her son, after the latter had beaten him and pushed him out of the house.

If one, with intent to kill or murder a particular person, illegally and feloniously shoots at him, but fails to accomplish his purpose, and unintentionally kills another person, he has no reason to complain if, under an indictment for murder, he is found guilty of manslaughter, because he may not have had reason to expect that his shot would strike a third person. *State v. Salter* (1896) 48 La. Ann. 197, 19 So. 265. The court says that the fact that accused may not have had reason to expect that his shot would strike a third person would not make any difference in the legal situation.

Where a man, in attempting to shoot a boarder in the family, shot and killed his own child, the court announced the rule that if a person, whilst doing or attempting to do another act, undesignedly killed a man, and the act intended or attempted was a felony, the killing is murder. *People v. Gordon* (1894) 100 Mich. 518, 59 N. W. 322.

In *State v. Johnson* (1879) 7 Or. 210, the court said that it is well settled that if one person, attempting to kill another, shoots at him, and, missing his aim, kills a third, he is as guilty as if he had killed the one at whom the shot was fired. This is an elementary principle of criminal law.

If one design to kill A, but by accident kills B, the crime will be the same as if he had executed his purpose. It will be murder, or manslaughter, or self-defense, according to circumstances. *State v. Smith* (1847) 33 S. C. L. (2 Strobb.) 77, 47 Am. Dec. 589.

A ball fired from a gun or pistol at one person, with an intent to wound or kill him, carries with it the ingredient of malice when it strikes another and a different person. Malice goes with the ball, and gives character to the action; or, as the rule is, malice speeds the ball, whoever may be the victim. *State v. Brown* (1902) 4 Penn. (Del.) 120, 53 Atl. 354.

II. Illustrative cases.

a. Murder.

1. In general.

The rule being that the degree of

the crime, in case one kills another in an attempt to kill a third, is the same that it would have been had the blow fallen on the intended victim, there is no intention here to point out the differentiating elements of the various degrees of homicide, because that could not be done merely by an examination of cases which have involved the incidental killing of an unintended victim; but enough cases will be referred to, to show the manner in which the rule has been applied.

In *Williams's Case* (1639) Wm. Jones, 432, 82 Eng. Reprint, 227, where one, upon thinking himself insulted by another, threw a hammer at him, which hit and killed a third, the chief justice said that he would have been guilty of murder if he had been indicted for that offense, on the ground that the provocation was not such as to reduce a killing of his intended victim to a lower degree of crime.

Where two persons, engaged in a fight in a public place, shoot at each other, and kill a bystander, they are both guilty of murder, one as principal and the other as aiding and abetting. *State v. Lilliston* (1906) 141 N. C. 857, 115 Am. St. Rep. 705, 54 S. E. 427.

People v. Molineux (1901) 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, was a prosecution for the murder of one who took, by mistake, poison sent through the mail to another. There is no discussion of the question of liability in such cases, but it seems to have been assumed by counsel and court that accused would have been guilty, if shown to have sent the poison.

Under a statute making a killing by a person engaged in the commission of, or in the attempt to commit, a felony either upon or affecting the person killed, or otherwise, murder in the first degree, one is so guilty if, in maliciously shooting at one with intent to wound or kill him, he accidentally hits and kills another, the word "otherwise" not being confined to felonies against property, but including felonies upon or against a person other than the one killed. *People v. Miles* (1894) 143 N. Y. 389, 38 N. E. 456.

Where, by statute, the jury may find

an accused guilty of a crime in a less degree than charged, and murder in the second degree is a designed killing without deliberation and premeditation, it is error to require the jury to find first-degree murder, or acquit, where accused, in shooting at a police officer, killed a bystander. The court said the jury might have ignored the element of the crime charged that accused was engaged in the commission of a felony, and found merely that accused assaulted the officer with a deadly weapon, without deliberation and premeditation, but with intent to kill him, when the crime would be murder in the second degree. *People v. Van Norman* (1921) 231 N. Y. 454, 132 N. E. 147.

If accused shoots at one, and, missing him, kills another, this is murder, because the law transfers the felonious intent from the intended victim to the innocent person who is slain. *State v. Gilmore* (1888) 95 Mo. 554, 8 S. W. 359, 912.

In a prosecution for an assault, the court says that, if a shot is aimed at one under circumstances which would have rendered a killing murder, the accidental killing of a bystander by it would likewise be murder. *People v. Hodges* (1917) 196 Mich. 546, 162 N. W. 966.

In *Com. v. Moore* (1905) 121 Ky. 97, 2 L.R.A.(N.S.) 719, 88 S. W. 1085, 11 Ann. Cas. 1024, which involved the question of the liability of persons attempting to commit robbery, for the death of a bystander accidentally killed by the owner in defending his property, the court said that, if they had accidentally killed a bystander by shooting at the property owner, they would have been guilty of murder.

In *King v. Com.* (1900) — Ky. —, 55 S. W. 685, where one convicted of murder, raised the question of the sufficiency of the indictment, it appeared that he shot at one person with the intention of killing him, but missed him and killed another, and the court, without discussion of the question of liability under such facts, affirmed the conviction.

In *Golliher v. Com.* (1865) 2 Duv. (Ky.) 163, 87 Am. Dec. 493, where it

appeared that one entered a building where an election was being held, having upon his shoulder a gun, which was discharged and killed his friend, the court, *inter alia*, says if he had taken a gun into the house for the felonious purpose of killing any person, and had voluntarily fired the gun for the purpose of executing that malicious design, and accidentally hit his friend, the killing of the friend, though unintended, would nevertheless have been murder.

If, after a quarrel, one fires upon his adversary who is fleeing, and by accident kills a bystander, he is guilty of murder. *Durham v. State* (1883) 70 Ga. 264.

If accident left his house with a riotous intent of killing one person, and failed in this, and anyone else was killed by him whilst in the prosecution of that intent, he would be guilty of murder. *McPherson v. State* (1857) 22 Ga. 478.

In *Isham v. State* (1862) 38 Ala. 213, which involved the question of liability for killing one by mistake of identity, the court, in argument, cites with approval authority to the effect that if one, out of malice at A., shoots at and misses him, and kills B., it is no less murder than if he had killed the person intended.

The killing of one, in an effort to carry out a premeditated design unlawfully and maliciously to effect the death of another, is murder in the first degree. *Gater v. State* (1904) 141 Ala. 10, 37 So. 692.

Where an attempted murder in the first degree fails, and results in the killing of an innocent bystander, the accused will be guilty of the same degree of murder that he would have been had he killed his intended victim, since the intention follows the bullet. *State v. Pollard* (1897) 139 Mo. 220, 40 S. W. 949.

Where the prisoner went to the room of a man with whom he had quarreled about half an hour before, and discharged a pistol at him, but shot and killed another, he was guilty of murder in the first degree. *Com. v. Johnson* (1907) 219 Pa. 174, 68 Atl. 53.

Murder committed by accidentally

killing an unintended person, when shooting at another when lying in wait, is murder in the first degree. *State v. Payton* (1886) 90 Mo. 220, 2 S. W. 394.

If a person purposely and maliciously strikes a blow with a deadly weapon with intent to kill, and death ensues, it will be murder in the second degree, although the blow missed the person against whom it was directed, and took effect upon another. The intent to kill and the malice follow the blow. And if deliberation and premeditation are added to the essential ingredients of murder in the second degree, the crime is murder in the first degree. The purpose and malice with which the blow was struck are not changed in any degree by the circumstance that it did not take effect upon the person at whom it was aimed. A blow given with deliberation and premeditated malice, and with the intent and purpose to kill another, if it accomplishes its purpose, cannot be said to have been given without malice and unintentionally, although it did not take effect upon the person against whom it was directed. *Wareham v. State* (1874) 25 Ohio St. 601.

The accidental killing of a woman, while attempting to kill a girl with premeditation and deliberation, is murder in the first degree. *Bradbery v. State* (1911) 170 Ala. 24, 54 So. 431.

Where persons, assuming to be a vice admiral and posse, made an attack on a house to take goods which had been taken by the owner of the house from a public enemy, and one of them killed an unarmed woman when throwing a stone at a person holding the entrance of the house, this was held to be murder in all those attacking the house. Certain of the judges, however, held that no malice was intended against the woman, and there could be no murder, because murder could not be extended beyond what was intended. *Mansell & Herbert's Case* (1555) 1 Dyer, 128, pl. 60, 73 Eng. Reprint, 279.

By poison.

If a husband gives a poisoned apple to his wife, intending to kill her, and she innocently gives it to a child, who

dies from the poison, it is murder in the husband, but the wife, because ignorant, is not guilty. *Reg. v. Saunders* (1576) 2 Plowd. 473, 75 Eng. Reprint, 706, 1 Hale, P. C. 466. The reason assigned for the judgment was that the husband gave the poison with the intent to kill a person, and in the giving of it he intended that death should follow. And when death followed from his act, although it happened to another person than her whose death he directly meditated, yet it would be murder in him, for he was the original cause of the death; and if such death should not be punished in him, it would go unpunished. And it is said: "If a man, of malice prepense, shoots an arrow at another with an intent to kill him, and a person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offense in him as if he had killed the person he aimed at; for the end of the act shall be construed by the beginning of it, and the last part shall taste of the first, and as the beginning of the act had malice prepense in it, and consequently imported murder, so the end of the act, viz., the killing of another, shall be in the same degree; and therefore it shall be murder, and no homicide only."

If one puts poison in a well with the intention of killing a particular person, but instead another one is killed against whom no intent was directed, he is nevertheless guilty of murder in the first degree. *State v. Evans* (1893) 1 Marv. (Del.) 477, 41 Atl. 186.

If one lays poison for another, and it is taken by a third person and death results, it is murder. *State v. Fulkerson* (1867) 61 N. C. (Phill. L.) 233.

Where a woman, in the attempt to kill her husband, put poison into a medicinal potion which had been prepared for him by an apothecary, and, after several had been made sick by tasting the medicine, the apothecary, in order to vindicate himself, took a portion of it, from the effects of which

he died, the woman was held to be guilty of murder. *Gore's Case* (1611) 9 Coke, 81, 77 Eng. Reprint, 853.

2. *Exceptions.*

In a few states the courts have held that, where the statute made malice a necessary ingredient of murder in the first degree, the fact that the accused had no malice against the one whom he in fact killed, although he did have it towards his intended victim, would prevent the killing from being murder in the first degree. It would seem that such a rule is too favorable to the murderer, however, for if he, actuated by malice, attempts to kill one person, and, by accident or under faulty aim, his blow falls upon and kills another, why should he be permitted to take advantage of the fact that he bore him no ill will? His intention was to kill, and he did kill, and it was by no design of his that his blow fell upon an unintended, rather than an intended, victim; therefore, why should the law be tender of him, and reduce the degree of his crime? His act, actuated by malice, had its intended result—death; and does the mere accident that one person died instead of another alter the degree of guilt?

Under a statute defining murder in the first degree as all murder which shall be perpetrated by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree, and all other murder shall be deemed murder in the second degree, the actual killing of a bystander, in a deliberate attempt to kill another, is merely murder in the second degree. *Bratton v. State* (1849) 10 Humph. (Tenn.) 103. The court says: "If the universal principle of construction is to be regarded, that every word in a statute is to have meaning and effect given to it, if practicable, it results of necessity, by force of the terms employed in the definition of the crime, that to constitute murder in the first degree, it must be established

that there existed in the mind of the agent, at the time of the act, a specified intention to take the life of the particular person slain. The characteristic quality of this crime, and that which distinguishes it from murder in the second degree, is the existence of a settled purpose and fixed design on the part of the assailant that the act of assault should result in the death of the party assailed; that death being the end aimed at, the object sought for and wished. . . . If then, by misadventure or other cause, a blow, directed at a particular person and designed to take his life, take effect upon and cause the death of a third person, against whom no injury was meditated, can it be said that the will concurred with the act which resulted in the accidental death of such third person; or that there existed a specific intention to take his life? A grosser absurdity cannot be conceived. The hypothesis that the killing was undesigned concedes that the will did not concur with the act; that, in point of fact, no such specific intention existed; no such result was either contemplated or designed. And upon what principle is it that this would be murder at common law? Simply upon the principle of implied or imputed malice and intention. In such case, all the essential elements of murder at the common law concur. A homicide has been committed with deadly weapon in the attempt to perpetrate a felony, by taking the life of another person, without legal justification or excuse, and in such case, from the circumstances and deadly weapon, the law conclusively presumes malice and the intent to murder; and, in like manner, the law conclusively presumes that the party contemplated the probable consequences of his own act."

In *McCoy v. State* (1860) 25 Tex. 33, 78 Am. Dec. 520, the court, in considering the question whether one accused of murder was entitled to bail, in defining and illustrating malice, said that if the formed design be not to kill the accused, or inflict upon him serious bodily injury, but to commit some other offense, the killing

will not be on express malice. *A.*, attacking *B* with malice, shoots at, but misses him, and kills *C.*, against whom he bears no malice. This is murder. Not because of any malice in fact against *C.*, but because of the evil design against *B.*, which, it is said, is carried over against *C.* by legal implication. And since the statute requires express and not implied malice to constitute murder in the first degree, this is merely murder in the second degree. And that rule has been subsequently followed in Texas. *Taylor v. State* (1878) 3 Tex. App. 387; *Musick v. State* (1886) 21 Tex. App. 69, 18 S. W. 95; *Black v. State* (1901) — Tex. Crim. Rep. —, 65 S. W. 906; *Lankster v. State* (1900) 41 Tex. Crim. Rep. 603, 56 S. W. 65; *Honeycutt v. State* (1900) 42 Tex. Crim. Rep. 129, 57 S. W. 806; *Howard v. State* (1900) — Tex. Crim. Rep. —, 58 S. W. 77; *Rainer v. State* (1912) 67 Tex. Crim. Rep. 87, 148 S. W. 735; *Buckley v. State* (1915) 78 Tex. Crim. Rep. 378, 181 S. W. 729; *Thomas v. State* (1908) 53 Tex. Crim. Rep. 272, 126 Am. St. Rep. 786, 109 S. W. 155; *Holland v. State* (1908) 55 Tex. Crim. Rep. 27, 115 S. W. 48; *McCullough v. State* (1911) 62 Tex. Crim. Rep. 126, 136 S. W. 1055; *Milo v. State* (1910) 59 Tex. Crim. Rep. 196, 127 S. W. 1025; *Breedlove v. State* (1888) 26 Tex. Crim. Rep. 445, 9 S. W. 768.

Where, in shooting at one person under circumstances which would have been murder had it resulted in his death, a bystander was killed, the court said that the killing was not in any attempt at arson, rape, robbery, or burglary, nor by poison, starving, or torture, and accused was, therefore, not guilty of murder in the first degree under the statute. The statute further provided that if one intend to commit a felony, and if, in the act of preparing for and executing the same, he shall, either by mistake or accident, do another act which, if voluntarily done, would be a felony, he should receive punishment affixed by law to the offense actually committed. *Bean v. Mathieu* (1870) 33 Tex. 591.

Where one, firing at a policeman who is attempting to arrest him, hits and kills a bystander, he may be found

to be guilty of murder in the second degree. *Angell v. State* (1871) 36 Tex. 542, 14 Am. Rep. 380.

If one, with malice aforethought, shoots at one person with intention to kill him, and kills another person unintentionally, the law implies and imputes to the killing malice, and the accused is guilty of murder in the second degree. *Halbert v. State* (1878) 3 Tex. App. 656.

If one, in attempting to kill his wife, accidentally kills his child, he is guilty of murder in the second degree. *McConnell v. State* (1883) 13 Tex. App. 390.

One who, in shooting at one with intent to kill, accidentally kills another, may be found to be guilty of murder in the second degree, under a statute providing that, if one intending to commit a felony, and in the act of preparing for or committing the same, shall, through mistake or by accident, do another act which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offense actually committed. *Richards v. State* (1895) 35 Tex. Crim. Rep. 38, 30 S. W. 805.

But in *Ricks v. State* (1905) 48 Tex. Crim. Rep. 264, 87 S. W. 1036, where accused, after a quarrel with his brother-in-law, went to the latter's house and, upon firing into it, killed his sister, error was alleged because of a charge of murder in the first degree. But, although the conviction was of murder in the second degree, the court held that a charge on first-degree murder was required, because, if accused intended to kill his brother-in-law, such killing would have been murder in the first degree, and if, under the facts, it might have been so, then the accidental killing of the wife would be murder in the first degree. But the court says that his firing into the house where he knew she was might be characterized as the act of one regardless of social duty and fatally bent on mischief. These dicta, however, do not seem to have been noticed in subsequent Texas cases, which have followed the doctrine holding the grade of the murder to be merely second degree.

One of the anomalies of the Texas rule is that one engaged in committing a much less heinous crime than murder may, if he accidentally kills another in its perpetration, be guilty of first-degree murder, whereas, if the killing result from an attempt to commit first-degree murder, it will be merely second-degree murder. Thus, under a statute providing that all murder done in committing robbery is murder in the first degree, one who, in the perpetration of robbery, shoots at one and kills another, is guilty of murder in the first degree. *Milo v. State* (1910) 59 Tex. Crim. Rep. 196, 127 S. W. 1025.

In *Territory v. Rowand* (1888) 8 Mont. 110, 19 Pac. 595, where the conviction was for murder in the second degree, an instruction that if accused had, with malice aforethought, wilfully, premeditatedly, and feloniously shot at a person with intent then and there to kill him, and while so engaged had killed accused, he should be found guilty of murder in the first degree, was not challenged by counsel for accused. The court says that the argument that there was no assault upon the deceased is fallacious. It can make no difference whether the assault was intended for deceased, or for Martin, the intended victim. On rehearing in (1889) 8 Mont. 432, 20 Pac. 689, 21 Pac. 19, the question discussed was whether or not the variance between the allegation of intent to kill the one actually killed, and proof of an intent to kill another, was fatal. The court held that, the conviction being for murder in the second degree, failure to show a specific intent was not fatal.

The Montana statute requires, as a constituent of murder in the first degree, a deliberate, premeditated design to kill. And in *State v. Caterni* (1918) 54 Mont. 456, 171 Pac. 284, the court held that the territorial court in the Rowand Case had settled that a charge of murder in the first degree against one for the premeditated, intentional killing of another was not sustained by evidence showing that the killing was done in an effort to accomplish the murder of a third

person. The court said that such killing is not murder in the first degree, because the specific intent required by the statute—the deliberate, premeditated design specifically to kill the person who was killed—is lacking, and it becomes murder in the second degree, or manslaughter, according to the circumstances.

As seen above, the ruling in the Rowand Case does not seem to have gone to the extent stated, but the Caterni Case evidently has settled the law in Montana the same as it is in Texas.

In *Com. v. Dougherty* (1807) 1 Browne (Pa.) appx. xviii., however, under a similar statute, the court, in instructing the jury in a case where a man killed his child by a blow aimed at his wife, stated that if a man should mix a glass of poison with intention to murder one person, and another should take it, it would be murder in the first degree. So, if one were to shoot at one and kill another, it would be murder in the first degree. Where the original intent is murderous, the crime on legal principles, is the same, whoever happens to be killed. The murderous intention, the wicked disposition of heart, being once established against a particular person, the nature and guilt of the acts are immutably fixed, whoever may happen to be killed.

In *Com. v. Hare* (1844) 2 Clark (Pa.) 467, the court held that, although all engaged in a riot during which shots were fired in a public street would be liable for the killing of a bystander, yet, in view of the fact that, by statute, malice is a necessary ingredient of murder in the first degree, their crime would be murder in the second degree. That rule was not, however, adopted by the supreme court of the state, since, in *Com. v. Breyessee* (1894) 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824, it was held that where a deliberate purpose is formed to kill A, and accused fires a pistol at him for that purpose, the fact that the ball misses the victim and takes effect on a third person and kills him, does not relieve the murderer. He is equally guilty, whether his

effort to kill A results in the taking of his life or the life of B.

In *People v. Suesser* (1904) 142 Cal. 354, 75 Pac. 1093, it was argued that to constitute murder in the first degree the malice must have existed toward the person killed. The court said Tennessee and Texas decisions sustain this contention, but that the overwhelming weight of authority is the other way.

The same statute exists in New Jersey, and the court, in *State v. Bectsa* (1904) 71 N. J. L. 322, 58 Atl. 933, held that the degree of crime was the same, in case of the accidental killing of a bystander, that it would have been had the blow taken effect on the intended victim. The court says: "In this statute, the two concrete cases of murder in the first degree and the general description of the cognate class that immediately follows are all based upon the existence of a certain condition of mind in the perpetrator of the murder, which, as to the concrete instances, is described by reference to the means employed or the method adopted, viz., by poison, or by lying in wait, and, as to the general class that follows, by the use of descriptive words, of which the two concrete cases are something more than apt illustrations, being, by force of the word 'other,' criteria controlling the sense in which the more general terms are employed. It is clear, therefore, that murder, whether resulting under the special circumstances first detailed, or evincing the state of mind afterwards described, is murder in the first degree, without regard to any extraneous consideration, and that the determining element in either case is the existence of the reprobated state of mind in the murderer, and not the measure of success that attended its accomplishment. So that if A administer poison to murder B, which is fatally drunk by C, A's crime is murder in the first degree. So, likewise, if A, lying in wait to murder B, or intending his murder in the state of mind described by the statute, chance to kill C, equally and in either case, A's crime is murder in the first degree. This is the plain meaning of the stat-

ute, consistent with its entire spirit, interpreted by its own illustrations, and sustained by the analogy it bears to the imputable quality at common law of the malice that is essential to the crime of murder."

Where a man killed a person who was escorting his wife home from a social function, the trial court charged that, if he intended to kill his wife or some other person than the one killed, and, missing his aim, killed deceased by mistake, he would be guilty of murder in the second degree. The appellate court, however, said it was unable to understand how the suggested fact could possibly have lessened the degree of the guilt of accused. *State v. Murray* (1884) 11 Or. 413, 5 Pac. 55. The court says: "The assassin who lies in wait, harboring in his bosom a murderous design to slay a human being, cannot extenuate his offense because he did not kill the particular person he designed to. All the circumstances constituting murder in the first degree are present, and, if he is guilty at all, he is guilty of that crime, and there is no more reason for lessening the degree of the crime in consequence of that circumstance, than there would be in acquitting him out and out. He has exhibited the same malignity and recklessness in the one event he would have displayed in the other, and the consequences to society are just as fearful."

b. Manslaughter.

If the circumstances of the killing are such that it would have been manslaughter had the blow fallen on and killed the intended victim, it will also result in manslaughter if a third person is killed. *Hill v. State* (1914) 74 Tex. Crim. Rep. 481, 168 S. W. 864; *Whiten v. State* (1913) 71 Tex. Crim. Rep. 555, 160 S. W. 462; *Clark v. State* (1885) 19 Tex. App. 495.

Where a woman threw a poker at her child for correction under circumstances which, if it had killed him, would have made her guilty of manslaughter, she is equally guilty if the poker accidentally hits and kills another child. *Rex v. Conner* (1836) 7 Car. & P. (Eng.) 488.

If one, in shooting at persons in a sudden affray or sudden heat of passion, kill an innocent bystander, he is guilty of manslaughter. *Shelton v. Com.* (1911) 145 Ky. 543, 140 S. W. 670.

The slaying of one by a blow intended for another, inflicted in sudden heat and passion, is manslaughter just as it would have been had it reached its intended mark. *Trabue v. Com.* (1902) 23 Ky. L. Rep. 2135, 66 S. W. 718.

In *Com. v. Flanigan* (1869) 8 Phila. (Pa.) 430, where the killing was caused by the accidental discharge of a weapon in a quarrel between two persons, the court says: Can it be doubted, in such a state of evidence, that, if the shot had killed the other person to the quarrel instead of the bystander, the offense would have been voluntary manslaughter? What matters it, then, if the shot took effect at the body of the bystander?

Where one killed a person with a shot fired at another, who at the time was fleeing from him, he could not complain that he was convicted of manslaughter under an instruction that, if he tried in sudden heat and passion to kill his intended victim, and accidentally killed accused, he was guilty only of manslaughter. *Sims v. Com.* (1890) 12 Ky. L. Rep. 215, 13 S. W. 1079.

c. Justifiable homicide.

One who, in shooting at another in self-defense, hits and kills a person who steps between the combatants, he will be guilty of no offense, since his right of self-defense protects him from the unexpected result of his act. *Gaines v. State* (1912) 67 Tex. Crim. Rep. 325, 148 S. W. 717.

If one kills a bystander by a random shot, in attempting to defend himself from an attack by another, the court says the rule is that if the killing of the person intended to be hit would, under all the circumstances, have been excusable, or justifiable homicide under the theory of self-defense, the killing of the bystander by a random shot fired in the proper and prudent exercise of such self-defense was also

excusable and justifiable. The court further says, had the killing of the intended victim been reduced by the situation to murder in the second or third degree, or manslaughter in any of the degrees, then the unintended killing of a bystander, resulting from an act designed to take effect upon the intended victim, would be likewise reduced to the same grade of defense as would have followed the death of the victim intended to be killed. *Pinder v. State* (1891) 27 Fla. 370, 26 Am. St. Rep. 75, 8 So. 837.

If a person shooting in what he believes to be necessary self-defense actually kills one coming in range of the bullet, the question of his guilt will be determined with reference to his rights with respect to the person at whom the shot was aimed. *Ringer v. State* (1905) 74 Ark. 262, 85 S. W. 410.

If the bullet is fired in necessary self-defense, and hits a bystander by accident, accused should be acquitted. *Shelton v. Com.* (1911) 145 Ky. 543, 140 S. W. 670.

Shooting at one in self-defense, and accidentally killing another, is justifiable homicide. *Ibid.*; *McCullough v. State* (1911) 62 Tex. Crim. Rep. 126, 136 S. W. 1055.

If one, in preparing to defend himself against the attack of another, accidentally kills a bystander, he is not guilty of any offense, whether his act of preparation endangered the life of such other person or not. *Lankster v. State* (1900) 41 Tex. Crim. Rep. 603, 56 S. W. 65.

If accused, when subjected to assault which he did not provoke, shoots at his assailant, and by accident hits a bystander, no guilt will attach to him if the assault was such as would have justified killing the assailant. In such case the killing would be homicide by misadventure. It would be otherwise if he shot carelessly, and in wanton, reckless disregard of danger resulting to the bystander. *Butler v. State* (1893) 92 Ga. 601, 19 S. E. 51.

Since, by law, a husband would not be guilty of any grade of homicide in killing a man caught in adultery with his wife, the accidental killing of his

wife, in an attempt to kill a man committing such an act, would not make him guilty of any offense. *Powell v. State* (1902) — Tex. Crim. Rep. —, 70 S. W. 218, 14 Am. Crim. Rep. 5.

d. Careless homicide.

The rule above stated may be somewhat modified by the care, or absence of care, with which one exercises his right of self-defense, or whatever other right he is relying on in justification of the killing. The law imposes upon all a duty of exercising a high degree of care in the use of deadly weapons, and will hold one to a strict account if he uses such weapons so carelessly that needless injury is done to a bystander, although the one using the weapon is not exceeding his legal rights in doing so.

If one, having a right to shoot in self-defense, does so in a place where others are present, without due caution or circumspection, and kills a bystander, he may be guilty of involuntary manslaughter. *Henwood v. People* (1913) 54 Colo. 188, 129 Pac. 1010.

If one, without criminal intent or design, shoots at one man, causing, as a result of carelessness, the death of another, he is guilty of manslaughter. *Ringer v. State* (1905) 74 Ark. 262, 85 S. W. 410.

So, one who fires a shot, when knowing that he cannot do so without hitting an innocent person, is guilty of voluntary homicide, but in determining that question regard must be had to the circumstances under which the shot was fired. *Ibid.*

An accused is guilty of involuntary manslaughter, where, in shooting at one carelessly and recklessly, in self-defense, he kills another. *Scott v. State* (1905) 75 Ark. 142, 86 S. W. 1004.

Where accused wrecked a house by an explosion in an attempt to kill his sister and stepmother, towards whom he entertained ill will, but instead another was killed, he is guilty of murder in the first degree, the act causing the death being one greatly dangerous to human life, and evincing a depraved mind regardless of human life, within the purview of the stat-

ute. *Gallant v. State* (1910) 167 Ala. 60, 52 So. 739. That ruling was under a statute providing that every homicide perpetrated from a premeditated design unlawfully and maliciously to effect the death of any hu-

man being other than he who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evincing a depraved mind regardless of human life, is murder in the first degree. H. P. F.

SPRINGFIELD GAS & ELECTRIC COMPANY, Appt.,
v.
CITY OF SPRINGFIELD.

Illinois Supreme Court—February 18, 1920.

(292 Ill. 236, 126 N. E. 739.)

Statutes — limitation by construction.

1. A provision excepting from a statute governing the regulation of public utilities such utilities when owned and operated by municipal corporations will not be construed so as to limit it to utilities operated by municipalities for their own use.

[See note on this question beginning on page 946.]

Public utility — injunction against rival.

2. A private corporation lawfully operating a public utility may enjoin another private corporation operating, without authority of law, a similar utility which competes with and injures the former's business.

Statutes — construction — validity of special provisions.

3. In determining the question of the validity or invalidity of particular provisions of public laws courts should not be unmindful of the effect upon the entire enactment of the holding of any particular provision invalid.

—effect of holding provision invalid.

4. If results not contemplated by the legislature would follow the holding of an exception in a statute invalid, then the entire statute must be held invalid if the exception is so held. [See 6 R. C. L. 124.]

—statute invalid in part, invalid in toto.

5. Where a portion of an act is valid and another portion invalid, and the court cannot say that the legislature would have passed the act with the invalid portion eliminated, the entire act must be held invalid. [See 6 R. C. L. 123.]

(Dunn, Ch. J., and Cartwright and Farmer, JJ., dissent.)

—effect of saving clause.

6. A provision in a statute that, if any portion of it is, for any reason, held unconstitutional, such decision shall not affect the validity of the remaining portion of the act, will not justify the court in holding invalid a clause exempting municipal corporations from its provisions if the effect would be to nullify an entire statute dealing separately with such corporations.

Courts — power to make laws.

7. Courts have no authority to make a law by holding invalid a provision of a statute and upholding the remainder, if, by so doing, they would accomplish a result which would not have been sanctioned by the legislature. [See 6 R. C. L. 123.]

Constitutional law — special privileges — exemptions of municipal corporation from public utility laws.

8. Excepting from a public utilities act municipal corporations and utilities owned and operated by them does not violate constitutional provisions against the enactment of special or local laws or the granting of special privileges.

Definition — corporation.

9. The word "corporation" in a constitutional provision forbidding the

granting of special privileges to corporations does not include municipal corporations.

Constitutional law — right to classify for legislative purposes.

10. The legislature may classify persons or occupations for the purpose of legislative regulation and control, provided such classification is not an arbitrary one, and is based upon some substantial difference which bears a proper relation to the classification.

[See 6 R. C. L. 373-375.]

Public utilities — right of municipal corporation to operate.

11. The legislature may authorize and empower municipal corporations to own and operate public utilities.

[See 19 R. C. L. 717-719.]

— power of legislature over rates.

12. The state has the right to prescribe rates and charges by private corporations and persons for the operation of public utilities that shall produce a reasonable profit or return on their entire investment and outlay, and, on the other hand, to limit the rates and charges of utilities owned by municipalities so that they will only be sufficient to meet outlays and expenses of every kind by reason of their ownership and operation.

[See 9 R. C. L. 1190; 12 R. C. L. 897; 19 R. C. L. 764, 765.]

Legislature — delegation of power to municipal corporation.

13. The legislature may delegate to municipalities the right of regulation and control of public utilities owned and operated by the municipalities.

Constitutional law — what is local or special law.

14. A law is not local or special in the constitutional sense if it operates in the same manner upon all persons in like circumstances.

[See 6 R. C. L. 418.]

Statutes — repeal by implication.

15. The provisions of a statute relating to the control of public utilities owned by municipal corporations are not repealed by implication by a statute dealing with the regulation and control of public utilities generally.

[See 25 R. C. L. 920.]

Municipal corporation — capacity in which it operates public utilities.

16. A municipal corporation which supplies its inhabitants with light, gas, or water acts in its capacity as a private corporation, and not in the exercise of its powers of local sovereignty.

[See 19 R. C. L. 764.]

Constitutional law — due process — power to discriminate in rates.

17. A private corporation operating a public utility in competition with one owned and operated by a municipality is not deprived of its property without due process of law by the fact that the control of rates of the latter is vested in the municipality, and not in the public utilities commission, which controls the rates to be charged by the private corporation.

Courts — wisdom of municipal ownership of public utilities — power over question.

18. The wisdom of municipal ownership of public utilities is a question for the legislature, not for the courts.

[See 6 R. C. L. 107.]

APPEAL by complainant from a decree of the Circuit Court for Sangamon County (Smith, J.), dismissing a bill filed to enjoin defendant from operating a public utility alleged to be injurious to, and in competition with, complainant's business. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. William L. Patton and P. B. Warren, for appellant:

The right of complainant to maintain the bill on the basis of unfair and illegal competition is undeniable.

Memphis Street R. Co. v. Rapid Transit Co. 133 Tenn. 99, L.R.A.1916B, 1149, 179 S. W. 635, Ann. Cas. 1917C, 1045; *Bartlesville Electric Light & P. Co. v. Bartlesville Interurban R. Co.* 26 Okla. 453, 29 L.R.A.(N.S.) 81, 109 Pac. 228; *Tulsa Street R. Co. v. Okla-*

homa Union Traction Co. 27 Okla. 339, 113 Pac. 180; *Millville Gaslight Co. v. Vineland Light & P. Co.* 72 N. J. Eq. 305, 65 Atl. 504; *Ashley Tri-County Mut. Teleph. Co. v. New Ashley Teleph. Co.* 92 Ohio St. 336, P.U.R. 1916B, 401, 110 N. E. 959; *Farmers' M. Co-op. Teleph. Co. v. Boswell Teleph. Co.* 187 Ind. 371, P.U.R.1918E, 172, 119 N. E. 513; *Lindsley v. Dallas Consol. Street R. Co.* — Tex. Civ. App. —, 200 S. W. 207; *Citizens Electric*

Illuminating Co. v. Lackawanna & W. Valley R. Co. 255 Pa. 176, 99 Atl. 465.

The use of the municipally owned electric light plant is in two widely diverse functions. In operating to light the streets it is acting in a governmental capacity, in which it may be excepted from the regulation imposed upon private plants; but in operating commercially, the municipality acts in a purely private capacity, and is, *quoad hoc*, no different from a private corporation engaging in the same business.

Wagner v. Rock Island, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Chicago v. Selz, S. & Co.* 104 Ill. App. 376; *Litchfield v. Litchfield Water Supply Co.* 95 Ill. App. 647; *Chicago v. University of Chicago*, 131 Ill. App. 361; *Davis v. Abstract Constr. Co.* 121 Ill. App. 121; *Holmes v. Chicago*, 203 Ill. App. 445; *People ex rel. Brockamp v. Schlitz Brewing Co.* 261 Ill. 22, 103 N. E. 555; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Richland County v. Lawrence County*, 12 Ill. 1; *Re Rapid Transit R. Comrs.* 197 N. Y. 96, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366; *Davoust v. Alameda*, 149 Cal. 69, 5 L.R.A.(N.S.) 536, 84 Pac. 760, 9 Ann. Cas. 847, 20 Am. Neg. Rep. 7; *Fisher v. New Bern*, 140 N. C. 506, 5 L.R.A.(N.S.) 542, 11 Am. St. Rep. 857, 53 S. E. 342; *Brantman v. Canby*, 119 Minn. 396, 43 L.R.A.(N.S.) 862, 138 N. W. 671; *Western Sav. Fund Soc. v. Philadelphia*, 81 Pa. 175, 72 Am. Dec. 730; *Baily v. Philadelphia*, 184 Pa. 594, 39 L.R.A. 837, 63 Am. St. Rep. 812, 39 Atl. 494; *Wigal v. Parkersburg*, 74 W. Va. 25, 52 L.R.A.(N.S.) 465, 81 S. E. 554; *State Journal Printing Co. v. Madison*, 148 Wis. 396, 134 N. W. 909; *Hinze v. Iola*, 92 Kan. 779, 142 Pac. 947, Ann. Cas. 1916B, 281; *Woodward v. Livermore Falls Water Dist.* 116 Me. 86, L.R.A.1917D, 678, 100 Atl. 317; *Oakes Mfg. Co. v. New York*, 206 N. Y. 221, 42 L.R.A.(N.S.) 286, 99 N. E. 540; *Higginson v. Treasurer (Higginson v. Slatery)* 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523; *Audit Co. v. Louisville*, 107 C. C. A. 467, 185 Fed. 349; *Karpenski v. South River*, 83 N. J. L. 149, 83 Atl. 639; *Keever v. Mankato*. 113 Minn. 55, 33 L.R.A.(N.S.) 339, 129 N. W. 158, 775, 1 N. C. C. A. 187, annotated in Ann. Cas. 1912A, 216; *Hodgins v. Bay City*, 156

Mich. 687, 132 Am. St. Rep. 546, 121 N. W. 275; *Henry v. Lincoln*, 93 Neb. 331, 50 L.R.A.(N.S.) 174, 140 N. W. 665; *Brantman v. Canby*, 119 Minn. 396, 43 L.R.A.(N.S.) 862, 138 N. W. 671; *State ex rel. W. J. Armstrong Co. v. Waseca*, 122 Minn. 348, 46 L.R.A.(N.S.) 437, 142 N. W. 319; *Bailey v. New York*, 3 Hill, 531; *Palestine v. Siler*, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345; *Eaton v. Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541, 20 Am. Neg. Rep. 504; *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953; *Riley v. Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915D, 743, 7 N. C. C. A. 191; *Brown v. Salt Lake City*, 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, note in 14 Ann. Cas. 1004; *Piper v. Madison*, 140 Wis. 311, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep. 1078, 122 N. W. 730; *Winona v. Botzet*, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487, 1117, 17 Am. Neg. Rep. 445; *Aschoff v. Evansville*, 34 Ind. App. 25, 72 N. E. 279; *Barron v. Detroit*, 19 L.R.A. 452, note; *Esberg-Gunst Cigar Co. v. Portland*, 34 Or. 282, 43 L.R.A. 435, 75 Am. St. Rep. 651, 55 Pac. 961.

If, as contended by the city, § 10 exempts municipally operated commercial plants from the jurisdiction of the public utilities commission, it is void, as being in violation of both the state and Federal constitutional provisions against "class legislation," because it is a "special immunity" granted to the commercially operated plant of the municipality, relieving it from a regulation imposed on the like plant of an individual or private corporation.

Galena & C. U. R. Co. v. Dill, 22 Ill. 264; *People ex rel. Peabody v. Chicago Gas Trust*, 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550; *Dike v. State*, 38 Minn. 366, 38 N. W. 95; *State v. Nashville, C. & St. L. R. Co.* 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; *People ex rel. Danville v. Fox*, 247 Ill. 402, 93 N. E. 302; *School Dist. v. St. Joseph F. & M. Ins. Co.* 103 U. S. 707, 26 L. ed. 601; *People ex rel. Kewanee v. Kewanee Light & P. Co.* 262 Ill. 255, 104 N. E. 680; *L'Hote v. Milford*, 212 Ill. 418, 103 Am. St. Rep. 234, 72 N. E. 399; *Mathews v. People*, 202 Ill. 389, 63

L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; *Badenoch v. Chicago*, 222 Ill. 71, 78 N. E. 31; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 541, 46 L. ed. 682, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *People v. Chicago*, 256 Ill. 564, 43 L.R.A.(N.S.) 954, 100 N. E. 194, Ann. Cas. 1913E, 305; *Starne v. People*, 222 Ill. 189, 118 Am. St. Rep. 389, 78 N. E. 61; *State v. Nashville, C. & St. L. R. Co.* 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; *Re Case*, 20 Idaho, 128, 116 Pac. 1037; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679, 705; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Richey v. Cleveland, C. C. & St. L. R. Co.* 176 Ind. 542, 47 L.R.A.(N.S.) 121, 96 N. E. 694.

There being a reasonable construction of the exception, i. e., that municipally owned plants are excepted from the regulation of the Public Utilities Act so long as they operate only in their governmental function, it is the duty of the court to adopt the construction which will avoid all doubt as to the constitutionality of the act, and hold that municipal plants operated in their governmental function are exempt from the Public Utilities Act, but, when operated commercially, in the private function, are subject to the regulation of that act.

Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886; *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22; *Henry v. Lincoln*, 93 Neb. 331, 50 L.R.A.(N.S.) 174, 140 N. W. 665; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Kline v. Minnesota Iron Co.* 93 Minn. 63, 100 N. W. 681; *Bradford Constr. Co. v. Heflin*, 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077; *Missouri P. Co. v. Haley*, 25 Kan. 35; *Beleal v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 23, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; *State*

v. Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D, 22; *State Public Utilities Commission v. Monarch Refrigerating Co.* 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528.

When the object attempted to be accomplished by the Public Utilities Act, its occasion and necessity, and the evils of the existing law, are considered, it is clear that the legislature could not have intended to exempt commercially operated municipal plants from the control of the commission.

36 Cyc. 1110; *Kehl v. Taylor*, 275 Ill. 346, 114 N. E. 125, Ann. Cas. 1918D, 948; *State Public Utilities Commission v. Monarch Refrigerating Co.* 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528; *State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co.* 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953; *State ex rel. Bernero v. McQuillin*, 246 Mo. 517, 152 S. W. 347.

The rate-fixing power lies with the legislature until it is granted to a municipal body; the legislature has the right to resume the grant, and the rate-fixing power granted by § 1 of the Municipal Ownership Act is repealed by the Public Utilities Act, and vested in the public utilities commission, and all rates for service must be fixed by the city under §§ 33 and 34 of the Public Utilities Act.

Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, L.R.A.1915F, 744, 142 N. W. 491, Ann. Cas. 1915A, 911; *Charleston Consol. R. Lighting Co. v. Charleston*, 92 S. C. 127, 75 S. E. 390; *Minnesota General Electric Co. v. Minneapolis*, 194 Fed. 215; *Union Electric Light & P. Co. v. St. Louis*, 253 Mo. 592, 161 S. W. 1166; *California-Oregon Power Co. v. Grants Pass*, 203 Fed. 173; *Chicago v. Burke*, 226 Ill. 191, 80 N. E. 720; *Cantrell v. Seaverns*, 168 Ill. 165, 48 N. E. 186; *Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255; *Pavey v. Utter*, 132 Ill. 489, 24 N. E. 77; 26 Am. & Eng. Enc. Law, 2d ed. 731; *Dingman v. People*, 51 Ill. 277; *New York C. R. Co. v. Stevenson*, 277 Ill. 474, 115 N. E. 633; *People ex rel. Hoyne v. Fisher*, 274 Ill. 116, 113 N. E. 47; *Merlo v. Johnston City & B. M. Coal & Min. Co.* 258 Ill. 328, 101 N. E. 525; *State v. Davis*, 70 Md. 237, 16 Atl. 529; *State ex rel. Gilbert v. Halliday*, 63 Ohio St.

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165, 57 N. E. 1097; Bailey v. Drane, 96 Tenn. 16, 33 S. W. 573; Palestine v. Siler, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345; Ladd v. Jones, 61 Ill. App. 584; Curry v. Lehman, 55 Fla. 847, 47 So. 18; Kane v. Kansas City, Ft. S. & M. R. Co. 112 Mo. 34, 20 S. W. 532; Masterson v. Whipple, 27 R. I. 192, 61 Atl. 446; Ensley v. State, 172 Ind. 198, 88 N. E. 62.

Messrs. B. L. Catron and Stevens & Herndon, for appellee:

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature; but this intention must be the intention expressed in the statute; and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.

36 Cyc. 1106; Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; Beardstown v. Virginia, 76 Ill. 34.

In the construction of statutes it is the duty of the court to take words found in the statute, and to give to each its ordinary, usual meaning, and not to qualify words there found by introducing other words which would change the effect of the act, to make it comport more nearly to what we might think it ought to be.

Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174; Crozer v. People, 206 Ill. 464, 69 N. E. 489; People ex rel. Cameron v. Flynn, 265 Ill. 414, 106 N. E. 961; People ex rel. Krebs v. Jacksonville & St. L. R. Co. 265 Ill. 550, 107 N. E. 237; People ex rel. Brokaw v. Painter, 267 Ill. 473, 108 N. E. 683; Bigelow v. Burnside, 269 Ill. 324, 109 N. E. 1045; Frye v. Chicago, B. & Q. R. Co. 73 Ill. 399; 36 Cyc. pp. 1114, 1115; Dwarrris, Stat. § 200; Cooley, Const. Lim. § 55.

Defendant has power to own and operate an electric light plant, and to sell its product within or without the limits of the city, to private persons or corporations, and to fix the rates and charges for services rendered by it, and to make all needful rules and regulations in relation thereto, without complying with the provisions of the Public Utilities Act.

Chicago v. O'Connell, 278 Ill. 591, 8 A.L.R. 916, P.U.R.1917E, 730, 116 N. E. 210.

The Municipal Ownership Act and the Public Utilities Act were considered and passed practically to-

gether at the same session of the legislature; and, so far as their provisions relate to the same subject-matter, said acts should be considered and construed together, in *pari materia*, and thereby made consistent and harmonious with each other, so as to give full force and effect to the provisions of both acts, and to each part thereof.

36 Cyc. 1147; Gale v. Knopf, 193 Ill. 245, 62 N. E. 229; Mette v. Feltgen, 148 Ill. 357, 36 N. E. 81.

The regulation and control of municipal public utilities by the municipality, and of privately owned public utilities by the state utilities commission, does not constitute improper classification or special immunity, and therefore does not violate either the state or Federal Constitutions.

Tarantina v. Louisville & N. R. Co. 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913B, 1058; Booth v. Opel, 244 Ill. 317, 91 N. E. 458; Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; Douglas v. People, 225 Ill. 536, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162, 80 N. E. 341; Burton Stock Car Co. v. Traeger, 187 Ill. 9, 58 N. E. 418; Cleveland, C. C. & St. L. R. Co. v. Randle, 183 Ill. 364, 55 N. E. 728; People ex rel. Green v. Cook County, 176 Ill. 576, 52 N. E. 334; People ex rel. Henderson v. Onahan, 170 Ill. 449, 48 N. E. 1003.

The legislature may regulate and control public utilities directly, under the police power of the state, or it may exercise the power indirectly, by conferring the power upon agencies created or designated by the legislature.

Chicago v. O'Connell, 278 Ill. 591, 8 A.L.R. 916, P.U.R.1917E, 730, 116 N. E. 210; State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, P.U.R.1917B, 1046, 114 N. E. 325, Ann. Cas. 1917C, 50; State Public Utilities Commission v. Monarch Refrigerating Co. 267 Ill. 523, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528.

Repeals by implication are not favored by the courts, and are never adjudged unless the two acts are irreconcilable, or the intent to repeal is otherwise clearly expressed; particularly where the two acts relate to the same subject-matter and were passed at the same session of the legislature.

36 Cyc. 1071; Ridgway v. Gallatin County, 181 Ill. 521, 55 N. E. 146; People ex rel. School Inspectors v. Mottinger, 215 Ill. 256, 74 N. E. 150;

People ex rel. Georgetown v. Murphy, 202 Ill. 493, 67 N. E. 226; Chicago v. Chicago & O. P. Elev. R. Co. 261 Ill. 478, 104 N. E. 240.

Duncan, J., delivered the opinion of the court:

Appellee, the city of Springfield, owns and operates an electric light plant, produces electricity for its own use, and sells electricity not required for its purposes to private consumers at about one half the cost for which it can be procured from other sources. Appellant is a private corporation engaged in the production and sale of electricity in the city of Springfield, and has complied with the provisions of the Public Utilities Act (Hurd's Rev. Stat. 1917, chap. 111a). It filed its bill for an injunction against appellee in the circuit court of Sangamon county, alleging, in substance, that appellee, in its production and sale of electricity to private consumers, is violating § 35 of the Public Utilities Act, providing that no public utility shall undertake to perform any service or to furnish any product or commodity unless and until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product, or commodity, have been filed and published in accordance with the provisions of that act; also that appellee is violating §§ 33 and 34 of said act, which require the filing with the public utilities commission and the printing, posting, and keeping open to public inspection of schedules showing all rates, charges, and classifications in force for any product furnished or service rendered by it as such public utility. The city filed an answer, to which appellant filed exceptions. There was a hearing on the bill, answer, and exceptions, and the court entered a decree dismissing the bill for want of equity.

The theory of the bill is that appellant and appellee are competitors in business, are operating public utilities, and are both subject to the Public Utilities Act; that appellee, not having complied with the re-

quirements of the act, is prohibited by its terms from engaging in the business; and that appellant is entitled to an injunction to prevent the illegal competition.

The parties have treated the issues in the case as questions of law, precisely as if they had arisen on a demurrer to the bill. In disposing of this appeal the court will also indulge in that same assumption.

The question for decision in the case is whether or not a municipality in this state, owning and operating an electric light plant for the production of electricity for its own use and also for the sale thereof to private consumers, is subject to the provisions of the act and to the supervision of the public utilities commission.

We are disposed to agree with the proposition of appellant that a private corporation lawfully operating a public utility may

**Public utility—
injunction
against rival.**

have an injunction against another private corporation operating, without authority of law, a similar utility which competes with and injures the former's business. Municipal corporations, however, are expressly excepted from the terms and provisions of the Public Utilities Act by § 10 thereof, and in a very emphatic manner, so much so that there can be no question that the act was not intended to apply to any public utility owned by a city. The following definitions are found in said § 10:

"The term 'public utility,' when used in this act, means and includes every corporation, company, association, joint-stock company or association, firm, partnership, or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter: (a) May own, control, operate or manage, within the state, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons

or property or the transmission of telegraph or telephone messages between points within this state; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water.

"The term 'company,' when used in this act in connection with a public utility, includes any corporation, company, association, joint-stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever, owning, holding, operating, controlling or managing such a public utility, but not municipal corporations.

"The term 'corporation,' when used in this act, includes any corporation, company, association, joint-stock company or association, but not municipal corporations."

The Public Utilities Act was passed June 20, 1913, as House Bill No. 907, and was approved June 30, 1913. It did not take effect until January 1, 1914, by special provision, because of the fact that that time was considered necessary for the appointment of the public utilities commission created thereby and for the railroad and warehouse commission to prepare its books and records, to be taken over by the public utilities commission. The Municipal Ownership Act (Laws 1913, p. 455) was passed June 20, 1913, as Senate Bill No. 538, was approved June 26, 1913, and became effective July 1, 1913. By § 1 of the latter act any city of this state is given the power to acquire, construct, own, and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants, and to contract for, purchase, and sell to private persons or corporations the products or service of such utility, to fix rates and charges for the service rendered by such public utilities, and to make all needful rules and regulations in relation thereto. The term "utility," when used in the act, is defined thereby to mean and include any

plant, equipment, or property, and any franchise, license, or permit, used or to be used for the production, storage, transmission, sale, delivery, or furnishing of cold, heat, light, power, or for the conveyance of oil or gas by pipe line, etc. Section 12 of the act provides that the charges for the service rendered by means of any public utility of any city shall be high enough to produce a revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity. Section 13 thereof provides that the accounts for the public utility shall be kept distinct from other city accounts, and in such manner as to show the true and complete financial results of such city ownership and operation, and so as to show the actual cost to such city of the public utility owned, all cost of maintenance, extension, and improvement, all operating expenses of every description, and the amounts set aside for sinking fund purposes, and also reasonable allowances for interest, depreciation, and insurance, and estimates of the amount of taxes that would be chargeable against such property if owned by a private corporation. It further provides that the city council shall cause to be printed annually for public distribution a report showing the financial results of such city ownership and operation, in form as aforesaid, and that the accounts of such utility, so kept, shall be examined once each year by an expert accountant, who shall report to the city council the result of his examination.

As will be seen from the foregoing, the Municipal Ownership Act is a complete act within itself, authorizing cities to acquire, own, and operate public utilities within their borders, and to regulate the same and fix rates and charges as aforesaid, and the act furnishes the rea-

son for excepting such public utilities from the jurisdiction of the public utilities commission by the provisions of § 10 of the Public Utilities Act.

Appellant insists that, if such public utilities owned and operated by cities should be held to be excepted from the jurisdiction of the public utilities commission, as provided in said § 10, such a construction would render that exception void because in violation of § 22 of article 4 of the state Constitution, prohibiting the legislature from passing any local or special law granting to any corporation, association, or individual any special privileges, and also in violation of the 14th Amendment to the Federal Constitution, which prohibits the states from denying to any person the equal protection of the laws. In the determination of the validity or invalidity

**Statutes—
construction—
validity of
special
provisions.**

of particular provisions of public laws, courts should not be unmindful of the effect upon the en-

tire enactment of the holding of any particular provision invalid. If the exception in § 10 is of such import that the other sections of the Public Utilities Act, without such exception, would cause results not contemplated or desired by the legislature, then the entire statute must be

**—effect of
holding pro-
vision invalid.**

held invalid if we hold the exception invalid. Connolly v.

Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. On the other hand, if § 10 is held to be invalid and the balance of the act valid, then a large portion of the Municipal Ownership Act must likewise be held to be invalid, as a bare inspection of the act will show.

The purpose of the Public Utilities Act expressed in its title is to provide for the regulation of public utilities. If municipal corporations are made subject to the act, will a result be produced contrary to the intention of the legislature? The legislature, by the exception in § 10, has answered this question and has

left nothing to inference, unless, as contended by appellant, § 83 of said act has expressed a different and controlling intention by this language: "If any section, subdivision, sentence or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act." The statute must be considered as a whole, and the intention derived from a consideration of all of its clauses and provisions. The statute, we must infer, was adopted in accordance with a plan. *State v. Gantz*, 124 La. 535, 24 L.R.A. (N.S.) 1072, 50 So. 524. That plan was that all private corporations owning and operating public utilities should be bound by all the provisions of the act, and that all municipal corporations should be excluded from the provisions of the act. Public utilities owned and operated by municipalities were to be governed and controlled by the provisions of the Municipal Ownership Act, and regulated only by such municipalities. It is not possible to get away from these conclusions. To strike out the provisions of § 10, exempting municipalities from the terms and provisions of the Public Utilities Act, and to then hold that the remainder of the act is valid, would be the making of a law by this court that the legislature never intended to make, and at the same time would be nullifying a large portion of the Municipal Ownership Act which the legislature clearly intended should be and remain effective. While it is well settled by adjudications of this and other courts that, if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections allowed to stand and be in force, yet it is also the inflexible rule that, where a portion of an act is valid

**—statute invalid
in part, invalid
in toto.**

and a portion invalid, and the court cannot say that the legislature would have passed the act with the void portion eliminated, then the en-

tire act must be held invalid. *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; *Cornell v. People*, 107 Ill. 372; *Hinze v. People*, 92 Ill. 406; *People ex rel. Miller v. Cooper*, 83 Ill. 585; *Mathews v. People*, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927.

We cannot agree with appellant's contention that the saving clause in § 83 of the Public Utilities Act will justify this court in holding invalid the exception in § 10 without affecting the act as a whole. Section 83 was not intended to nullify any rule of statutory construction, and must receive a construction consistent with the rules of constitutional law. While this section may be some indication of legislative intention, yet, in construing it, we must give due consideration to the rules heretofore laid down by this court in the interpretation of statutes. *State ex rel. Wausau Street R. Co. v. Bancroft*, 148 Wis. 124, 38 L.R.A. (N.S.) 526, 134 N. W. 330. We cannot, under such rules, ignore the fact that the enforcement of this section to the letter would not only nullify the exceptions in § 10 aforesaid, but would practically nullify the whole Municipal Ownership Act.

The history of the legislation under consideration furnishes the court material aid in determining whether or not the legislature would have passed the act with the exception in § 10 eliminated. It appears from the senate and house journals, as quoted by appellant, that the two acts were introduced and passed as twin measures. They were passed after a legislative inquiry made by a committee appointed under a joint resolution passed in 1911, authorizing an inquiry into public utilities and also municipally owned public utilities. A spirited contest appears to have been waged concerning the Public Utilities Act in reference to the senate's "home rule" amend-

ments, giving to cities the right to regulate public utilities. The house refused to concur in those amendments, and later the senate receded from its amendments and permitted the house bill to become a law, and the house permitted the senate bill to become a law. The governor submitted the house bill to the attorney general for his opinion as to its form and constitutionality. In that opinion the attorney general said: "The bill as originally framed provides for the exercise by each city of power and authority to regulate its own public utilities, but the provisions on that subject were stricken out before the bill was finally adopted. However, the general assembly has passed senate bill No. 538, which, as I have already informed you, is constitutional and valid, and which by its terms authorizes cities to own and operate public utilities within their limits, and § 10 of house bill No. 907 especially exempts municipally owned or operated public utilities from the operation of the act." Reports & Opinions of Attorney General, 1913, p. 46. The efforts of the governor, who signed these measures, to get the home-rule feature incorporated in the house bill, are well known by everybody who is familiar with the contest over these measures during the time they were pending in the legislature. It seems to us that the conclusion must follow that, if the exception contained in § 10 had been stricken by amendment, the Public Utilities Act would never have been passed by that legislature, as the act would then have authorized the public utilities commission to regulate and fix rates for public utilities owned and operated by municipalities, contrary to the provisions of the Municipal Ownership Act. This court would, in our judgment, be virtually making a law by so amending the act, and holding the Public Utilities Act valid as amended. Courts have no power to make laws.

If appellant's contention is cor-

—effect of saving clause.

Courts—power to make laws.

rect that the exception in § 10 creates a special or local law and grants special privileges, in violation of our Constitution, this court would have no alternative but to hold it invalid, even though, in doing so, we would be compelled to declare the entire Public Utilities Act unconstitutional.

Constitutional law—special privileges—exemption of municipal corporation from public utility laws.

and operated by municipalities from the provisions of the statute

Definition—corporation.

violates the Constitution. The word "corporation," as used in § 22 of article 4 of our Constitution, does include municipal corporations. *People ex rel. Danville v. Fox*, 247 Ill. 402, 93 N. E. 302. But municipal corporations may form a separate and distinct class from private corporations. The constitutional provision does not mean that the same rule shall apply to every individual in the state under all circumstances, but only under substantially the same circumstances; and laws may be valid, though operating only upon particular persons or classes, if there is a valid reason for such particular operation. *Condon v. Chicago*, 249 Ill. 596, 94 N. E. 976; *Tarantina v. Louisville & N. R. Co.* 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913B, 1058; *Dawson Soap Co. v. Chicago*, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; *Douglas v. People*, 225 Ill. 536, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162, 80 N. E. 341; *Casparis Stone Co. v. Industrial Bd.* 278 Ill. 77, 115 N. E. 822. Of course, an arbitrary designation of persons is not permissible. The only reason which is recognized as valid is a substantial distinction, which differentiates in important particulars the particular persons to whom it applies from all other persons, having some reasonable and just relation to the purpose of the law. *People ex rel. Kewanee v. Kewanee Light & P. Co.* 262 Ill. 255,

104 N. E. 680. The basis of the two statutes in question for making two distinct classes of public utilities—those owned and operated by private corporations and those owned and operated by municipalities—is the supposition that there exists some valid reason why both of them cannot or should not be subject to all the provisions of the Public Utilities Act, and be regulated and rates fixed for them in accordance with the provisions of that act. If such a valid reason does exist, the legislature did not violate any constitutional provision in enacting the two separate acts for the regulation and control of the two classes of public utilities. The legislature may classify persons or occupations for the purpose of legislative regulation and control, provided such classification is not an arbitrary one, and is based upon some substantial difference which bears a proper relation to the classification. *People v. Schenck*, 257 Ill. 384, 44 L.R.A.(N.S.) 46, 100 N. E. 994, Ann. Cas. 1914A, 1129.

Constitutional law—right to classify for legislative purposes.

The purposes of the Public Utilities Act were to prevent exorbitant rates, unjust discrimination, and undue preferences in rates between different consumers, and, at the same time, to protect public utilities from local influences which would compel them to render services at such low rates that efficient services to the public would be thereby impaired. To enable consumers to protect themselves against exorbitant rates and unjust discrimination without compelling them, in the first instance, to resort to their right to a hearing under the act on the question of rates, §§ 33–35 were incorporated in the Public Utilities Act, requiring the filing of schedules of rates and the posting and publishing of the same. No such requirement is necessary for the protection of the consumer when the utility is owned and operated by the municipality. Before the enactment of the Public Utilities Act the records of

public utilities owned by private corporations or private persons were free from public inspection. Municipalities speak only by their records, which are always open to inspection. Under § 1 of the Municipal Ownership Act, granting municipalities the power to own and operate public utilities, and fix the rates and charges for the services rendered by them, and to make all needful rules and regulations in relation thereto, municipalities can only act by ordinances and resolutions passed in the manner required by statute. Municipalities, under the Municipal Ownership Act, are limited in rates and charges for the product furnished by their public utilities, and cannot operate them at a profit to the same extent as can private corporations, associations, or persons owning like utilities. They are required, under the act governing them, to keep separate accounts of the moneys received from the operation of their utilities, and such funds cannot be used as revenues except to discharge their obligations and expenses in the operation of the utilities. Their charges for such services are simply to be high enough to produce revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund sufficient to meet all outstanding bonds or certificates at maturity, issued on account of such utilities. The statute does not contemplate that the rates shall be higher or lower than for the purposes aforesaid, no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities.

The legislature had the right and

Public utilities—
right of
municipal corporation to
operate.

power to authorize and empower municipalities to own and operate public utilities. That is

not questioned in this case. It is not questioned that the legislature had

the power to prescribe the rates and charges or the limits of the same to municipalities, as it has done in the Municipal Ownership Act. The right to fix rates for all public utilities is vested, in the first instance, in the state. The state has the right to prescribe rates

—power of
legislature over
rates.

and charges by private corporations and persons for the operation of public utilities that shall produce a reasonable profit or return over and above and on their entire investment and outlay, and, on the other hand, to limit the rates and charges of utilities owned by municipalities so that they will only be sufficient to meet outlays and expenses of every kind by reason of their ownership and operation, as provided by the Municipal Ownership Act. It is contemplated that private corporations and persons shall realize profits. The legislature had the right to assume that the rates and charges of each of these two classes of public utilities would not and could not be the same to consumers. It is clear, therefore, that the legislature acted within its constitutional rights and powers in enacting the two statutes and making different provisions in so far as the same were necessary to accomplish the purposes for which the two acts were enacted. It is equally clear that the legislature had the right and

power to delegate
to the municipal-
ities the right of
regulation and control of such municipally owned plants. Such right is clearly recognized not only in this state, but in other states. It might have given the public utilities commission the right to fix the rates and charges of plants owned by municipalities, in accordance with the provisions of the Municipal Ownership Act, as well as the right to regulate and fix charges for privately owned public utilities under the Public Utilities Act, had it seen fit to do so. The fact that it has designated municipi-

legislature—
delegation of
power to
municipal
corporation.

palities as the proper bodies that shall regulate and fix the rates to be charged by utilities owned by them can furnish no cause for complaint to appellant, as the rates that appellant may charge under the Public Utilities Act are necessarily fixed upon a different basis, and may or may not be the same as the rates and charges that may be fixed under the Municipal Ownership Act, even in the same city.

There is another reason for holding that neither of the two acts aforesaid violates § 22 of article 4 of our Constitution, or the 14th Amendment to the Federal Constitution. A law is not local or special, in a constitutional sense, if it operates in the same manner upon all persons in like circumstances. "A

Constitutional law—what is local or special law.

law general in its character may extend only to particular classes and not

be obnoxious to the provisions of the Constitution if all persons of the same class are treated alike under similar circumstances and conditions.' . . . A law is general, not because it embraces all the governed, but that it may from its terms, when many are embraced in its provisions, embrace all others when they occupy like positions to those who are embraced. Such a law must be based upon some substantial difference between the situation of a class or classes and another class or classes to which it does not apply." *Chicago, B. & Q. R. Co. v. Doyle*, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914B, 385. When tested by the foregoing rules, it will readily appear that the Public Utilities Act does not violate the constitutional provision aforesaid by reason of the exception in § 10. The Municipal Ownership Act for the same reason is equally unobjectionable, so far as it is material to the issues in this case.

There is no reason for appellant's contention that any part of the Municipal Ownership Act is repealed by implication by the provisions of the Public Utilities Act, be-

cause the latter act was passed after the enactment of the former. Whether or not public utilities owned by municipalities shall be placed upon a different basis from public utilities owned by private corporations, associations, or persons, for regulation and for fixing their rates and charges, is a question solely for the legislature to determine, as is also the question whether or not they shall be regulated and rates fixed for them by different tribunals or by the same tribunal. There was a good and substantial reason for the legislature dividing public utilities into the two classes aforesaid, and making laws specially applicable to each of them, as aforesaid. When we consider the acts in this light, their several provisions are in complete harmony, and are not so antagonistic to each other in the matters complained of by appellant as to leave any

Statute—repeal by implication.

reasonable ground for the contention that any provision of the Municipal Ownership Act is repealed by implication by any provision of the other act.

We have no disagreement with the general proposition argued by appellant that a municipal corporation which supplies its inhabitants with light, gas, or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. This general principle has been announced in a number of cases in this and other jurisdictions, mostly in cases for personal injuries arising on the question of the liability of cities operating municipally owned public utilities. We may concede that the operation by a municipality of an electric light plant for the furnishing of light or power to private consumers, for gain, cannot in any sense be the performance of a governmental function. Such established principle can furnish no reasonable basis for appellant's argument in this case that such mu-

Municipal corporation—capacity in which it operates public utilities.

municipalities must be put in the same class with private corporations or persons operating public utilities, for the purpose of regulation and of fixing their rates and charges in operating such public utilities. It might just as well be argued that corporations operating steam railroads should be put in the same class, for all purposes of legislation, with corporations operating street railroads, because they both carry for hire passengers and freights of all kinds. *Chicago, I. & L. R. Co. v. Railroad Commission*, 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011.

Appellant suggests that, if we construe the exception in § 10 of the Public Utilities Act as simply excepting municipal plants that only produce electricity for the use and requirements of the municipalities when acting in their governmental capacity, such a construction would render the whole act valid. It is argued that such a construction is permissible under the well-known rule that words in a statute may be modified, altered, or supplied so as to obviate any repugnance or inconsistency with legislative intention, although in so doing particular provisions of an act may not be read or construed according to their literal reading. *State Public Utilities Commission v. Monarch Refrigerating Co.* 267 Ill. 528, P.U.R.1915D, 119, 108 N. E. 716, Ann. Cas. 1916A, 528. It is therefore urged that the exception should be read as if it were written, "except, however, such public utilities as are or may hereafter be owned or operated by any municipality *for its own use.*" This contention is fully answered already, we think, by our showing that there is no such repugnance or inconsistency in these statutes to be obviated, and there is, therefore, no necessity for invoking the rule suggested. Besides, it is

Statutes—
limitation by
construction.

clear that no such rule could be applied, in any event, without doing violence to the legislative intent. There can be no doubt whatever that the legislature in-

tended that public utilities owned and operated by municipalities should not be under the supervision and regulation of the public utilities commission in any way. There is also no reason for supposing that such municipally owned and operated plants as only produced electricity or other product for the use of the municipalities were intended to be excepted by § 10. Such a utility would not be a public utility any more than would a utility owned and operated by a private individual for his own use exclusively. The term "public utility" implies a public use, carrying with it the duty to serve the public and treat all persons alike; and it precludes the idea of service which is private in its nature and is not to be obtained by the public. *State Public Utilities Commission ex rel. Macon County Teleph. Co. v. Bethany Mut. Teleph. Asso.* 270 Ill. 183, P.U.R.1916A, 997, 110 N. E. 334, Ann. Cas. 1917B, 495. No such private utility could be considered as being subject to the provision of said act in the absence of any exception, and the legislature cannot be reasonably held to have made such a meaningless exception in this statute.

One of the statements made by appellant, and upon which it bases an argument that § 10 aforesaid, with its exceptions aforesaid, is unconstitutional, is that "any legislation which pretends to relieve the city of the same burdens of regulation imposed upon private corporations or individuals engaged in like enterprise is invalid." As we have already shown, municipally owned public utilities are not exempt from regulation by the Municipal Ownership Act as to rates and charges, and they are not exempt from the making of rates and charges that are reasonable and just and uniform for the same amount and character of service. Under the Municipal Ownership Act the consumers are just as completely protected from exorbitant rates

Constitutional
law—due process
—power to dis-
criminate in
rates.

and unjust discrimination as the consumers are under the Public Utilities Act. If the consumers had to depend entirely upon the municipalities to be kept free from the effects of unjust and exorbitant rates and unjust discrimination, then there might be some reason for appellant's contention. The consumers of the product of utilities of private, corporations and private persons operating under the Public Utilities Act may be just as much subject to be burdened with exorbitant and unjust rates and unjust discrimination under the action of the public utilities commission, if we are to assume that all public officials would be corrupt and unfair or inefficient when acting in such capacity. The public utilities commission may make serious mistakes in rating and in regulating public utilities, and so may officers of municipalities, acting in a similar capacity. We have no reason to assume that either one will intentionally be corrupt or unfair. There is little or no reason why either body might be more unfair or corrupt than the other. But the consumers in either case have the right to appeal to the courts to correct such abuses as may occur. Municipal officers under the Municipal Ownership Act cannot discriminate in rates, or make exorbitant and unjust rates to consumers, if they discharge their duties faithfully, honestly, and efficiently under that act. All their rates and charges fixed by ordinances or resolutions are subject to review by the courts to a like extent as the rates fixed by the public utilities commission for public utilities privately owned, although the matter of review may be had under a different law and by a different remedy. *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953; *Cincinnati v. Public Utilities Commission*, 98 Ohio St. 320, 3 A.L.R. 705, P.U.R. 1919C, 119, 121 N. E. 688; 2 *Abbott, Mun. Corp.* 1196.

The question whether or not the appellant or any other public utility or person may be injured or the

Public Utilities Act violated by a lessee of appellee is not in this case, as appellee has not leased and is not intending to lease its plant to any private corporation or person whatever, and appellant does not claim that there is to be such a leasing. Upon the same footing is the question whether or not appellee may sell its product to persons residing outside its corporate limits. We must, therefore, regard all such discussions by appellant as serving no useful purpose in this case, and as not proper to be further considered by us in this opinion.

Municipal ownership of public utilities may or may not be a wise policy for the state. It was a matter for the legislature, and not for this court, to determine. The act has been adopted, as aforesaid, and we find no legal reason why it should not be held valid as written, in so far as it is questioned in this case. Appellant's contention, therefore, that public utilities owned and operated by municipalities are subject to the same regulation and rates under the Public Utilities Act as those owned and operated by private corporations, and that it should be granted an injunction on the grounds contended for by it, cannot be sustained.

The decree of the Circuit Court is affirmed.

Dunn, Ch. J., and Cartwright and Farmer, JJ., dissenting:

In operating an electric light plant and selling electricity to individuals the city is not exercising its governmental powers, but its private or proprietary rights, and its duties and liabilities are the same as those imposed by law upon individuals engaged in the same business. It was so held in regard to the furnishing of water and gas in *Wagner v. Rock Island*, 146 Ill. 139, 154, 21 L.R.A. 519, 34 N. E. 545, where we said: "A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in

Courts—wisdom of municipal ownerships of public utilities—power over question.

the exercise of its powers of local sovereignty. If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating the two powers,—public and private,—regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." *Chicago v. Selz, S. & Co.* 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23; *Palestine v. Siler*, 225 Ill. 630, 8 L.R.A.(N.S.) 205, 80 N. E. 345. In *Butler v. Karb*, 96 Ohio St. 472, 117 N. E. 953, it is said: "That neither public nor private corporations may discriminate between members of the public with reference to rates and terms of service does not longer admit of controversy. This wholesome rule, long in force, has had frequent application, particularly to common carriers and utilities companies. A municipality operating a utility is not exempt therefrom. Acting in a proprietary capacity, we have seen, it should have the freedom of action of a private utility corporation, but it is also subject to the same restrictions as to practices of discrimination in rates and service." So far as a municipality is engaged in the commercial distribution of electricity, its rights and liabilities, powers, and duties, are measured by the same standard and governed by the same rules as apply to private corporations similarly engaged.

There is no doubt that the exception of municipalities owning or operating public utilities from the op-

eration of the Public Utilities Act, which applies to every other corporation, company, association, or individual, grants to such corporations a special privilege which such other corporations do not enjoy, and is therefore obnoxious to the provision of the state Constitution against special laws unless there exists some reasonable basis, having reference to the object of the legislation, for placing such municipalities in a class by themselves. The constitutional provision does not mean that the same rule shall apply to every individual in the state, under all circumstances, but only under substantially the same circumstances; and laws may be valid though operating only upon particular persons or classes of persons, if there is a valid reason for such particular operation. An arbitrary designation of persons is not permissible. The only reason which is recognized as valid is a substantial distinction which differentiates in important particulars, having some reasonable and just relation to the purpose of the law, the particular persons to whom it applies from all other persons. *People ex rel. Kewanee v. Kewanee Light & P. Co.* 262 Ill. 255, 104 N. E. 680.

A municipal corporation has no authority either to sell electricity to private consumers or to fix the rate at which it shall be sold within the municipality, in the absence of a statute enabling it to do so. In June, 1913, the general assembly passed and the governor approved a law which went into effect on July 1st, and gave to any city in the state the power to acquire, construct, own, and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants, and to contract for, purchase, and sell to private persons or corporations the products or service of such utilities, and to fix the rates and charges for the services rendered by such public utilities. Laws 1913, p. 455. This statute does not confer authority for the regulation

of public utilities upon municipalities. At the same session of the legislature another law was enacted which became effective on January 1, 1914, and is known as the Public Utilities Act. Laws 1913, p. 459. This act created a public utilities commission, to which it gave the general supervision of all public utilities, and upon which extensive powers of regulation were conferred. Among many other things, every public utility was prohibited from undertaking to perform any service or furnish any product or commodity unless or until the rates and other charges and classifications, rules, and regulations relating thereto, applicable to such service, product, or commodity, have been filed and published in accordance with the provisions of the act. Such rates, charges, or classifications, or any rule, regulation, practice, or contract relating to or affecting any rate or other charge, classification, or service, cannot be changed, unless the commission otherwise orders, except after thirty days' notice to the commission and to the public; no increase in any rate or charge can be made except upon a showing before the commission, and a finding by it that such increase is justified, and no greater or less rate can be charged for any product or service than that specified in the schedule at the time filed and in effect. Section 10 contained the clause which has been referred to, defining the term "public utility," and excepting utilities owned by municipalities from the definition. There is no doubt that the legislature intended that public utilities owned or operated by municipalities should not be under the supervision of the public utilities commission, or subject to its authority. There is no reason to suppose that this exemption was limited only to the operation of the utility in furnishing its product and service for the use of the municipality, and did not extend to the entire operation. On the contrary, there was no occasion to except an electric

light plant, for instance, which a city operated only for lighting the streets and public places and property, and which had no private consumers. There was no need of all the detailed requirements of the Public Utilities Act in the case of a municipality which is the only consumer of the product of its plant. The exception applies to utilities owned by municipalities and operated commercially.

The purpose of the Public Utilities Act was the prevention of extortionate charges and unjust discriminations by public utilities. The authority to regulate public utilities is vested in the legislature, which may exercise it directly or through such governmental agencies as it may deem best. It might have given to each city in the state the power to regulate the rates to be charged by public utilities for their services, respectively, within the municipality. It did not do this, but it enacted a law authorizing each city to enter upon the commercial business of operating public utilities, and to fix its own rates, and it is not contended that this was beyond the legislative power. The Public Utilities Act, though passed at the same session, did not go into effect until six months later, and if there is any inconsistency between them, the later act must prevail. This act placed all public utilities under the supervision of the commission, and if the exception of utilities owned or operated by a municipality cannot be given effect, the acts are inconsistent. The one gives the public utilities commission supervision of the business of public utilities and control of rates, while the other gives the municipality the entire supervision and control of the business of any public utility it may own, and the regulation of its rates and charges. The effect of the two statutes is that public utilities engaged in commercial operation are divided into two classes; that is, those owned by a municipality, and all others. The former have the privilege of operation without re-

striction or supervision by the state; the latter have not, but must operate under the supervision and control of the public utilities commission. Is the difference of ownership a reasonable basis, having reference to the purpose of the legislation, for the difference in privilege? So far as this question is concerned, there is no difference in the character or purpose of the business transacted. No municipal, political, or governmental question is involved. The appellant and the appellee each owns and operates an electric plant and sells electricity for the purpose of profit to all persons who want to buy it. What relation has the ownership of their respective plants to the questions of unjust discrimination, extortionate charges, and unequal or inferior service, which the Public Utilities Act was intended to prevent? The consumers of the appellant's product may be the same persons as the consumers of the appellee's product, or neighbors, side by side. They may be required to pay extortionate rates or different rates for the same service, or, if they pay the same rate, the service may be inferior. The appellant's customer has a remedy. He may apply to the public utilities commission for relief, and, if the facts justify it, he is entitled to relief as a legal right. The appellee's customer has no remedy. He can apply only to appellee—the very authority of whose action complaint is made. In the one case, the controversy is submitted to a third party; in the other, to one of the parties to the controversy. The appellee's claim with reference to this classification is contained in the following extract from its brief: "The legislature has adopted its own classification of public utilities by authorizing the municipalities to regulate and control municipal public utilities, and the state commission to regulate and control privately owned public utilities. This is a reasonable classification, based upon the different conditions arising under municipal and private owner-

ship and operation. In the operation of a municipal public utility, the public officials are conducting the business for the people themselves, who are in a position to obtain such rates and regulation as may be reasonably required. On the other hand, privately owned utilities can only be controlled by an independent body, such as a state commission or other agency."

The persons who use the products or service of public utilities are entitled to the benefit of the Public Utilities Act, and are entitled to its protection against extortion, discrimination, and inferior service, by whomsoever furnished. The furnishing of such service is an ordinary commercial business, by whomsoever undertaken. Whether a public utility is owned by a private corporation or a municipal corporation, its relation to its customers is not different. They are under the same compulsion to use its service—are at its mercy to the same extent. If a customer is oppressed by extortionate charges, or discriminated against by a wrongful rate or inferior service, the wrong is the same whether done by a municipal corporation or a private corporation. The difference in ownership does not change the character of the wrong done, or justify the refusal of a prompt, adequate and complete remedy in one case which is granted in the other. The fact that, by organizing with others, complaining customers may be able, at some future election, to secure a change of administration which will, perhaps, have the ability and sense of justice voluntarily to correct the wrong, does not justify putting municipally owned public utilities in a class separate from other competing public utilities, and relieving them from the supervision of the public utilities commission.

The clause which excepts municipally owned or operated public utilities from the definition of a public utility in § 10 of the Public Utilities Act is unconstitutional. Section 83 of the act provides that

"if any section, subdivision, sentence or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act." The act can be effectively carried out after eliminating the unconstitutional clause, and it is not necessary to declare the whole act unconstitutional. If some of the provisions of an act of the general assembly are within the legislative power and others are beyond the legislative power, the former provisions may be held valid while the latter must be held invalid. Section 83 is not a mere declaration of a common-law rule, but is a declaration of the legislative intention. It expresses the intention that the legislative purpose to establish a commission, and give it authority for the regulation of public utilities, shall not be defeated by the unconstitutionality of any section, subdivision, sentence, or clause of the act. This general purpose of the act must be carried out, though parts of it

may be declared unconstitutional. The inclusion of municipal plants within the authority of the commission does not destroy the general legislative scheme; it merely modifies it in detail. The general assembly might have created the commission without exempting municipal corporations. Though it intended to exempt municipal corporations, it had the power to provide that, if such exemption were invalid, the act should still be valid without the exemption. This is the meaning of the declaration in § 83, and it is not the province of the court to say that the legislature did not mean what the words say, or did not know what they meant.

In our judgment the decree of the Circuit Court should be reversed.

Petition for rehearing denied April 13, 1920.

Affirmed by the Supreme Court of the United States November 7, 1921 (U. S. Adv. Ops. 1921-22, p. 38) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 24.

ANNOTATION.

Applicability of public utility acts to municipal corporations owning or operating a public utility.

The earlier cases on this question are discussed in the note in 10 A.L.R. 1432. As there stated, the statute involved in the reported case (*SPRINGFIELD GAS & E. CO. v. SPRINGFIELD*, ante, 929) expressly excluded municipally owned plants, the chief contest in that case being over the validity of the exclusion. That such an exclusion is valid is held in the reported case, and this conclusion is sustained by the United States Supreme Court upon appeal (U. S. Adv. Ops. 1921-22, p. 38) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 24.

In accord with the decision in *Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 10 A.L.R. 1425, 192 Pac. 25, it was held in *Los Angeles Gas & E. Corp. v. Public Service Dept.* (1921) — Cal. App. —, 197 Pac. 962, that the railroad commission was without

jurisdiction over a municipal corporation engaged in supplying electric energy to its inhabitants, and therefore the municipality could not be compelled to apply and obtain, as a condition precedent, a certificate of public convenience and necessity. That a municipality operating an electric light plant is not subject to the railroad commission is held also in *Sincerney v. Los Angeles* (1921) — Cal. App. —, 200 Pac. 380. And that a municipality furnishing water to its inhabitants is not subject to the commission is held in *Jochimsen v. Los Angeles* (1921) — Cal. App. —, 202 Pac. 902.

As appears from the earlier note, the Pennsylvania statute subjected municipalities to the authority of the commission to the extent of requiring them to obtain a certificate of con-

venience and necessity as a condition precedent to the construction or operation of the public utility. The statute, however, applies, to municipalities only to a limited extent. They are held not subject to the authority of the commission in relation to municipal rate making, in *Barnes Laundry Co. v. Pittsburgh* (1920) 266 Pa. 24, P.U.R.1920D, 569, 109 Atl. 535. It was held in *Gilmore v. United Gas Improv. Co.* (1921; Pa.) P.U.R.1921B, 490, that the Public Service Company Law of that state left the commission without power to regulate the rates or service of plants owned by a municipality, and operated either directly by it or by others, under the lease.

The Illinois law specifically exempts such public utilities as are or may hereafter be owned or operated by any municipality. A plant owned by the municipality, but operated by an individual, under lease, was held to be municipally owned within this rule, in *Re Louisville Light & Water Co.* (1920; Ill.) P.U.R.1921C, 160.

The jurisdiction of the public service commission over the rates charged by a municipality outside its territorial limits was affirmed in *Star In-*

vest. Co. v. Denver (1919; Colo.) P.U.R.1920B, 684.

As shown in the earlier note, the public service commission has jurisdiction over public utilities owned and operated by municipal corporations in Montana. It is held in *Re Laurel* (1921; Mont.) P.U.R.1921D, 817, that the commission has authority over the extensions of municipal service of a water system to persons beyond its boundaries, although service beyond its boundaries cannot be compelled.

The New Jersey act was held, in *Re South River* (1920; N. J.) P.U.R.1920E, 408, not to subject municipal plants to the jurisdiction of the public service commission to the extent of requiring the commission's approval of the erection of a modern light and power plant, not in contemplation of the supplying of service beyond the limits of the municipality.

The Pennsylvania commission has jurisdiction to hear an application of a municipality to acquire a water plant, although the rights and financial ability of the municipality to acquire it have not been judicially determined. *Re Burgess* (1921; Pa.) P.U.R.1921C, 812. W. A. E.

J. G. WILLIS, Rcspt.,

v.

ARIE KRANENDONK, Appt.

Utah Supreme Court — September 16, 1921.

(— Utah, —, 200 Pac. 1025.)

Landlord and tenant — surrender — effect on liability for rent.

1. The surrender of leased premises by the tenant and their acceptance by the landlord during the term releases the tenant from liability for all rents not due and payable at the time of the surrender.

[See note on this question beginning on page 957.]

— rent payable at end of year — apportionment.

2. Where rent for a year is payable in a lump sum at the end of the year, there can be no apportionment if the landlord accepts a surrender during the year, although the tenant has had the use of the premises for several months.

[See 16 R. C. L. 937, 938.]

— effect of evidencing rent by note.

3. The fact that rent payable for a year is evidenced by a note payable at the end of the year does not change the rule that there can be no apportionment if the landlord accepts a surrender during the year.

Pleading — legal conclusion — effect.

4. A tenant whose surrender of the premises is accepted before rent evi-

denced by a note becomes due does not plead failure of consideration in an action on the note by stating that the surrender was accepted before the rent became due, by reason of which "the consideration of the note failed," since the statement is a mere legal conclusion.

— deprivation of benefit of facts.

5. The mere adding of a conclusion of law to a pleading of facts in a case does not prevent the party from insisting upon the rights arising from the facts pleaded.

Landlord and tenant — acceptance of surrender — what is.

6. An irrevocable acceptance by the landlord is effected if, when the tenant tells him he will move off the property, the landlord acquiesces and accepts the premises and rents them to another.

[See 16 R. C. L. 1155; see note in 3 A.L.R. 1080.]

— what amounts to acceptance of surrender.

7. The entry by a landlord into possession of premises abandoned by the tenant, and treating them as though the tenancy had expired,

amounts to a surrender and acceptance.

[See 16 R. C. L. 1153, 1154.]

Evidence — judicial notice — seasons on farm.

8. Judicial notice is taken that in case of farm lands used for agricultural purposes there is a dormant and a growing season in each year.

[See 15 R. C. L. 1103.]

Landlord and tenant — apportionment of rent for farm property.

9. Upon abandonment by a farm tenant who has leased the property from fall to fall of premises in the spring, it is inequitable to apportion the yearly rent as though it was payable monthly, so as to charge him with the proportional part of the yearly rent during the winter months when he retains possession.

Appeal — directing final judgment.

10. When the result of a suit depends entirely upon a legal question, the appellate court should, in reversing the judgment of the trial court, declare the legal conclusion which the trial court should have done, and end the litigation.

[See 2 R. C. L. 281.]

(Gideon, J., dissents.)

APPEAL by defendant from a judgment of the District Court for Weber County (Agee, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note made and delivered by defendant to plaintiff's assignor. *Reversed.*

The facts are stated in the opinion of the court.

Mr. George Halverson, for appellant:

If the lessor unqualifiedly takes possession of the property delivered to him by his tenant, he thereby releases the tenant.

Baker v. Eilers Music Co. 26 Cal. App. 371, 146 Pac. 1056; *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; *Rehkopf v. Wirz*, 31 Cal. App. 695, 161 Pac. 285.

And where the surrender is between rent days the tenant, in the absence of a special agreement to the contrary, is discharged from all liability for rent, even* for the period between the surrender and the last rent day, unless it is payable in advance.

24 Cyc. 1163; *American Bonding Co. v. Pueblo Invest. Co.* 9 L.R.A. (N.S.) 557, 80 C. C. A. 97, 150 Fed. 30, 10 Ann. Cas. 357; *McKensie v. Farrell*, 4 Bosw. 192; *Vernam v. Smith*, 15 N. Y.

327; *Learned v. Ryder*, 61 Barb. 552; *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. 420; *Sperry v. Miller*, 16 N. Y. 407; 2 Wood, Land. & T. 2d ed. 477, note 3, p. 1096.

But a surrender, re-entry, or eviction between rent days, or at any time before the rent has fully accrued, releases the lessee from liability therefor, and defeats an action for its recovery.

Smith v. Shepard, 15 Pick. 147, 25 Am. Dec. 432; *Curtiss v. Miller*, 17 Barb. 477; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374; *Reed v. Snowhill*, 51 N. J. L. 162, 16 Atl. 679; *Hall v. Gould*, 13 N. Y. 127; *Okie v. Person*, 23 App. D. C. 170; *Alvord v. Banfield*, 85 Or. 49, 166 Pac. 549;

Meagher v. Eilers Music House, 77 Or. 70, 150 Pac. 266.

Mr. J. G. Willis, for respondent:

In cases of abandonment, a right of recovery is recorded by the law.

24 Cyc. 1165; *Higgins v. Street*, 19 Okla. 45, 13 L.R.A.(N.S.) 398, 92 Pac. 153, 14 Ann. Cas. 1086; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639; *Schuisler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168; *Respini v. Porta*, 89 Cal. 464, 23 Am. St. Rep. 488, 26 Pac. 967.

Frick, J., delivered the opinion of the court:

The plaintiff, as assignee of one Rufus A. Garner, commenced this action in the district court of Weber county to recover upon a promissory note made and delivered by the defendant to said Garner. The complaint is in the usual form in such actions. The defendant filed an answer, in which, after making certain denials, he, as an affirmative defense, averred: "That on the 14th day of November, 1912, the said Rufus A. Garner, payee in said promissory note, leased, demised, and let to defendant by a certain agreement in writing 92 acres of land in Uintah, Weber county, Utah, for a period of five years, for the sum of \$200 down, and the balance of \$150 October 31, 1913, to be covered by a note due October 31, 1913, and \$350 on the 31st day of October, 1914, and \$400 per year, October 31, 1915, October 31, 1916, and October 31, 1917, which said several payments were covered by promissory notes, and that the promissory note set forth in the complaint here was given to cover the payment due October 31, 1917; that on or about March 1, 1917, with the consent of the said Rufus A. Garner, payee in said promissory note, and the holder of said lease, this defendant surrendered the balance of the term thereof to the said lessor, who accepted the surrender thereof and entered into the possession of said property and every part thereof, and that the said Rufus A. Garner should have surrendered said note to this defendant at the

time of accepting the surrender of said lease; that after such surrender of said leased premises the said Rufus A. Garner either continued in possession thereof himself, or leased the same for a long period of time to some other party; that the consideration for said note failed by the acceptance of the surrender of said lease."

The defendant further averred that the note was assigned by said Garner to plaintiff long after the same became due, and that the same was so assigned to plaintiff for collection, and that said Garner is the real party in interest.

There is no dispute respecting the facts, which, in substance, are that the note was assigned to plaintiff, after the same was due, for collection merely; that on the 14th day of November, 1912, the defendant leased from said Garner the land referred to in defendant's answer for a period of five years, commencing on the date aforesaid, for which the defendant agreed to pay as rent the several amounts stated in his answer, and to evidence which the notes set forth were given, of which the note in suit is the last one named in the answer. A copy of the lease was produced in evidence, in which it was provided that the rent should be evidenced by the notes aforesaid. It further appeared that the defendant did not occupy the leased premises, for the full five-year period, but that in April, 1917, he left the same with the consent of Garner, and that the latter let the same to another for the remainder of the year 1917.

Upon that subject the defendant testified that, before he "moved off" the premises, he and Mr. Garner had a conversation, in which, in speaking about the rent, the defendant said to Garner, "It is hard for a man to make it this year," to which Mr. Garner replied, "Well, if you can't make it, move off," and the defendant answered, "Thank you." Upon the same subject Garner testified that the defendant had asked him for a reduction of the

rent, which he had declined to make, and that the defendant then said, "I'll move off," to which Garner replied, "Very well, it is up to you." Garner added: "That is the sum and substance of the conversation." Garner, however, also testified that within a few days after the defendant had moved off the premises "a Jap moved on the place, whose name he said was Sakuma." After Garner had testified that the defendant had left the premises, and that Sakuma, the Jap, had taken possession (the court found the date on which defendant left the premises to have been April 28, 1917), and that Sakuma had paid rent to Garner for the premises for the remainder of the year, defendant's counsel asked Garner: "How much rent did he pay?" Plaintiff objected to the question, upon the grounds that it was "incompetent and immaterial." The court, in giving his reason for sustaining the objection, said: "It is immaterial what arrangement he made. If the lease was surrendered to him in May [April] and he got \$1,000 for it, that is wholly immaterial."

Defendant excepted to the ruling. In view that it is beyond controversy that the defendant left—surrendered—the premises to Garner in the latter part of April, 1917, and that Garner accepted the surrender and placed another tenant in possession, from whom he collected rent for the remainder of the year 1917, it is not necessary to quote further from the evidence. Upon the foregoing facts, the district court proceeded upon the theory that the premises had been surrendered by the defendant to, and accepted by, Mr. Garner for the unexpired term of 1917.

Notwithstanding the undisputed fact that the premises were leased for a term of years, and that the rent was payable in annual instalments as evidenced by the notes, the last of which is the one in suit, and that the rent was not payable until the end of each year, the district court, nevertheless, proceeded

to ascertain the amount of the rent due from defendant by dividing the whole year into twelve monthly parts. In doing that the court divided the amount of rent payable for the last year, to wit, \$400, by 12, and thus determined the amount for each month during the period defendant remained in possession to be \$33.33. The court then found that the defendant occupied the premises from November 14, 1916, to sometime in April, 1917, making a period of a little in excess of five months. The court then multiplied the time the defendant was in the occupation of the premises at the rate of \$33.33 per month, which aggregated the sum of \$183.33 for which judgment was entered against the defendant on the \$400 note. From that judgment defendant prosecutes this appeal.

Defendant has assigned a number of errors, but in his brief he relies upon two legal propositions, which, stating them in his own words, are:

"(1) That the evidence shows a surrender by the defendant, and an acceptance by Garner, and a consequent release of any future rents not yet accrued; and

"(2) That if there was not a surrender the court erred in refusing to permit the defendant to show the amount of rent paid by the Japanese to Garner."

In view that there is no dispute in the evidence, the district court correctly held as a matter of law that there was a surrender of the leased premises by the defendant, the lessee, to Mr. Garner, the lessor, in April, 1917. It is also undisputed, and in view of the record it cannot be disputed, that no part of the rent was due or payable at the time the premises were surrendered by the tenant and accepted by the landlord in April, 1917. Nor, in view of the undisputed facts and the law applicable thereto, does it make any difference whether it is held that the defendant abandoned the premises rather than that he surrendered them. The undisputed fact is that Mr. Garner unconditionally accepted

the premises in April, 1917, and that he leased them to another. In the light of the foregoing facts the question arises whether Garner, the landlord, did not release or discharge the defendant from the payment of any rent for the year 1917.

The legal effect of a surrender of leased premises by the tenant to the landlord during the term for which they were leased, and before the rent is due and payable, has frequently been declared by the courts, and, so far as the writer is advised, there is no conflict among the decisions, although they are very numerous and emanate from both English and American courts. It has

Landlord and
tenant—sur-
render—effect on
liability for
rent.

so frequently been held by the courts aforesaid that in case a tenant surrenders the prem-

ises to his landlord before the end of the term, and before any of the rent is due and payable, the tenant is released or discharged from the payment of all rent, and that the landlord is without a remedy, that the rule has practically become elementary. The doctrine is likewise stated by all the text-writers on *Landlord & Tenant*. In 2 Underhill, on *Landlord & Tenant*, § 730, the author states the rule in the following language: "The effect of a surrender is to terminate the relation of landlord and tenant, and to put an end to the lease so far as the rights of the parties to it are concerned, and to their reciprocal duties and obligations. For a surrender at once terminates all covenants in the lease in favor of either party, where no cause of action has accrued or matured during the life of the lease. Neither has the landlord, after he has accepted a surrender of the premises, a cause of action for damages against his former tenant by reason of the diminished rent paid thereafter by a tenant whom he has accepted under a new lease in place of his former tenant. But a surrender, or the rescission, of a lease after rent has accrued, does not prevent its subsequent recovery by the

landlord. If, however, there is a surrender of the premises before rent is due the rule is otherwise. There is no apportionment of rent up to the date of surrender. The acceptance of a surrender by the landlord prevents him not only from recovering rent accruing in the future, but also, where it takes place during a rental period, it prevents him from recovering for occupation for any period short of the whole period. The rent for the whole of the period, which is not then due, is extinguished, and the landlord can compel the tenant to pay no part thereof."

In 2 McAdam on *Landlord & Tenant*, 4th ed. § 399, the author says: "It is well settled that, when the term is surrendered before the expiration of a period for which rent accrues, the rent for the whole of such period, *not then due*, is extinguished, and can neither be distrained for nor collected by action." (*Italics ours.*)

The author then gives an illustration of what amounts to a surrender, as follows: "Therefore, where A demised to B, . . . rent payable quarterly, and during a current quarter, some dispute arising between the parties, B told A that she would quit immediately; and A answered, she might go when she pleased, and B quitted, and A accepted possession, . . . it was held that A could neither recover the rent which, by virtue of the original contract, would have become due at the expiration of the current quarter, nor rent pro rata for the actual occupation of the premises for any period short of the quarter,"—citing cases from the courts of both England and this country.

To the same effect are 2 Tiffany, *Land. & T.* § 191, and Taylor, *Land. & T.* 8th ed. § 518. In 16 R. C. L. pp. 973, 974, §§ 484, 485, it is said: "A surrender of the leasehold interest in the entire premises terminates the lease and all unmatured obligations between the parties dependent upon the continuance of the leasehold estate, and it is therefore

well settled that a surrender releases the tenant from all liability for unaccrued rents. This principle as to the effect of surrender is the true foundation of the view taken in those cases which hold that the re-entry upon or reletting of the demised premises in case they are abandoned by the tenant releases the tenant from liability for future accruing rents. The liability of the tenant for unaccrued rents may, however, by the express terms of the surrender, be continued, and the courts will give effect to such provisions. It is well settled that a tenant's liability for rents accrued at the time of the surrender are unaffected thereby. A surrender between rent days discharges the tenant from all liability for the rent of the current period in case the rent is not payable until the end of such period, and the landlord in such case is not entitled to recover a proportionate part of the rent for such period as had expired at the time of the surrender. The theory of this rule is that the rent is not due, and that the contract does not contemplate the payment of rent until the completion of the period preceding the rent day. The continuation of the tenancy during this period is a condition precedent to the payment of the rent, and the landlord, by accepting a surrender before the rent day, waives this condition."

To the same effect is 23 Cyc. 1163.

Ireland v. United States Mortg. & T. Co. 72 App. Div. 95, 76 N. Y. Supp. 177, is a well-considered case. The court, after discussing the evidence (72 App. Div. at page 102), states the rule thus: "Nor could the defendant [the tenant] be charged with the rent that became due on April 1, 1899. It is conceded that defendant surrendered possession of the premises to the plaintiff on the 31st of March, 1899, the day before this rent became due. When there is a surrender before rent due, *there is no apportionment of rent up to the day of surrender.* The rent for the whole of the period not then due is extinguished." (Italics ours.)

The foregoing decision was af-

firmed by the New York court of appeals in 175 N. Y. 491, 67 N. E. 1083.

In *Reed v. Snowhill*, 51 N. J. L. at page 164, 16 Atl. 679, the court, after referring to the doctrine of surrender, says: "With this ending of the estate or interest in the land go also all covenants in the lease which had not matured and become actionable during the continuance of the estate."

In *Curtiss v. Miller*, 17 Barb. at page 479, it is said: "It is well settled by numerous adjudged cases that, when the term is surrendered before the expiration of a period for which rent accrues, the rent for the whole of such period, not then due, is extinguished, and can neither be distrained for nor collected by action."

In a recent case from California, *Baker v. Eilers Music Co.* 26 Cal. App. 371, 146 Pac. 1056, it is said: "A lessor who takes possession of property delivered to him by his tenant, and does so unqualifiedly, thereby releases his tenants. He may accept possession of the property for the benefit of the tenant and relet the same; in the latter case he has no action, except one for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement"—citing cases.

To the same effect is *Rehkopf v. Wirz*, 31 Cal. App. 695, 161 Pac. 285.

The following cases are all in point upon the question of surrender and the discharge of the tenant as a consequence of such surrender: *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; *McKenzie v. Farrell*, 4 Bosw. 192; *Sperry v. Miller*, 16 N. Y. 407; *Hunter v. Reiley*, 43 N. J. L. 480; *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374. It is not necessary to cite more of the numerous cases upon the subject. If the reader desires to pursue the question, he will find a large number of cases cited in support of the texts hereinbefore quoted.

(— *Utah*, —, 200 Pac. 1085.)

The foregoing cases have been referred to and quoted from rather copiously, for the purpose of showing that the courts are all agreed that, where there is a surrender by a tenant and an acceptance by the landlord, as in the case at bar, no action can be maintained by the landlord after such surrender for any rent not due and payable at or before the time the surrender went into effect; that in case of surrender the landlord can only maintain an action for the rent that was due and payable at or before the time of the surrender; and that in case of surrender before the rent is payable there can be no apportionment of the rent. So far as the writer is advised there are no decisions to the contrary. None have been cited, and the writer, after making diligent search, has not found any. In order, therefore, to uphold the judgment of the district court, we must not only depart from the uniform holdings of the courts, but we must also violate the contract entered into between the defendant as tenant and Mr. Garner as landlord. By the terms of the lease the rent was payable in a lump sum at the end of each year during the five-year period. The district court, however, disregarded the terms of the lease and treated them as though the rent were made payable monthly. If the

—rent payable
at end of year—
apportionment.

rent had been payable monthly, then, under all the

decisions, the defendant would be required to pay rent for the months he was in possession during the last year and before the surrender was made. In view, however, that the rent was not payable until long after the premises were surrendered to and accepted by Garner, the defendant, as matter of law, was released from the payment of any rent for the last year of the term, and the district court was without legal authority to apportion the rent as it attempted to do.

Nor does the fact that the rent was evidenced by a note in any way affect defendant's rights in the premises. The doctrine or principle

that, as between landlord and tenant, the latter is released or discharged from the payment of rent for the whole period of time for which the rent is payable, —effect of evidencing rent by note.

if the premises are surrendered to and accepted by the landlord before any part of the rent is due and payable, is always available to the tenant as a defense if he insists upon it. The right to make the defense arises out of the relationship of the parties and the nature of the contract or transaction, and not the form of the promise to pay rent. The contention, therefore, that in this case the doctrine does not apply because the rent was evidenced by a note, is wholly without merit.

It is, however, also suggested, and the district court, it seems, seriously considered the fact, that the defendant had interposed a plea of failure of consideration, and that inasmuch as the defendant occupied the premises for a portion of the last year of his term, for that reason, that plea was not established, except in part. In taking that view the district court erred in at least two particulars: (1) In holding that the defendant pleaded failure of consideration as a defense; and (2) in concluding that such a plea could be considered as between landlord and tenant in view of the undisputed facts in this case.

As to the first proposition it is very clear that the defendant did not plead failure of consideration as a defense. What he did plead in the answer was that the leased premises were surrendered to and accepted by the landlord before the end of the term and before any rent for the last year of the term was due and payable. After stating the facts respecting the surrender, the pleader added, that by reason of the surrender of the premises to,

and the acceptance thereof by the landlord, "the consideration for said note failed." Pleading—legal conclusion—effect.

That statement was a mere legal conclusion of the pleader, and was of no effect as a pleading of facts. The

statement amounted to no more than if the pleader had said: "That by reason of the surrender of the premises to, and the acceptance thereof by, the landlord before the end of the term and before any rent was due and payable under the lease, the defendant was released."

To have so pleaded would merely have been a statement of a legal conclusion, and not a pleading of facts. In view of the undisputed facts in this case the conclusion would, no doubt, have been correct as a matter of law, but it would have performed no function in the pleading. For the same reason the conclusion that the consideration of the note had failed performed no function whatever. That was a mere conclusion, deduced from the facts of surrender and acceptance of the premises. The facts respecting the surrender of the premises to and the acceptance thereof by the landlord, and the circumstances under which they occurred, were the only necessary facts to be pleaded in order to entitle the defendant to the defense that he was released or discharged from the payment of the rent. Those facts were pleaded, and no confusion whatever would have arisen had the pleader stopped after stating the facts. The mere fact, however, that the pleading is not couched in the most approved terms makes no difference.

Moreover, the mere fact that the pleader added his conclusion in no way affects the defendant's right to insist upon the defense of release. In this connection it is also important to keep in mind that the real ^{—deprivation of legal question involved here is one of release or discharge from an obligation by operation of law, and not one of failure of consideration. By reason of the surrender of the premises by the defendant as tenant, and the acceptance thereof by Mr. Garner as landlord, before the rent was due and payable, the defendant was released or discharged from payment of rent by operation of law,} benefit of facts.

and, being so released or discharged, no action for the rent becoming due and payable after such surrender and acceptance can be maintained against the defendant.

The legal proposition is one of having been released or discharged from an obligation by operation of law, and not whether the plaintiff may recover to the extent that the consideration passing between him and the defendant has failed, if it has only partially failed.

Nor is there any merit whatever to the contention made by plaintiff that the premises were abandoned by the defendant. Taking Mr. Garner's own version of the transaction, it is clear and explicit to the effect that, when the defendant told Garner, "I will move off," Mr. Garner said, "Very well, it is up to you." This being followed by defendant's leaving the premises, and by Mr. Garner's accepting them and ^{Landlord and tenant—acceptance of surrender—what is.}

renting them to another, constituted an irrevocable surrender and acceptance. Assuming, however, that there had been merely an abandonment of the premises by the defendant, then the result, in view of the undisputed facts, would still have to be the same. As pointed out in the case cited from California, where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though the tenancy had expired, it amounts to a surrender, and the ^{—what amounts to acceptance of surrender.} landlord cannot thereafter recover any rent, or sue for damages. If he desires to reserve that right, he must recognize the tenant's rights in the premises for the unexpired term, and sue him for damages upon his breach of covenant to pay rent. This, however, is elementary doctrine.

If it were further assumed, however, that the district court's judgment could be maintained upon the theory assumed by it, the judgment, nevertheless, could not be sustained

(— *Utah*, —, 200 Pac. 1025.)

as matter of law. As we have seen, the court apportioned the rent and entered judgment at the monthly rate of \$33.33 for the time the defendant occupied the premises during the year 1917. If it were assumed that the court had the power under the law to make such an apportionment, yet the apportionment was merely arbitrary and without any evidence upon which to base it. While it is true that the court insisted that such an apportionment would be more equitable between the parties than a total release would be, yet the assumed equity is based upon nothing but a bare assumption. If the district court's theory could be maintained as matter of law, it, nevertheless, in view of the circumstances, would still be far from equitable in this case. If the defendant is to be deprived of his legal rights, and is to be adjudged according to the equities, then he is still entitled to be adjudged in accordance with the actual facts and circumstances.

In this connection it must be kept in mind that the leased premises consisted of a farm, which was used to produce crops. We take judicial notice of the fact that, with respect to farm lands used for agricultural purposes, there is a dormant and a

Evidence—
judicial notice—
seasons on farm. growing season in each year, and that in this latitude and altitude the principal growing season is between April and October; in some years a little earlier, and in others a little later. Mr. Garner, therefore, had the full benefit of the growing season after the land was surrendered to and accepted by him, and so had any one to whom the lands were leased for that year. If, therefore, the premises in question had been farmed by Garner himself, he might have grown and harvested a full crop; and what is true in his case would be true as to a tenant to whom the premises were released by Garner. If Garner had thus relet the premises, and had received a portion of the crop, as is frequently done, it might well be that he had re-

ceived all the rent the land was worth. That would also have been true if he had received a cash rent.

Be that as it may, however, if Garner wanted to hold the defendant for the rent for the year 1917, he was required to accept the premises upon that condition, and to so notify the defendant. Not having done that, but having accepted the premises unconditionally, he must abide by the law, the same as all others. In view of the circumstances, therefore, the apportionment of the rent in accordance with the method adopted by the district court was manifestly unjust and inequitable.

Landlord and
tenant—ap-
portionment of
rent for farm
property.

We have referred to this phase of the case, however, only for the purpose of showing that the theory of apportioning the rent which the district court assumed to be more equitable than the general law governing surrender is fallacious, and, under certain circumstances, might result in gross injustice, unless based strictly upon all the facts and circumstances, which was not done in this case.

In view of the conceded facts, which cannot be disputed, and in view of the well-settled law, there is —there can be—but one conclusion in this case, and that is that the judgment cannot prevail; further that, in view that the result entirely depends upon a legal question, this court should end the litigation between the parties and now declare the legal conclusion that the district court should have declared; namely, that the plaintiff cannot recover, and that judgment be entered in favor of the defendant dismissing the action.

Appeal—direct-
ing final judg-
ment.

It is therefore ordered that the judgment of the District Court be and the same is hereby reversed, and the cause is remanded to the District Court of Weber County, with directions to set aside its conclusion of law in favor of the plaintiff and enter a conclusion of law in favor of

the defendant, and enter judgment dismissing the action. Defendant to recover costs.

Corfman, Ch. J., and Weber and Thurman, JJ., concur.

Gideon, J., dissenting:

It is apparent from the record that the district court recognized fully the general rule of law stated in the text-books and cases, that in an action upon the covenants of a lease a complete defense is made by pleading and proving a surrender of the leased premises during the term of the lease and prior to any rental becoming due and payable. That, however, in the judgment of the district court, is not the question present in this record. A promissory note was given at the time of the execution of the lease agreement. The consideration for the note was the rental of the premises for a period of one year, admittedly a valid and good consideration. The note was a part of the contract between the parties, just as much as the lease.

"Every negotiable instrument," such as a promissory note, "is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." Utah Comp. Laws 1917, § 4053.

The defense, in its final analysis, is failure of consideration. The answer alleges the relationship of landlord and tenant, and that by surrender of the premises that relationship was terminated; that the termination of that relationship wiped out the consideration of the note. The district court was of the opinion that, while the relationship of landlord and tenant had ceased, the presumption of consideration to support the note still existed. The burden was therefore thrown upon the defendant to support the contention that there had been a failure of consideration. It is without dispute that there had not been a total failure. The consideration for the note

was a year's rental. The defendant had occupied the premises for some five months, a part of the year's rental. True it is, the court arbitrarily prorated the annual rental and gave judgment for the months the defendant occupied the land. That ruling of the court, however, is not before this court for review. The defendant's position is, and was at the trial, that there had been a termination of any contractual relationship between the landlord and tenant, and, having established that fact, that the consideration for the note failed in toto. In my judgment, such does not necessarily follow.

It is suggested that to uphold the judgment of the district court is to establish a different legal relationship between a landlord and tenant when a note is given than when one is not given. The legal relationship between the parties is created and controlled by the contract entered into by them. If the lessee executed a promissory note to pay, and the law throws the burden on him to prove a failure of consideration, the court is not creating any different relationship in enforcing that contract. It is simply taking the contract between the parties as it finds it, and enforcing it. The legal relationship between the parties is based upon the contract. A part of the contract in this case was a promissory note, which carries with it the presumption of consideration. A defense against that presumption places the burden upon the defendant, and that is so by reason of the contract and the legal rights and duties growing out of the same. To reverse this judgment and direct a dismissal of the action in effect takes from the assignor of plaintiff something of value and gives it to the defendant without any consideration. Unless the rules of law compel that result, the courts should hesitate before entering a judgment to that effect.

The judgment of the district court, in my opinion, should be affirmed. I, therefore, dissent.

ANNOTATION.

Surrender and acceptance of term as affecting right to recover rent or on obligation given for rent.**I. Introductory, 957.****II. Rent due at time of surrender:**

- a. Liability of tenant, 957.
- b. Liability of surety or guarantor, 959.

III. Rent accruing after surrender:

- a. Surrender of entire premises:
 1. Liability of tenant, 960.
 2. Liability of surety, 963.
 3. Liability of subtenant, 963.

I. Introductory.

The purpose of this annotation is to review the cases which deal with the effect of the surrender and acceptance of a term in real property, on the landlord's right to recover rent or on an obligation given for rent. It is not concerned with what constitutes a surrender and acceptance, but merely with the effect of a condition which is conceded to constitute a surrender and acceptance. The words "surrender" or "surrender and acceptance" have been and are loosely used in some instances, but cases which involve merely an abandonment are not included unless spoken of by the court as a surrender, and cases involving a dispossession by the lessor as of right have been excluded even though specifically termed a surrender and acceptance by the court. Tenancies at will are not included although tenancies from month to month are considered as being within the scope of the discussor. The liability of sureties has not been considered where the case involved dealt only with general principles of suretyship rather than a question of landlord and tenant. Cases involving merely the right of distress as affected by a surrender and acceptance are not included. This, however, is not to be considered as eliminating those decisions where, as a basis for the distress, the court has dealt with the right to recover rent.

III.—continued.

- b. Surrender of part of premises, 965.

IV. Surrender between rent days:

- a. Rent payable in advance, 967.
- b. Rent not payable in advance:
 1. In absence of special agreement, 968.
 2. Under special agreement, 970.

V. Decisions not showing time of accrual of rent, 971.**II. Rent due at time of surrender.****a. Liability of tenant.**

It seems to be the universal rule that, in the absence of any agreement to the contrary, the surrender and acceptance of a term does not relieve the tenant from liability for rent already accrued at that time.

United States. — See *Re Sherwoods* (1913) 127 C. C. A. 304, 210 Fed. 754, Ann. Cas. 1916A, 940.

California.—*Hobson v. Silva* (1902) 7 Cal. Unrep. 31, 70 Pac. 619; *Voss v. Levi* (1917) 33 Cal. 671, 166 Pac. 359.

Massachusetts.—*Deane v. Caldwell* (1879) 127 Mass. 242.

Missouri. — *Nicol v. Young* (1897) 68 Mo. App. 448.

New York.—*Sperry v. Miller* (1853) 8 N. Y. 336; *Young v. Peyser* (1858) 3 Bosw. 308; *Barkley v. McCue* (1899) 25 Misc. 738, 55 N. Y. Supp. 608; *Manley v. Berman* (1908) 60 Misc. 91, 111 N. Y. Supp. 711; *Baker v. Donlin* (1915) 88 Misc. 586, 151 N. Y. Supp. 433. See also *Sperry v. Miller* (1857) 16 N. Y. 407; *McKensie v. Farrell* (1859) 4 Bosw. 192; *MacKellar v. Sigler* (1874) 47 How. Pr. 20; *McGregor v. Board of Education* (1887) 107 N. Y. 511, 14 N. E. 420.

Pennsylvania. — *Hall v. Bardsley* (1878) 5 W. N. C. 553.

Oklahoma. — See *Higgins v. Street* (1907) 19 Okla. 45, 13 L.R.A. (N.S.) 398, 92 Pac. 153, 14 Ann. Cas. 1086.

Washington. — See *Rockwell v.*

Eiler's Music House (1912) 67 Wash. 478, 39 L.R.A. (N.S.) 894, 122 Pac. 12.

England.—Atty. Gen. v. Cox (1850) 3 H. L. Cas. 240, 10 Eng. Reprint, 93. See also *Barnard v. Duthy* (1813) 5 Taunt. 27, 128 Eng. Reprint, 595.

Canada.—See *Bradfield v. Hopkins* (1865) 16 U. C. C. P. 298; *Crozier v. Trevarton* (1914) 32 Ont. L. Rep. 79, 22 D. L. R. 199, 7 Ont. Week. N. 111.

It was said in *Curtiss v. Miller* (1854) 17 Barb. (N. Y.) 477, that a surrender of a term "does not operate to extinguish rent then due because that has already become a personal debt."

In *Barnard v. Duthy* (1813) 5 Taunt. 27, 128 Eng. Reprint, 595, wherein rent was sought to be recovered for seven quarters ending about September 29, 1812, and the defendant pleaded a surrender of the lease on September 28, 1811, there was judgment for the plaintiff, the court holding that the plea did not answer the whole breach but only the last four quarters out of the seven.

In *Deane v. Caldwell* (1879) 127 Mass. 242, it appeared that the lessee died within less than a year after leasing from the plaintiff certain premises for a period of five years. The defendant, the lessee's administrator, remained in occupation of the property for some months thereafter, and delivered the place to another, who, after an occupation of a month or two, returned the key to the lessor, who subsequently relet the premises at a reduced rent. It having been found that there was a surrender by operation of law, in the acceptance by the lessor of the key, the court held that, the surrender and acceptance having been absolute and unqualified, all liability on the covenants of the lease was terminated thereby, and the case was referred to an assessor to ascertain the amount of rent due up to the time of surrender.

In *Nicol v. Young* (1897) 68 Mo. App. 448, it appeared that the defendants had entered into an agreement with the plaintiff to rent the latter's house for a certain period, at the end of which the plaintiff agreed to convey the title to him without further

payment. After three months' possession of the premises, the defendants refused to pay further rent, but continued to occupy the property for another month, when they abandoned it, whereupon it was conceded the contract was rescinded. The plaintiff sought to recover unpaid rent for the last month of the defendant's occupancy. The court held that the obligation to pay rent due at the time the agreement was rescinded was not discharged.

In *Sperry v. Miller* (1854) 8 N. Y. 336, it appeared that the lessee had occupied the premises of the lessor under a five-year lease, providing for the payment of \$130 yearly rental in semiannual instalments of \$65, one of which fell due on April 1. On April 2, the lessee then owing one year's rent, the parties entered into an agreement of surrender providing, *inter alia*, for the payment of a sum of money to the lessee by the lessor. A couple of months thereafter the lessor brought an action against the lessee to recover a year's rent. It was held that while, as a result of the contract, the remainder of the term was surrendered, the lease on which the rent accrued was not thereby canceled as to the rent then due, the court pointing out that nothing was said in the agreement as to the rent, which had then become a personal debt due from the lessee to the lessor.

In *Young v. Peyser* (1858) 3 Bosw. (N. Y.) 308, the evidence showed that the lessee of the premises, for which rent was sought to be recovered, had assigned the premises to the defendant for the benefit of creditors. The rent was payable quarterly, one instalment falling due on November 1, the defendant having taken possession of the premises some time prior thereto and surrendered them on November 14 to the plaintiff, who accepted them. The court held that, having accepted and enjoyed the premises, the defendant was clearly liable for the rent which was due November 1.

Barkley v. McCue (1899) 25 Misc. 738, 55 N. Y. Supp. 608, was an action brought to recover two months' rent. The rent was due in advance on the

first of each month. It was shown that the rent was paid up to the last of June, when the defendant abandoned the property. An acceptance of the surrender of the term on August 15 was held not to affect the landlord's right to recover the rent which had already accrued, consisting of the rent for July and August.

In *Hembrock v. Stark* (1873) 53 Mo. 588, an action by attachment for rent, the defendant in his answer set up a release by the plaintiff from the payment of the rent by virtue of an agreement that the defendant should be discharged from liability for any rent in arrears and unpaid, if he surrendered the possession of the farm before the expiration of the term. In a discussion of other points involved in the case the court said: "The agreement to discharge the defendant from payment of rent constituted a bar to the plaintiff's right of recovery."

b. Liability of surety or guarantor.

The liability for rent of a surety on a lease is not discharged by the fact that his principal has surrendered and the lessor has accepted the term, where the rent sought to be recovered had accrued prior to the surrender.

Thus, a surety for a lease of hotel property has been held to be liable for the amount of a plumbing and heating bill which was paid by the lessor, the lessee having agreed to install certain plumbing and heating apparatus in lieu of rent, and the liability of the lessee having accrued prior to his surrender of the lease. *American Bonding Co. v. Pueblo Invest. Co.* (1906) 9 L.R.A.(N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 Ann. Cas. 357.

In *McKensie v. Farrell* (1859) 4 Bosw. (N. Y.) 192, the court said: "A surrender, where one takes place, does not operate to release the tenant from rent already accrued. And if such a change in the relation of the parties could have any other operation upon the obligation of the sureties for the rent (e. g., as an alteration of the principal contract without

the consent of the sureties), there is no foundation here for such a claim, because in this case it is proved without contradiction that the reletting relied upon as a surrender was by the authority and consent of the defendant."

In *Bradfield v. Hopkins* (1865) 16 U. C. C. P. 298, it appeared that the plaintiff sought to recover from the defendant on his bond, conditioned for the payment of rent by the lessee of certain premises. The defendant pleaded on equitable grounds that, sometime after the death of the lessee, his executors, his widow, and one Simpson, by the plaintiff's consent, entered into an agreement whereby Simpson agreed to purchase the remainder of the term under the lease for a sum equal to the amount of rent due and unpaid; that Simpson agreed to give his note for this amount, with the defendant joining him as maker of the note, the tenancy and defendant's liability on the bond to cease; and that the plaintiff agreed to accept the note and surrender in full satisfaction of rent in arrears and the defendant's liability on the bond therefor. It was also alleged that the agreement was carried into execution, and that the plaintiff accepted and received the promissory note and the surrender of the lease in full satisfaction, as stated. The court held that as regards the overdue rents the surrender would not be a good defense at law, nor would the note, nor the two combined, but that there was no reason why they should not be so in equity. The plea setting up a new contract and part performance in substitution of the first one was considered a valid equitable bar.

In *Kingsbury v. Westfall* (1875) 61 N. Y. 356, it was sought to recover from the defendant as guarantor on a lease of certain premises which ran from October 1, 1855, for a term of five years. The buildings on the premises were destroyed by fire on January 1, 1858, from which time no rent was paid for two years, when by agreement between the lessor and the lessee, the former released all claim for rent subsequently to accrue in con-

sideration of the lessee's release to him of the unexpired term. The defendant guarantor sought to escape responsibility for the accrued rent on the ground that the agreement for the payment of rent guaranteed by him had been changed. The court, while recognizing the general principle that a guarantor is bound only by the precise terms of the contract of his principle, held it to be inapplicable to the case at bar, pointing out that the obligation to pay the accrued rent had not been changed, nor had any right of the defendant in relation thereto been altered or impaired. See to the same effect, *Kingsbury v. Williams* (1868) 53 Barb. (N. Y.) 142, a case based on the same facts.

In *Bothfeld v. Gordon* (1906) 190 Mass. 567, 5 L.R.A. (N.S.) 764, 112 Am. St. Rep. 341, 77 N. E. 639, it appeared that the defendant had guaranteed the prompt payment of rents by the lessee of premises the lessor of which was the plaintiff. The lessee, falling in arrears as to rent, entered into an agreement with the lessor whereby the premises were surrendered to the latter, the lessee being relieved of liability for further rent, but not for that sum which had accrued and was unpaid. An action was then brought against the defendant for three months' rent which remained unpaid by the lessee. The court pointed out that the lease contained a covenant for the monthly payment of rent, and another provision to the effect that, on a failure of the lessee to observe any of the covenants therein, the lessor might re-enter and repossess the premises, and that in this case the agreement of surrender merely relieved the plaintiff from the necessity of such entry; the term being ended substantially in accordance with the provision of the lease. It was said: "The obligation to pay the past rent was not changed by the surrender, and the liability of the defendant to pay it, which, before the surrender had become fixed, continued notwithstanding the termination of the lease."

III. Rent accruing after surrender.

a. Surrender of entire premises.

1. Liability of tenant.

It is the general rule that a lessor cannot recover rent from a lessee, or on an obligation for rent, where he has accepted a surrender of the term prior to the accrual of the rent claimed, as a discharge from all subsequent liability is effected thereby.

United States. — *Re Schomacker Piano Forte Mfg. Co.* (1908) 163 Fed. 413; *Re Sherwoods* (1913) 127 C. C. A. 304, 210 Fed. 754, Ann. Cas. 1916A, 940; *Re Mullings Clothing Co.* (1916) 230 Fed. 681, reversed on the ground that there was no acceptance of the attempted surrender in (1916) L.R.A. 1918A, 539, 161 C. C. A. 134, 238 Fed. 58, which has writ of certiorari denied in (1917) 243 U. S. 635, 61 L. ed. 941, 37 Sup. Ct. Rep. 399.

Arizona. — *Kastner v. Campbell* (1898) 6 Ariz. 145, 53 Pac. 586.

California. — *Welcome v. Hess* (1891) 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; *Hobson v. Silva* (1902) 7 Cal. Unrep. 31, 70 Pac. 619; *Baker v. Eiler's Music Co.* (1915) 26 Cal. App. 371, 146 Pac. 1056; *Rehkopf v. Wirz* (1916) 31 Cal. App. 695, 161 Pac. 285; *Voss v. Levi* (1917) 33 Cal. App. 671, 166 Pac. 359.

District of Columbia.—*Okie v. Person* (1904) 23 App. D. C. 170.

Georgia. — *Ledsinger v. Burke* (1901) 133 Ga. 74, 38 S. E. 313; *Gay v. Peake* (1909) 5 Ga. App. 583, 63 S. E. 650. See also *Johnson v. Watkins* (1921) 26 Ga. App. 759, 107 S. E. 341.

Illinois.—*Stobie v. Dills* (1872) 62 Ill. 432.

Indiana. — *Terstegge v. First German Mut. Ben. Soc.* (1883) 92 Ind. 82, 47 Am. Rep. 135; *Donahoe v. Rich* (1891) 2 Ind. App. 540, 28 N. E. 1001; *Weil v. Waterhouse* (1910) 46 Ind. App. 690, 91 N. E. 746. See also *Powell v. Jones* (1912) 50 Ind. App. 493, 98 N. E. 646.

Iowa.—*Armour Packing Co. v. Des Moines Pork Co.* (1902) 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196; *Kean v. Rogers* (1909) 146 Iowa, 559,

123 N. W. 754, reversing (1908) — Iowa, —, 118 N. W. 515.

Maine. — Hesselstine v. Seavey (1839) 16 Me. 212.

Massachusetts.—Amory v. Kannoffsky (1875) 117 Mass. 351, 19 Am. Rep. 416.

Minnesota.—Minneapolis Co-op. Co. v. Williamson (1892) 51 Minn. 53, 88 Am. St. Rep. 473, 52 N. W. 986. See also Lafferty v. Hawes (1895) 63 Minn. 13, 65 N. W. 87.

Mississippi. — Kiernan v. Germain (1884) 61 Miss. 498.

Missouri.—Prior v. Kiso (1883) 81 Mo. 241; Hutcheson v. Jones (1883) 79 Mo. 496; Churchill v. Lammers (1895) 60 Mo. App. 244; McDonald v. May (1902) 96 Mo. App. 236, 69 S. W. 1059. See also Destrehan v. Scudder (1848) 11 Mo. 484.

Nevada. — Washoe County Bank v. Campbell (1917) 41 Nev. 153, 167 Pac. 643.

New Hampshire.—Elliott v. Aiken (1863) 45 N. H. 30; Davis v. George (1892) 67 N. H. 393; 39 Atl. 979.

New Jersey. — Stotesbury v. Vail (1861) 13 N. J. Eq. 390; Meeker v. Spalsbury (1901) 66 N. J. L. 60, 48 Atl. 1026.

New York. — Page v. Ellsworth (1865) 44 Barb. 636; MacKellar v. Sigler (1874) 47 How. Pr. 20; Fobes v. Lewis (1876) 2 N. Y. Week. Dig. 65; Danziger v. Falkenberg (1892) 64 Hun, 635, 46 N. Y. S. R. 331, 18 N. Y. Supp. 927; Herter v. Mullen (1899) 159 N. Y. 28, 44 L.R.A. 703, 70 Am. St. Rep. 517, 53 N. E. 700; Gray v. Kaufman Dairy & Ice Cream Co. (1900) 162 N. Y. 388, 49 L.R.A. 580, 76 Am. St. Rep. 327, 56 N. E. 903; Crane v. Edwards (1903) 80 App. Div. 333, 80 N. Y. Supp. 747, 12 N. Y. Anno. Cas. 436; Daggett v. Champney (1907) 122 App. Div. 254, 106 N. Y. Supp. 892; Upright Co. v. Delson (1919) 178 N. Y. Supp. 389; Creighton v. Winfree (1921) 187 N. Y. Supp. 72. See also Hegeman v. McArthur (1851) 1 E. D. Smith, 147; McKensie v. Farrell (1859) 4 Bosw. 192; Vandekar v. Reeves (1886) 40 Hun, 430; Schork v. Moritz (1889) 24 N. Y. S. R. 898, 6 N. Y. Supp. 554; Tallman v. Earle (1891) 37 N. Y. S. R. 271, 13 N. Y. 18 A.L.R.—61.

Supp. 805; Gaffney v. Paul (1899) 29 Misc. 642, 61 N. Y. Supp. 173; Ayen v. Schmidt (1913) 80 Misc. 670, 141 N. Y. Supp. 938.

North Carolina. — Everett v. Williamson (1890) 107 N. C. 204, 12 S. E. 187.

Pennsylvania. — Murphy v. Losch (1892) 148 Pa. 171, 23 Atl. 1059; Jenkins v. Root (1920) 269 Pa. 229, 112 Atl. 153. See also Pratt v. Richards Jewelry Co. (1871) 69 Pa. 53; Hall v. Bardsley (1878) 5 W. N. C. 553; Rafferty v. Klein (1917) 256 Pa. 481, 100 Atl. 945.

Utah.—See the reported case (WILLIS v. KRANENDONK, ante, 947).

Wisconsin. — Imler v. Baenish (1889) 74 Wis. 567, 43 N. W. 490; Kneeland v. Schmidt (1890) 78 Wis. 345, 11 L.R.A. 498, 47 N. W. 438; West Concord Mill. Co. v. Hosmer (1906) 129 Wis. 8, 107 N. W. 12.

England. — Natchbolt v. Porter (1689) 2 Vern. 113, 23 Eng. Reprint, 682; Barnard v. Duthy (1813) 5 Taunt. 27, 128 Eng. Reprint, 595; Whitehead v. Clifford (1814) 5 Taunt. 518, 128 Eng. Reprint, 791, 15 Revised Rep. 579; Gore v. Wright (1838) 8 Ad. & El. 118, 112 Eng. Reprint, 780, 3 Nev. & P. 243, 1 W. W. & H. 266, 7 L. J. Q. B. N. S. 147, 2 Jur. 840; Dodd v. Acklom (1843) 6 Mann. & G. 672, 134 Eng. Reprint, 1063, 7 Jur. 1017, 13 L. J. C. P. N. S. 11, 7 Scott, N. R. 415; Smith v. Lovell (1850) 10 C. B. 6, 138 Eng. Reprint, 3, 1 Lowndes M. & P. 794, 20 L. J. C. P. N. S. 37, 15 Jur. 250; Baynton v. Morgan (1888; C. A.) L. R. 22 Q. B. Div. 74, 58 L. J. Q. B. N. S. 139, 37 Week. Rep. 148, 53 J. P. 166, affirming (1888) 59 L. T. N. S. 478. See also Nickells v. Atherton (1847) 10 Q. B. 944, 116 Eng. Reprint, 358, 16 L. J. Q. B. N. S. 371, 11 Jur. 778, 15 Eng. Rul. Cas. 512.

Canada.—Gold v. Ross (1903) 10 B. C. 80; Crozier v. Trevarton (1914) 32 Ont. L. Rep. 79, 22 D. L. R. 199, 7 Ont. Week. N. 111; McKeown v. Lechtzier (1914) 24 Manitoba L. R. 295, 5 West. Week. Rep. 778, 26 W. L. R. 264, 15 D. D. R. 15, affirming (1914) 24 Manitoba L. R. 307, 28 West. L. R. 558, 20 D. L. R. 986. See also Strathey v. Crooks (1848) 6 U. C. Q. B. O. S. 587;

Bradfield v. Hopkins (1865) 16 U. C. C. P. 298.

In **West Concord Mill. Co. v. Hosmer** (Wis.) *supra*, the court, after finding that there was a surrender and acceptance, said: "We must hold that the plaintiff, having accepted such surrender of the leased premises and taken full and exclusive possession thereof, was thereby estopped from collecting rent which otherwise would have accrued under the lease, subsequent to such surrender."

In **Johnson v. Watkins** (1921) 26 Ga. App. 759, 107 S. E. 341, the court said (obiter): "If, pending a tenancy, . . . the tenant becomes dissatisfied, and offers to surrender possession to the landlord, and the landlord thereafter resumes possession, or exerts a control over the premises inconsistent with the tenant's right of occupation, he thereby discharges the tenant from liability for future rent."

In **Washoe County Bank v. Campbell** (1917) 41 Nev. 153, 167 Pac. 643, the acts of a lessor were said to be so inconsistent with the relation of landlord and tenant as to convey the idea of a recognition of the surrender of the leasehold, and it was also said that these acts were sufficient to constitute an estoppel sufficient to defeat an action by the lessor against the lessees for the collection of rentals claimed.

In **Wood v. Partridge** (1814) 11 Mass. 488, the court pointed out that rent payable quarterly gave rise to no debt until the arrival of the time provided for payment, and that the rent might never become due, as the lessee might quit the premises with the consent of the lessor.

In **Bain v. Clark** (1813) 10 Johns. (N. Y.) 424, it was held that a surrender and acceptance of a term extinguished the estate and the rent, but it was pointed out that in that case the lessee might continue bound for the year's rent to accrue thereafter by virtue of a special agreement between the parties in the deed of surrender.

The court, in the case of **Re Schomacker Piano Forte Mfg. Co.** (1908) 163 Fed. 413, held that the landlord,

having taken over the premises on surrender by the lessee, could not claim the remainder of the rent. It was contended that the landlord accepted the premises only to relet them for the benefit of the lessee, but the court held that there was a general acceptance; it being shown that the landlord's agent asked an increased rental thereafter, and that alterations were made.

In the case of **Re Sherwoods** (1913) 127 C. C. A. 304, 210 Fed. 754, Ann. Cas. 1916A, 940, it appeared that, after the assignment of a lease by the lessee's receiver in bankruptcy, the lessor, with the acquiescence of the assignee, entered into a new lease with another. The court remarked that the making of the new lease operated as a surrender by operation of law, the effect of which was to relieve the tenant, whose right to possession was terminated, from liability for rent subsequently accruing.

In **Welcome v. Hess** (1891) 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369, wherein it was shown that the landlord, following the abandonment of the premises by the tenant, had relet them at a lower rental for a period longer than that of the first lease, it was held that the tenants could not thereafter be held for any rent. Said the court, "If the surrender has not been accepted, have they not been evicted?"

In **Baker v. Eilers Music Co.** (1915) 26 Cal. App. 371, 146 Pac. 1056, a suit to recover rent which accrued subsequently to the surrender to and acceptance by the plaintiff-lessor of certain premises, it was said that the contract relationship had been thereby brought to an end; that the relationship of landlord and tenant had ceased.

In **Terstegge v. First German Mut. Ben. Soc.** (1883) 92 Ind. 82, 47 Am. Rep. 135, wherein it appeared that the tenant, after paying the rent for certain premises on the day it was due, left the keys with the landlord, stating that it was desired to surrender the property, it was said: "It is well settled that if the tenant surrenders the premises and yields up the posses-

sion, and the same are accepted by the landlord, the lease and all liability under it for future rent is extinguished."

2. Liability of surety.

The surrender and acceptance of a term in real property discharges the surety of the lessee, as well as the lessee, from liability for rent accruing thereafter. *American Bonding Co. v. Pueblo Invest. Co.* (1906) 9 L.R.A. (N.S.) 557, 80 C. C. A. 97, 150 Fed. 17, 10 Ann. Cas. 357; *Carson v. Arvantes* (1897) 10 Colo. App. 382, 50 Pac. 1080, affirmed in (1899) 27 Colo. 77, 59 Pac. 737; *Prior v. Kiso* (1883) 81 Mo. 241; *Rafferty v. Klein* (1917) 256 Pa. 481, 100 Atl. 945.

In *Carson v. Arvantes* (1899) 27 Colo. 77, 59 Pac. 737, affirming (1897) 10 Colo. App. 382, 50 Pac. 1080, it appeared that the lessee had made a deposit of a sum of money as security for the payment of rent for premises which passed to the possession of another whom the lessor agreed to accept under certain conditions. The transferee later surrendered the premises, the lessor selling his stock, and, from the proceeds of the sale, keeping the amount of rent due to the time of the sale, handing to the transferee the balance. It was held that the transferee having been relieved of liability by acts which the court considered to be a cancellation of the lease, the security or fund pledged for the performance thereof was likewise discharged.

In *Prior v. Kiso* (1883) 81 Mo. 241, the court held that the defendants, sureties on a lease, were relieved of liability for unpaid rent, by reason of the fact that, while the lease had more than a year to run, the plaintiff lessor took back the whole premises pursuant to an agreement with the lessees.

In *Rafferty v. Klein* (Pa.) *supra*, it was sought to recover from the defendant as surety on a lease. It was alleged that the premises were surrendered to the plaintiff on January 31, the rent for January having been paid, and it was shown that a new tenant was put in possession under a

new lease on April 1, following. The court held that the defendant could not be held liable for any rent beyond that due for February and March, and that there should be subtracted from this amount whatever the plaintiff received for the use of the premises as storage during these months.

In *Rhineland Real Estate Co. v. Cammeyer* (1921) 190 N. Y. Supp. 516, where the lessee, upon surrendering the lease, guaranteed the rentals of certain subtenants, recovery on that guaranty was denied upon the ground of a constructive eviction by the failure of the lessor to furnish live steam to the subtenants in performance of the lessee's covenant with the latter, which the lessor was held to have assumed upon accepting a surrender.

3. Liability of subtenant.

It seems to have been the common-law rule, supported, apparently, in several American jurisdictions, that where a lessee has subleased the premises and thereafter has surrendered his term to his lessor, the sublessee is discharged from liability for rent to either the lessee or the lessor.

Thus, in *Thre'r v. Barton* (1570) F. Moore, 94, 72 Eng. Reprint, 463, it appeared that one had made a lease for one hundred years, the lessee making an underlease for twenty years, rendering rent with a clause of re-entry. Sometime thereafter the original lessor granted the reversion in fee, the grantee purchasing the reversion of the term. It was held that the grantee might not have either rent or the power of re-entry, since the reversion of the term to which they were incident was extinguished in the reversion in fee.

In *Bailey v. Richardson* (1885) 66 Cal. 416, 5 Pac. 910, the court said: "A tenant may surrender his estate to his landlord, but if he have, since its commencement, created some minor interest out of it, or have made an underlease, he cannot, by surrendering, destroy the charge or affect the estate of the underlessee. 1 Washb. Real. Prop. 360, and cases cited in note. Although the tenant cannot prejudice the interest of the under-

lessee, yet he will lose the rent he has reserved upon the underlease, for the rent is incident to the reversion; nor can the surrenderee have it, for, though the reversion to which it was incident has been conveyed to him, yet as soon as it was so conveyed, it merged in the greater reversion; so that the consequence is, that neither the surrenderor nor the surrenderee being entitled to the rent, the underlessee holds without payment of any rent at all, excepting where the contrary has been expressly provided by statute."

The case of *Williams v. Michigan C. R. Co.* (1903) 133 Mich. 448, 103 Am. St. Rep. 458, 95 N. W. 708, is not, on its facts as construed by the court, directly in point, but it involves a discussion of the effect of the surrender of premises by a lessee on the liability for rent of a sublessee. It was pointed out by the court that even if the holding in *Beal v. Boston Car Spring Co.* (1878) 125 Mass. 157, 28 Am. Rep. 216 (set out *infra*) were conceded to be correct, it was inapplicable in the case at bar, there being no reservation from the alleged surrender or any confirmation of the subtenant's lease.

In *Krider v. Ramsay* (1878) 79 N. C. 354, a case not directly in point, it was remarked that unless otherwise provided by statute, a surrender of a term by a lessee relieves the subtenant from liability for rent thereafter, the lessee being unable to collect it because he has parted with his reversion to the lessor, who is in no better position, since the reversion, to which the rent is incident, on conveyance to him, merges in the greater reversion, of which he is already possessed.

In some jurisdictions the courts, while apparently recognizing the authority of the common-law rule just stated, have attempted to avoid the effects of its application, and have held that where a lessee, after having sublet all or a portion of the premises, surrenders his term to the lessor, the sublessee is not discharged from liability thereby, but remains responsible for the rent by virtue of a special agreement of assignment between the

lessor and lessee at the time of the surrender, or by reason of an attornment on the part of the sublessee.

In *Beal v. Boston Car Spring Co.* (Mass.) *supra*, it appeared that the plaintiff had leased certain premises to one who sublet a part thereof to the defendant. Later he accepted from the lessee a surrender of his term, without prejudice, however, to the underlease, which was assigned to the plaintiff, who brought an action against the defendant to recover on his covenant to pay rent. It was suggested that the rent due from the defendant sublessee was an incident of reversion in the lessee, which incident was lost when the reversion was extinguished by the surrender of the lease. With this, however, the court did not agree, pointing out that rent was not necessarily always an incident to a reversion. It was said: "As the assignments were simultaneous with the surrender, Heyer Brothers [the lessee] did not in terms reserve the rent to themselves, but the plaintiff accepted the surrender in consideration of the assignment, with the express stipulation that it should not prejudice the underleases assigned to him; that is, should not invalidate the assignment, or affect the rights of the parties holding the leases."

In *Appleton v. Ames* (1889) 150 Mass. 34, 5 L.R.A. 206, 22 N. E. 69, it appeared that a lessee of certain premises, who had sublet part of them, failed and subsequently surrendered his term to the lessors, who accepted it. The sublessee, after the surrender, paid his rent for the month prior to that in which the surrender took place and asked whether he was to be given a lease covering the term of the lease which he had from the lessee. The sublessee had theretofore, following the failure, inquired whether his lease was affected thereby, and some time thereafter had denied the obligation to pay rent to anyone. The contention of the sublessee was that, by the surrender of the lease by the lessee, he was enabled to hold his sublease without the payment of rent, since the rent, being an incident of the reversion, could not

be collected by the lessee after parting with the reversion to the lessors, now was it collectable by the latter, since the reversion, of which it was an incident, on conveyance to them, merged in the greater reversion in fee of which they were possessed. The court, however, refused to take this view on the facts of the case, pointing out that the lessors had entered and repossessed themselves of the estate in accordance with the provisions of the lease, and that the sublessee, by his payment of rent and the seeking of a new lease, had shown that he assented to the entry of the lessors as one lawfully made, and dispossessing him of his estate under the sublease, his subsequent tenancy being, at most, one at the will of the lessors.

In *McDonald v. May* (1902) 96 Mo. App. 236, 69 S. W. 1059, it appeared that the defendant was a sublessee with an eighteen months' term of certain premises, the lessee of which had surrendered his ninety-nine-year term to the lessor, the remote grantor of the plaintiff. The plaintiff sought to recover from the defendant on his lease for unpaid rent for the premises in question. It was pointed out by the court that by a contract between the lessor and the lessee the latter had surrendered his term to the former, but that the former was not thereby enabled to sue the sublessee for the rent, since there was neither privity of contract nor privity of estate between them. An assignment of the reversion by the lessee would give the assignee right to sue on a covenant to pay rent made by a subtenant, but here the surrender of the term did not constitute such an assignment; and the court called attention to the fact that while a surrender of the main term of a leasehold estate will not destroy the rights of the undertenants, the lessor may not sue the subtenant for rent or any other covenant. A surrender of a ninety-nine-year term did not work an assignment of an eighteen months' term. But it appeared that the defendant sublessee, by paying rent to the plaintiff after the surrender of his term by the lessee to the lessor, the plaintiff's

remote grantor, had attorned to him, and thus established between them the relation of landlord and tenant, and the court held that in consequence the obligation of the defendant to pay rent was as comprehensive as his right to hold the premises, which latter covered the whole period of the lease, it being remarked that, in the absence of the attornment, it would have been doubtful whether the plaintiff would have had any recourse against the defendant.

In *Hessel v. Johnson* (1889) 129 Pa. 173, 5 L.R.A. 851, 15 Am. St. Rep. 716, 18 Atl. 754, it appeared that Rossiter, a lessee, surrendered his term after having sublet a portion of the premises, the surrendered term being leased anew. The court pointed out that in England prior to the Statute of 4 Geo. II. chap. 28, in case of a surrender of a lease by the lessee, following the subletting of a part of the premises, both the lessor and lessee would have lost their right to distrain from rent, the former because of the merger of the reversion of the lessee with the greater reversion. It was decided, however, that the doctrine of merger would not be held to apply against the intention of the parties and the interest of the original lessor, and that Rossiter's surrender might be regarded as in the nature of a transfer of the sublease the effect of which was to attorn the subtenant to the original landlord, to whom he was bound to pay rent under his contract, on the failure of which his goods on the premises were liable to distress according to the terms of the lease from Rossiter.

b. Surrender of part of premises.

It has been held in several instances that a surrender of part of leased premises will not entirely relieve the tenant or his assignee from responsibility for rent accruing thereafter. But as to whether the rent is apportionable so as to relieve the tenant from liability for rent for the portion surrendered, the courts are not in agreement, nor indeed is their position clear.

In *Hewitt v. Hornbuckle* (1901) 97

Ill. App. 97, it was shown that the lessee had leased of the lessor 188 acres of land at a certain rental, and had thereafter declined to cultivate it all, requesting the lessor to let someone else plant the part uncultivated, the lessor complying with the request as to half of the untilled portion. It was held that the lessee could not surrender part of the farm, retain a part, and refuse to pay rent on the part retained. The court, however, approved an instruction to the effect that where the lessor consented to the surrender of a portion of the premises, he would be estopped from recovering any rent for the property surrendered.

In *Smith v. Pendergast* (1879) 26 Minn. 318, 3 N. W. 978, it appeared that there had been a surrender by operation of law of a part of the premises, prior to the assignment of the lease to the defendant sublessee, who claimed that the lessor could not recover the entire rent, because he had been deprived of the use of a part of the premises. The court held that the rent should not be reduced, since it was not found that the value of the premises had been impaired; it being admitted that a point of some difficulty might have been presented if the case had been otherwise.

In *Baynton v. Morgan* (1888; C. A.) L. R. 22 Q. B. Div. (Eng.) 74, 58 L. J. Q. B. N. S. 139, 37 Week. Rep. 148, 53 J. P. 166, affirming (1888) 59 L. T. N. S. 478, an action on a covenant for the payment of rent in a lease, it appeared that the plaintiff had leased certain premises to the defendant, who had assigned his term to another, by whom a small portion of the premises was surrendered to the plaintiff, the term in the remainder being later assigned by him to one who became bankrupt. The rent for a certain quarter being due and unpaid, the plaintiff sought to recover it from the original lessee on his personal covenant, deducting, however, a sum declared to represent the rental value for the quarter of the portion surrendered. The defendant contended that he was relieved of liability because of the surrender of a portion of

the premises by his assignee, and this on the theory that he was a surety for the payment of rent and was released because of the alteration of the contract without his consent. The court, however, refused to accept this point of view, saying that, since the surrender of a part of the property by the lessee himself would not put an end to the term, neither would that be done when the surrender was by the lessee's assignee. It was also contended that since part of the premises was no longer enjoyed, the whole rent could no longer be payable, and since the covenant could not be apportioned it was gone altogether. It was held to be unnecessary to decide whether there could be an apportionment, but the court said that if there could not the defendant must pay the whole rent, for so he covenanted to do.

In *Bless v. Jenkins* (1895) 129 Mo. 647, 31 S. W. 938, wherein it appeared that the defendant had abandoned the first and second floors of certain premises, leaving a subtenant in possession of the third and fourth floors thereof, the court pointed out that the defendant would not be exonerated from liability for the rent therefor unless the plaintiffs agreed to accept the subtenant as their own tenant.

In *McKenzie v. Lexington* (1836) 4 Dana (Ky.) 130, wherein it was alleged that a surrender had been made by a lessee of a part only of the leased premises, the remainder having been sublet, it was said that if a surrender had been made the contract was so far extinguished that an action of covenant would not lie thereon, but that an action of assumpsit for use and occupation of the part not surrendered, or for breach of promise in failing to surrender, would be the proper remedy. But it was remarked, in addition, that the jury might possibly have inferred that the surrender and acceptance of part of the premises was intended to be a discharge of the defendant from all liability for rent for those parcels not surrendered.

In *Lenane v. Mayer* (1896) 18 Misc. 454, 41 N. Y. Supp. 960, it appeared that the defendant, surety on a lease of six rooms, had induced the land-

lord to take back three of them and to reduce the rent for the others. The surety thereafter paid the rent at the reduced rate for some time. In a suit for rent subsequently accruing, the surety sought to avoid liability on the ground that the lease was canceled by the giving up of three rooms, and his responsibility as surety discharged. It was held, however, that the lease and suretyship were not abrogated by the action of the parties, and the defendant was held liable.

IV. Surrender between rent days.

a. Rent payable in advance.

Since a surrender and acceptance of a term does not relieve a tenant from liability for rent already accrued at the time of the surrender (see *supra*, II.), and since rent payable in advance is considered as accruing on the day on which it is due, the surrender of a term between rent days does not release the lessee from the payment of rent for the whole rental period, where it is payable in advance. *MacKellar v. Sigler* (1874) 47 How. Pr. (N. Y.) 20; *Conklin v. White* (1886) 17 Abb. N. C. (N. Y.) 315; *Weston v. Ryley* (1896) 15 Misc. 638, 37 N. Y. Supp. 216; *Kahn v. Simons* (1899) 25 Misc. 737, 55 N. Y. Supp. 619; *Barkley v. McCue* (1899) 25 Misc. 738, 55 N. Y. Supp. 608; *Kahn v. Rosenheim* (1901) 34 Misc. 192, 68 N. Y. Supp. 856; *Stern v. Murphy* (1907) 102 N. Y. Supp. 797; *O. M. & D. Realty Co. v. Griffin* (1917) 165 N. Y. Supp. 440. See also *Okie v. Person* (1904) 23 App. D. C. 170. *Danziger v. Falkenberg* (1892) 64 Hun, 635, 46 N. Y. S. R. 331, 18 N. Y. Supp. 927; *Cheesebrough v. Leiber* (1896) 18 Misc. 459, 42 N. Y. Supp. 1122; *Rockwell v. Eilers Music House* (1912) 67 Wash. 478, 39 L.R.A. (N.S.) 894, 122 Pac. 12. Compare *Voss v. Levi* (1917) 33 Cal. App. 671, 166 Pac. 359, and *Schwartz v. Brucato* (1901) 57 App. Div. 202, 68 N. Y. Supp. 289.

In *Kahn v. Rosenheim* (1901) 34 Misc. 192, 68 N. Y. Supp. 856, the general rule was followed, but it was said that the tenant's remedy was by way of counterclaim or independent action covering the portion of the rental period surrendered.

In *MacKellar v. Sigler* (N. Y.) *supra*, an action brought to recover two months' rent, it appeared that the rent was payable in advance, and that while the defendant left the premises on February 1, the acts which the court held constituted the plaintiff's acceptance thereof did not occur until sometime thereafter in the same month. But the court held that since the rent became due on the 1st of that month the surrender constituted no defense to the plaintiff's right to have rent for February.

In *Conklin v. White* (1886) 17 Abb. N. C. (N. Y.) 315, wherein it appeared that the rent sought to be recovered was due on the first of November in advance, and that the acceptance of the surrender did not take place until after the rent was due, the defendant having moved out of the premises on the afternoon of November 1, it was held that the rent for the month of November might be recovered.

In *Weston v. Ryley* (1896) 15 Misc. 638, 37 N. Y. Supp. 216, an action brought to recover rent for the months of August and September under a lease, it appeared that there was a surrender and acceptance of the premises on August 12, the rent being payable in advance on the first of the month. The court held that the plaintiff was clearly entitled to one month's rent.

In *Kahn v. Simons* (1899) 25 Misc. 737, 55 N. Y. Supp. 619, wherein it appeared that one month's rent due on the first of the month in advance was unpaid and was sought to be recovered, it was held that a surrender and acceptance of the premises would not relieve the lessee of liability for the rent which had already accrued at the time of the surrender, which it was shown had taken place during the month for which it was sought to recover rent.

In *Barkley v. McCue* (1899) 25 Misc. 738, 55 N. Y. Supp. 608, wherein it appeared that certain premises had been surrendered and accepted on the 15th of the month, it was held that the right to recover the rent for that month, which was payable in advance

on the first day of the month, was not affected thereby.

The court, in *Kahn v. Rosenheim* (N. Y.) *supra*, upheld the general rule that rent already accrued, although payable in advance, is not discharged by a surrender and acceptance. The rent sued for was due September 1, in advance, and it was said that the plaintiff might recover the entire month's rent, "as no counterclaim was interposed to cover the portion of the month of September alleged to have been surrendered and accepted by the landlord."

In *Schwartz v. Brucato* (1901) 57 App. Div. 202, 68 N. Y. Supp. 289, it was sought by the plaintiff to recover from the defendant for rent for the last three months of a term ending May 1, the rent being payable in advance on the first of the month. It appeared that the defendant left the premises on January 28 and sent the key to the landlord, who declined to accept the surrender, but who did, however, let the premises to another for a term beginning May 1st, allowing him to occupy the premises from April 13 to May 1, rent free. It was held that the plaintiff might have judgment for the rent for February and March and for thirteen days' rent in April; the court pointing out that the plaintiff had the benefit of the possession of the premises thereafter.

b. Rent not payable in advance.

1. In absence of special agreement.

Where the surrender and acceptance of a term occurs between rent days, the rent being payable at the end of specified periods and not in advance, in the absence of special agreement, the lessee is discharged from responsibility for any rent for the period in which the surrender occurs.

District of Columbia.—See *Okie v. Person* (1904) 23 App. D. C. 170.

New York.—*Shepard v. Merrill* (1816) 2 Johns. Ch. 276; *Curtiss v. Miller* (1854) 17 Barb. 477; *Young v. Peyser* (1858) 3 Bosw. 308; *Smith v. Wheeler* (1878) 8 Daly, 135; *Ireland v. United States Mortg. & T. Co.* (1902) 72 App. Div. 95, 76 N. Y. Supp. 177, affirmed in (1903) 175 N. Y. 491, 67

N. E. 1083. See also *Bain v. Clark* (1813) 10 Johns. 424.

Oregon.—*Ladd v. Smith* (1876) 6 Or. 316.

Pennsylvania.—*Magaw v. Lambert* (1846) 3 Pa. St. 444; *Greider's Appeal* (1846) 5 Pa. 422.

Utah.—See the reported case (*WILLIS v. KRANENDONK*, ante, 947).

Wisconsin.—See *Imler v. Baenish* (1889) 74 Wis. 567, 43 N. W. 490.

England.—*Whitehead v. Clifford* (1814) 5 Taunt. 518, 128 Eng. Reprint, 791, 15 Revised Rep. 579; *Grimman v. Legge* (1828) 8 Barn. & C. 324, 108 Eng. Reprint, 1063, 6 L. J. K. B. 321, 2 Mann. & R. 438; *Smith v. Lovell* (1850) 10 C. B. 6, 138 Eng. Reprint, 3, 20 L. J. C. P. N. S. 37, 1 Lowndes, M. & P. 794, 15 Jur. 250; *Furnivall v. Grove* (1860) 8 C. B. N. S. 496, 141 Eng. Reprint, 1259, 30 L. J. C. P. N. S. 3. See also *Doe ex dem. Phillip v. Benjamin* (1839) 9 Ad. & El. 644, 112 Eng. Reprint, 1356, 1 Perry & D. 440, 2 W. W. & H. 96, 8 L. J. Q. B. N. S. 117.

Canada.—*Matthias v. Pace* (1882) 15 N. S. 366. Compare *Crozier v. Trevarton* (1914) 32 Ont. L. Rep. 79, 7 Ont. Week. N. 111, 22 D. L. R. 199.

In *Whitehead v. Clifford* (Eng.) *supra*, wherein it was sought to recover for rent accruing after a surrender and acceptance of premises in the middle of a quarter, the court held that the plaintiff could not recover for use and occupation, since he himself had taken possession of the house.

In *Davison v. Donadi* (1853) 2 E. D. Smith (N. Y.) 121, a case not directly in point, the court said: "Had the premises been surrendered by the tenant in the middle of a month, when no rent was due (the same not being payable in advance), the landlord would have terminated the tenancy by accepting the possession. He could not, according to the authority of *Grimman v. Legge* (1828) 8 Barn. & C. 324, 108 Eng. Reprint, 1063, 6 L. J. K. B. 321, 2 Mann. & R. 438, have had an action for the previous occupation."

Where rent was payable quarterly, one quarter ending November 1, and the lessee's assignee surrendered the premises on November 14, when they were accepted by the plaintiff lessor,

it was held that the tenant was not liable for rent for the fourteen days in the new quarter. *Young v. Peyser* (1858) 3 Bosw. (N. Y.) 308.

In *Smith v. Wheeler* (1878) 8 Daly (N. Y.) 135, wherein it appeared that a surrender of premises took place on the 26th of the month, it was held that the lessor could not recover for that month the rent, which was not due and payable until the end thereof.

In *Ireland v. United States Mortg. & T. Co.* (1902) 72 App. Div. 95, 76 N. Y. Supp. 177, affirmed in (1903) 175 N. Y. 491, 67 N. E. 1083, it appeared that the defendant surrendered the premises, the rent of which was sought to be recovered by the plaintiff, on the day before the rent became due. The court said: "When there is a surrender before rent due, there is no apportionment of rent up to the day of surrender. The rent for the whole of the period not then due is extinguished."

In *Greider's Appeal* (1846) 5 Pa. 422, it appeared that a lessee took possession of certain premises for a term of two years, commencing April 1, 1844, at a yearly rental payable on the first days of April, 1845 and 1846. One Moore later purchased the reversionary estate and received an assignment of that portion of the lessee's term which began April 1, 1845, thus becoming the landlord entitled to receive the second year's rent when due. The lessee, becoming embarrassed on January 8, 1846, entered into an agreement with the landlord whereby he gave up to the latter the premises in question, and on the following day a fieri facias was levied on the lessee's goods on the demised premises, two more *fi. fas.* being levied on the same goods later in the month. The landlord went into possession of the premises, and later claimed, and was awarded from the proceeds of the sheriff's sale of the lessee's chattels, a portion of the last year's rent up to the time of the levy, to which the execution creditors objected. The court, accepting the fact of the surrender, discussed the effect thereof on the claim of the landlord, and it was declared that, on surrender of a term, the estate of the

lessee was extinguished in the estate of the lessor, as a result of which the rent issuing out of the lessee's estate, and not due at the time of the surrender, was also extinguished. It was said: "A demise, such as the present, is an entire contract, and by an acceptance of a surrender pending a current year, the landlord, having destroyed his right to recover the entire rent of that year according to the covenants of the lease, cannot recover any part of it, and is therefore not permitted to claim *pro rata*."

The reported case (*WILLIS v. KRAN-
ENDONK*, ante, 947) was an action brought to recover on a promissory note which had been given in payment of one year's rent falling due October 31, 1917. It appeared that in April, 1917, the defendant surrendered the premises to the landlord, the payee and assignor of the note, who accepted them. It is held that, since the rent was payable yearly, and the premises had been surrendered and accepted before the rent in question was due and payable, the defendant could not be held liable therefor, nor could the rent be apportioned and the tenant compelled to pay for the portion of the year during which he remained in possession.

In *Grimman v. Legge* (1828) 8 Barn. & C. 324, 108 Eng. Reprint, 1063, 6 L. J. K. B. 321, 2 Mann. & R. 438, an action of assumpsit for use and occupation, it appeared that the defendant surrendered the premises to the plaintiff, who accepted them, in the first month of the second quarter, the rent for the first quarter having been paid. The court held that the plaintiff was not entitled to recover rent *pro rata* for the time the premises were occupied by the defendant, but that, since the plaintiff had destroyed his right to recover under the contract, it had been destroyed altogether.

In *Furnivall v. Grove* (1860) 8 C. B. N. S. 496, 141 Eng. Reprint, 1259, 30 L. J. C. P. N. S. 3, it appeared that the defendant entered into an agreement with the plaintiff whereby he leased certain premises for a term of four years, the rent to be payable quarterly, on condition that the plain-

tiff would make certain repairs within twenty-eight days. Rent was paid on the following Christmas, 1858, and Lady day, 1859. In April, 1859, the defendant complained of the condition of the building, and the plaintiff received a notice from the authorities to repair the premises, and in the latter part of April the plaintiff told the defendant he was going to pull the premises down, and told the defendant that he would assist him to remove. In May the ground-floor story was removed by the plaintiff, and the defendant vacated the premises on June 23. The plaintiff sought to recover rent for the quarter, Lady day to midsummer day, but the court gave judgment for the defendant. The several judges based their opinion on different grounds, but one of the judges, with the support of another, decided that there was an agreement between the parties that the defendant, giving up possession on June 23, should not be liable for the rent accruing the following day, and based his opinion on the intent to be drawn from the aforementioned facts, together with the failure of the plaintiff to repair as agreed, a letter containing the key sent by the defendant to the plaintiff on June 22, and the latter's silence on its receipt, and the entering and pulling down of the whole premises by the plaintiff a few days thereafter. All these things, it was said, showed that the tenant intended to propose, and the landlord to assent to, the determination of the tenancy, and that no rent was to accrue subsequently.

In *Matthias v. Pace* (1882) 15 N. S. 366, wherein, on a suit for a quarter's rent, it was found that there had been a surrender of a term, by operation of law, in the middle of a quarterly rent period, it was held that the plaintiff lessor was not entitled to pro rata rent, the court pointing out that rent pro rata was not recoverable in England before the passage of the Apportionment Act (33 & 34 Vict. chap. 35), which statute, it was said, "does not apply to us."

2. Under special agreement.

In two cases, the rent in question

not being payable in advance, the right of the lessor to recover rent for the whole rental period, in the midst of which a surrender and acceptance occurred, has been held to be saved by the fact that the parties had made a special agreement to that effect at the time of the surrender.

Bates v. Phinney (1881) 45 Mich. 388, 8 N. W. 88, was an action for rent wherein it appeared that the defendant had leased certain premises for a period of three years from March, 1877, the rent to be paid each year on October 15. On September 2, 1878, the lessor and lessee entered into an agreement whereby the lessee gave up immediate possession of the property to the lessor to enable her to put in fall crops, it being specified that he should pay no rent from that date, but that the agreement was not to affect the rent to become due in October. The question arose whether the lessee should pay the rent for the whole year ending March, 1879, or for the half year ending at about the time of the agreement. There was a provision in the agreement stipulating for the occupancy of the house and premises by the lessee for forty days after the date thereof. The court pointed out that rent is the consideration for occupancy, and that the consideration for payment ceased when the enjoyment terminated; and it was held that the agreement merely meant that the lessee was not excused from the payment for his half year's occupancy because of the surrender and termination of the lease before the arrival of the rent day. The judgment of the lower court, holding the lessee liable for the remaining half year when he was out of possession, was reversed.

In *Bain v. Clark* (1813) 10 Johns. (N. Y.) 424, it appeared that a lessee, after taking possession of a farm under a lease, at a yearly rental payable at the end of the term, and occupying it for about seven months, quitted the possession thereof and indorsed on the lease a surrender, holding himself liable, however, for the payment of the rent. The court, holding that the lessor had no right of distress for rent, remarked that the

effect of the surrender was to extinguish the estate of the lessee, passing it to the lessor, whereby the rent likewise became extinct, although it was pointed out that the lessee might continue bound for the year's rent by virtue of the agreement.

V. Decisions not showing time of accrual of rent.

In a few cases, although it does not appear whether the rent sought to be recovered accrued before or after a surrender, it has nevertheless been held or declared that the lessee is discharged from liability for rent by a surrender and acceptance of the term in the entire premises leased.

In *Heine v. Morrison* (1883) 13 Mo. App. 577, the court said: "Acts which indicate a purpose on the part of the landlord to accept a surrender of the demised premises will estop him from demanding rent."

In *Huling v. Roll* (1890) 43 Mo. App. 234, it was shown that the defendants, lessees of the plaintiff's premises, following their failure in business, refused to pay the monthly rental therefor, whereon the plaintiff took possession of the property, and, after making alterations, leased it within a month after the defendant's refusal to pay rent, to a third person for a term extending beyond that of the defendant's. The court, apparently dealing more with what constitutes a surrender than with its effect, did, however, say: "It is said in *Thomas v. Cox* (1840) 6 Mo. 506, that nothing will discharge a sealed covenant but 'performance or discharge under seal.' This statement is not strictly correct unless the word 'performance' was used in the sense of surrender; for the law is well settled that 'nothing but a surrender or release or an eviction absolves a tenant from the obligation to pay rent.' *Dyer v. Wightman* (1870) 66 Pa. 425; *Fisher v. Milliken* (1848) 8 Pa. 111, 49 Am. Dec. 497, 8 Mor. Min. Rep. 395. Unless this word was used in its broader sense, as indicated, the statement of the rule is incorrect. The plea of surrender has always exonerated the tenant from the payment of rent."

In *Harft v. Tonnelli* (1890) 16 Daly (N. Y.) 115, wherein it does not clearly appear whether the rent sought to be recovered had accrued before or after the alleged surrender and acceptance, it was simply remarked that if the surrender and acceptance were made, the judgment which had been rendered for the lessee should not be disturbed.

In *De Morat v. Falkenhagen* (1892) 148 Pa. 393, 23 Atl. 1125, the plaintiff's statement of claim in an action of assumpsit for one month's rent was met by an affidavit of defense which averred a surrender by the lessee and an acceptance by the plaintiff's agent. The court held that this was sufficient to take the case to the jury, who might determine any disputes which might arise as to the facts of agency and surrender. See also *Auer v. Penn* (1882) 99 Pa. 370, 44 Am. Rep. 114.

Compare, however, *Thomas v. Cox* (Mo.) supra, wherein it appeared that the plaintiff, lessee of certain premises, had subleased them to the defendant, against whom he brought an action for rent. It was pleaded by the defendant that, the rent having been paid to a certain date, the balance of the term was then surrendered to and accepted by the plaintiff. The court, holding the plea bad, said: "The plea nowhere asserts the fact that the lot, etc., was surrendered to and accepted by Cox, in satisfaction of the defendant's obligation to him to pay the \$1,000. It is a well-settled rule in law that nothing will discharge a sealed covenant but a performance or discharge under seal. Here no such thing is alleged; the plea says Cox accepted the lease, but for what it does not say; whether in satisfaction of his demand is not said."

In two cases wherein it does not appear whether the rent sought to be recovered had accrued before or after the surrender, the defendant surety has been held to be released from liability for rent by the surrender and acceptance of the terms.

Thus, in *White v. Walker* (1863) 31 Ill. 422, wherein it was sought to recover from the guarantor of a lease for unpaid rent, it appeared that on

the death of the lessee, his widow entered into a new agreement with the plaintiff respecting the premises, a new lease being made to her at less rent. The court said that if these facts constituted a waiver or surrender of the original lease, which was a question for the jury, the defendant was unquestionably discharged of his guaranty. So, in *Wistar v. Campbell* (1875) 10 Phila. (Pa.) 359, an action on a recognizance on certiorari, the condition of which was to pay costs and rent accrued or to accrue to the final determination of the cause, the surety, Campbell, swore that the principal debtor, before the finding of the sheriff's jury, gave up possession of the premises to the plaintiff, who accepted the same. The court held that such a clear assertion of an acceptance of the surrender would, if proved, defeat the plaintiff's action. It does not appear from the report whether any rent had accrued at the time of the alleged acceptance.

In two cases it has been held that, where a surrender of part of the leased premises has been accepted, the tenant may be held for an apportioned rental, or, what corresponds thereto, for the portion not surrendered, there being nothing in the cases to indicate specifically whether the rent in question accrued before or after the surrender.

Thus, in *Ehrman v. Mayer* (1882)

57 Md. 612, a case not within the scope of this note, it was held that where one leased land for a term of years and the assignee of the reversion accepted a surrender of a portion of the premises, the rent of the remaining portion was not extinguished, but was to be apportioned.

So, in *Van Rensselaer v. Bradley* (1846) 3 Denio (N. Y.) 135, 45 Am. Dec. 451, another case not in point, the court, relative to the subject under discussion, remarked as follows: "The rule found in the books, which I take to be sound, is this,—'if a man which hath a rent service purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but for that parcel. For a rent service in such case may be apportioned according to the value of the land.' 1 Co. Litt. Phil. ed. 1836, p. 539. 'But if one holdeth his land of his lord by the service to render to his lord yearly at such a feast, a horse, a golden spear, or a clove, gilliflower, or the like, and the lord purchase parcel of the land, such service is taken away, because such service cannot be severed or apportioned.' Id. p. 545. The whole tenancy being equally chargeable with them, the lord by his own act shall not discharge part, and throw the whole burden upon the residue for his own private benefit and advantage." R. S.

JOHN W. WHALEN, Admr., etc., of Francis J. Whalen, Deceased,
v.

RICHARD E. SHEEHAN.

Massachusetts Supreme Judicial Court—January 7, 1921.

(237 Mass. 112, 129 N. E. 379.)

Automobile — liability for injury done by car in possession of repair man.

The owner of an automobile is not liable for injury done by it while a repair man in whose possession it has been placed for repairs, without any right on the part of the owner to exercise control or direction over the employment and its details, is "tuning" it up after the repairs are finished, and before it is returned to the owner.

[See note on this question beginning on page 974.]

REPORT by the Superior Court for Essex County (Cox, J.) for determination by the Supreme Judicial Court, on direction of a verdict for defendant, of a question arising in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligent operation of defendant's automobile. *Judgment for defendant.*

The facts are stated in the opinion of the court.

Messrs. William E. Sisk and Richard L. Sisk for plaintiff.

Messrs. Walter I. Badger, Chester M. Pratt, and Louis C. Doyle, for defendant:

Buckley, at the time of the accident, was not the servant or employee of defendant, so as to render defendant liable for his negligence.

Forsyth v. Hooper, 11 Allen, 419; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Corliss v. Keown, 207 Mass. 149, 93 N. E. 143; Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694; Dutton v. Amesbury Nat. Bank, 181 Mass. 154, 63 N. E. 405; Connors v. Hennessey, 112 Mass. 96; Centrello's Case, 232 Mass. 456, 122 N. E. 560; Winslow's Case, 232 Mass. 458, 122 N. E. 561; Robichaud's Case, 234 Mass. 60, 124 N. E. 890.

Pierce, J., delivered the opinion of the court:

This is an action of tort, brought by the administrator to recover for the death of his intestate, a minor child, who was struck and killed on May 1, 1918, by an automobile owned by the defendant and operated by one Joseph H. Buckley, while the intestate was crossing a public highway in the city of Lynn. The defendant was not present at the time of the accident. There was sufficient evidence of the due care of the intestate and of the negligence of Buckley to warrant the submission of the case to the jury on these points. At the close of the evidence the judge ordered a verdict for the defendant, and reported the case to this court upon the following stipulation: "If the case should have been submitted to the jury, then judgment is to be entered for the plaintiff in the sum of thirty-seven hundred and fifty (\$3,750) dollars, costs and interest from the date of the writ; otherwise, judgment for the defendant."

The only question raised by this report is whether, upon all the evi-

dence, the case should have been submitted to the jury on the issue of the defendant's responsibility for the negligence of the driver of the automobile.

The defendant and Buckley were the only witnesses called to testify on the issue of the relation of the defendant and Buckley. The evidence warranted the jury in finding the following facts: The defendant and Buckley lived in Lynn. The defendant purchased the automobile two weeks before the accident. He was then unfamiliar with its operation and care. Afterward, the person who sold him the automobile gave him lessons. Four or five days before the accident, desiring to go to Gloucester, he went to the garage where he kept the automobile and asked for a man to drive him there. The keeper of the garage sent Buckley, not being able to send a man from the garage. Buckley had a chauffeur's license; he was not employed by anyone steadily; temporarily he did "jobs, driving or repairing, for persons who asked him;" he lived with his parents, had a workshop, and did not have a garage. The defendant and Buckley drove to Gloucester in the morning and returned to Lynn. In the afternoon they drove to Lawrence, the defendant for a short distance taking the wheel. Buckley gave the defendant instructions on the last trip. While returning from Lawrence they found the car was not in good condition. Buckley told the defendant that his business was repairing automobiles, and that he would be glad to take the car and do what was necessary to repair it. As a result of the conversation, the car, after it was returned to the garage in the evening of the same day, was driven by the son-in-law of the defendant to Central square, Lynn,

and there delivered to Buckley, as a repair man, to do what was necessary. Nothing was said about the compensation to be paid, nor was the agreement such that the defendant could not stop the work and give it to some other man if the defendant was not satisfied with the work of Buckley. After Buckley had had the car about two days the defendant called him up and asked if the car was ready. Before the accident, on the day of the accident, he again called him up and asked how soon he could have it. Buckley answered that there was a lot of work that had to be done on it, and that he could not give the car to him before late that afternoon. The defendant had not seen the car after its delivery to Buckley, and had no other conversation with him previous to the accident. As an incident in the repair of the car, to see that the repairs were effective, Buckley, "after he got the car where he thought was right," took it out "to 'tune' it up . . . and was coming back to his home" when the accident occurred.

We are of opinion that the facts, as a matter of law, do not warrant the conclusion that the defendant, during the time the automobile was in the control of Buckley, had the right to exercise control and direction over the employment and all its details; in other words, had a right to say not only what was to be done, but when and how it should be done. Baltimore

**Automobile—
liability for
injury done by
car in possession
of repair
man.**

Boot & Shoe Mfg. Co. v. Jamar, 93 Md. 404, 86 Am. St. Rep. 428, 49 Atl. 847; *Reg. v. Walker* (1858) 8 Cox, C. C. 1. On the other hand, Buckley was in possession and had full control of the automobile, and "was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." *Morgan v. Smith*, 159 Mass. 570, 574, 35 N. E. 101; *Dutton v. Amesbury Nat. Bank*, 181 Mass. 154, 157, 63 N. E. 406. Had the defendant been possessed of a watch or clothing in need of repair, and had he taken it to a repairer for emendation, it would be extraordinary to hold that such an artisan became the servant of the owner during the time the labor and skill of the workman were exercised upon it. Indeed, such a deposit has been long recognized as creating the relation of bailor and bailee, and not that of master and servant. In principle we perceive no distinction between the illustrative case and the case at bar. *Segler v. Callister*, 167 Cal. 377, 139 Pac. 819, 51 L.R.A.(N.S.) 772, note; *McColligan v. Pennsylvania R. Co.* 214 Pa. 229, 6 L.R.A.(N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792, 20 Am. Neg. Rep. 471.

It follows that the verdict for the defendant was properly directed, and by the terms of the stipulation judgment is to be entered for the defendant.

So ordered.

ANNOTATION.

Liability of owner for injury by automobile while being operated by repair man.

It appears to be well settled that where the owner of an automobile turns it over to a person not in his general employ, for repairs, and surrenders entire control to the repair man, he is not liable for an injury inflicted by the car while it is being operated by the latter, who is deemed

to be an independent contractor. *Segler v. Callister* (1914) 167 Cal. 377, 51 L.R.A.(N.S.) 772, 139 Pac. 819; *Chamberlain v. Southern California Edison Co.* (1914) 167 Cal. 500, 140 Pac. 25; *Daugherty v. Thomas* (1913) 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615, Ann. Cas. 1915A, 1163;

Woodcock v. Sartle (1914) 84 Misc. 488, 146 N. Y. Supp. 540; Thorn v. Clark (1919) 188 App. Div. 411, 177 N. Y. Supp. 201; McCabe v. Allan (1910) Rap. Jud. Quebec 39, C. S. 29. And see the reported case (WHALEN v. SHEEHAN, ante, 972).

Thus, in Segler v. Callister (Cal.) supra, wherein it appeared that an owner had turned his car over to the keeper of a garage, to be put in repair for selling, it was held that the owner was not liable for an injury caused by the repair man while driving the machine on the public street to test it. The court said: "We have, then, the case of a man who has turned his automobile over to a mechanic to put it in order. He exercised no control over the work or over the mechanic in the performance of the work. If, in the due performance of that work, it became proper for the mechanic to take the car out on the street to test it, the owner would be no more responsible for damage which might result from the mechanic's bad management of the car than he would if the mechanic, without any authority at all, had taken the car and so used it. The evidence of plaintiff is not sufficient to raise a conflict upon the question, and it certainly needs no citation of authority to show that the owner, who has surrendered possession and control of his property under the indicated circumstances to an independent contractor, is not legally responsible for the damages which that contractor may occasion in his use of the property." See to the same effect, McCabe v. Allan (1910) Rap. Jud. Quebec 39 C. S. 29.

So, in Thorn v. Clark (1919) 188 App. Div. 411, 177 N. Y. Supp. 201, it was decided that an owner who delivered his automobile to a garage keeper to be repaired was not liable for a negligent act of the repair man, causing injury to another while operating the car to test it and also for pleasure, by virtue of the owner's authority to "take the car out." The court said: "The action must fail as to the owner of the automobile. Laravie, in repairing it, represented the will of the owner only as to the result

of his work; the means by which he accomplished such work being left to his own discretion. It is a most common occurrence for the owner of an automobile to have it repaired at a garage. The accomplishment of that result and work incidental thereto, such as testing the automobile, are the work of an independent contractor, and not that of a servant. It makes no difference that the work, as in this case, may have been done by a particular employee in the garage, acting independently and for himself."

It is held in the reported case (WHALEN v. SHEEHAN) that the owner of an automobile was not liable for a fatal injury resulting from the negligent operation of the car by a repair man in whose custody the owner had left it to be repaired. It appeared in that case that the owner had no right, while the machine was in the control of the repair man, to exercise any direction over the employment.

In Daugherty v. Thomas (1913) 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615, Ann. Cas. 1915A, 1163, the court held to be unconstitutional a statute of Michigan providing that "the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provisions of a statute of this state, or in the failure to observe such ordinary care in such operation as the rules of the common law require, but such owner shall not be so liable in case such motor vehicle shall have been stolen." In that case, the owner of an automobile was held not to be liable for its negligent operation by repair men while testing it without the owner's knowledge or permission.

In Woodcock v. Sartle (1914) 84 Misc. 488, 146 N. Y. Supp. 540, it was held that a mechanic engaged by the owner of an automobile to overhaul the latter's car on his premises, and put it in running condition, at a specified wage per week, was an independent contractor, and not a servant, the nature of the repairs and the manner in which they were to be made being left entirely to the judgment of the

repair man, so that the owner was not liable for an injury to a third person caused by the negligent operation of the car while the mechanic was testing it. The court said: "Sartle, in fact, reserved no right to control or direct Smith in repairing the car to be overhauled. He neither had the knowledge nor experience necessary to do so. He, in fact, did not assume to direct what should be done, or how it should be done. He was only interested in the result to be accomplished. He relied upon, and trusted entirely to, the mechanical skill and experience of Smith, who undertook the job. The fact that the work was done on Sartle's premises does not change the legal relations between the parties. Had Smith had a shop of his own, and had he taken the automobile there to do the work, his duties would have been precisely the same. Nor does the fact that he was to be paid at an agreed compensation of \$20 per week, or at the rate of \$20 per week, alter the relations. It is a circumstance to be considered, but cannot control. If the 'auto' had been sent to a factory, the cost of the necessary repairs might have been either for a lump sum, or, if the time and extent of the repairs could not be definitely foreseen, the parties could agree that the cost be ascertained on the basis

of the time necessarily expended, plus the cost of the required new parts. This was, in substance, just what the arrangement was between Sartle and Smith; all necessary parts to be charged to Sartle, and the time expended to be paid for at the rate of so much per week."

In *Chamberlain v. Southern California Edison Co.* (1914) 167 Cal. 500, 140 Pac. 25, it appeared that an electric lighting and heating company, maintaining a shop for the repair of its own motor vehicles, had sent, by order of its general storekeepers, one of its automobile truck drivers, who was subject to the general orders of the officers of the company, to the residence of another employee of the company to get an automobile belonging to that employee which needed repairs, and that, while towing the automobile, a person was injured through the driver's negligence. It also appeared that the machine was repaired at the company's shop, and the charges, amounting to the actual cost of material and labor, were paid by the owner. It was held that the driver was acting within the scope of his employment as a servant of the company, and was not acting for the owner of the automobile, so as to render the latter liable for the injuries inflicted. L. F. C.

WILLIAM GIERTH, Respt.,

v.

FIDELITY TRUST COMPANY et al., Appts.

New Jersey Court of Errors and Appeals — November 14, 1931.

(— N. J. —, 115 Atl. 397.)

Fraud — contract to reveal bank deposit — compensation.

1. Complainant had a large deposit in a trust company of which he lost all recollection, resulting from a mental condition caused by illness, and an officer or head of a department of the trust company having charge of depositor's accounts, knowing of complainant's abnormal mental condition, and concealing his relation to the trust company, induced complainant to contract to and pay him a large part of the deposit—nearly one half—to reveal its location. When the depositor learned the facts

he filed a bill in equity to compel the party to restore the fund. Held, that under the circumstances the defendant had, by superior knowledge and artful silence, obtained an unfair advantage over the complainant, whose mentality was, to the knowledge of the defendant, abnormal, and that defendant's acts were constructively fraudulent; that equity has power to give affirmative relief from such an exorbitant and unconscionable bargain, and compel restitution.

[See note on this question beginning on page 976.]

Pleading — multifariousness.

2. Under recent statutes and rules governing the court of chancery, mul-

tifariousness, as an objection to a pleading, has been, substantially, done away with.

APPEAL by defendants from an order of the Chancery Court (Walker, Ch.) refusing to dismiss complainant's bill filed to compel restoration of moneys alleged to have been illegally taken and withheld from him by defendants. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Lum, Tambllyn, & Colyer and Ralph E. Lum, for appellants:

Complainant has not stated a cause of action against the defendants, Ralph Mortimer Kutz and Edith K. Ryan.

Trapahagen v. Voorhees, 44 N. J. Eq. 21, 12 Atl. 895; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120; Perth Amboy Gaslight Co. v. Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704; Tufts v. People's Bank & T. Co. 59 N. J. L. 380, 35 Atl. 792.

Messrs. William A. Brooks and Pomerehne & Laible for respondent.

Bergen, J., delivered the opinion of the court:

This is an appeal from an order made by the chancellor, refusing to dismiss the complainant's bill of complaint, and the only matters argued are that the bill does not disclose sufficient facts to sustain it, and that it is multifarious. The bill avers that complainant had deposited to his credit with a trust company, in 1912, \$22,505, which remained in that condition until 1916, when complainant was stricken with an illness which caused a total loss of memory of this deposit; that in 1920 Ralph M. Kutz represented to the complainant that he had knowledge that the latter had over \$25,000 on deposit in a certain financial institution, and offered to reveal that knowledge if he would agree to pay him \$10,199.53, and that such a bar-

gain was made, whereupon Kutz induced the complainant to draw three checks on the Fidelity Trust Company of Newark, New Jersey, against this deposit for the sum agreed on, and pass them over to Kutz, who collected the money and deposited \$8,000 of it to the order of Edith K. Ryan, a relative of his, with a banking or brokerage company doing business as C. I. Hudson & Company; that Kutz concealed from the complainant the fact that he was in the service of the Fidelity Trust Company as chief accountant, in charge of the accounts of depositors; and that when complainant discovered this, within three days after making the contract with Kutz, he went to the Fidelity Trust Company and informed it of what had happened, and thereafter the trust company refused to honor any further checks drawn by complainant, who then filed his bill of complaint making the trust company, C. I. Hudson & Company, Kutz, and Edith K. Ryan, parties, praying that an account be taken of the amount due from each of the defendants to him, and that it be decreed that the moneys which complainant alleges were illegally taken and withheld from him be restored. A motion was made on behalf of Kutz and Edith K. Ryan to dismiss the bill of complaint, which was denied, from which action of the court Kutz

and Edith K. Ryan have appealed. In dealing with this motion we must treat it as a demurrer, and, if the facts averred state an equitable case for relief against appellants, the order of the chancellor should be affirmed.

The inferences to be drawn from the facts charged are that, when the complainant made this agreement and paid the money, his mind was in an abnormal condition, which is to be inferred from the fact that he had absolutely, because of his illness, lost all memory of so large a deposit in a financial institution located in the city where he lived, without any reason other than his illness; that Kutz was either an officer or the head of a department in the Fidelity Trust Company, which gave him knowledge of the deposit, and also that he knew of the complainant's illness and loss of memory, otherwise he could not have accomplished his scheme to secure nearly one half of the deposit; that he concealed from the complainant all knowledge of his connection with the financial institution where the money was lodged, and declined to reveal it until the complainant had agreed to pay him nearly one half of the amount on deposit. It is not pretended that the trust company would have had any right to make any such bargain, and the only question remaining is whether one of its officers, who obtained such knowledge because of his confidential relations with the trust company and the account of this depositor, can avail himself of the bargain which he made with the depositor. That such conduct by a bank official holding a semiconfidential position to a

Fraud—contract to reveal bank deposit—compensation.

depositor is contrary to fair dealing and good morals cannot be doubted.

If the conduct of Kutz was not an actual fraud, it is certainly what is denominated a constructive fraud.

That learned jurist, Chief Justice Beasley, said, in *Erie R. Co. v. Delaware, L. & W. R. Co.* 21 N. J. Eq. 283: Equity "will never lend its

active aid to a party who, by superior knowledge and artful silence, has gained an unfair advantage over another. Such triumphs are deemed unconscionable, and are opposed to the general principles of the law."

That the defendant Kutz, by superior knowledge and artful silence, gained an unfair advantage over the complainant, cannot be rightfully disputed. Occupying the position he did in relation to the complainant's account with the Fidelity Trust Company, if he had been upright in his dealings with complainant, he would have informed the customer of the situation, and not have taken advantage of his superior knowledge and of the abnormal condition of complainant's mentality, due to his illness, which must have been known to Kutz when he induced the complainant to make this exorbitant and unconscionable bargain. Such conduct justifies the implication of fraud, and authorizes a court of conscience to set it aside. *Hyer v. Little*, 20 N. J. Eq. 443, 460. Fraud in equity includes all wilful or intentional acts or concealments by which an undue or unconscionable advantage over another is obtained. *Pom. Eq. Jur.* § 873. Under the facts stated in the bill the conduct of the defendant Kutz was a fraud on the complainant, for, if he told him the facts,—namely, that he was the officer of the trust company in charge of the complainant's account and that he knew as such officer that the complainant had that amount of money to his credit with the trust company, which he had forgotten,—it is not to be supposed that the complainant would have made any such unconscionable agreement. That equity has power to give affirmative relief in a proper case, in order to satisfy its conscience and effectuate justice, cannot be doubted, when necessary to accomplish that result, provided the court has jurisdiction of the parties and the subject-matter. So far as Edith K. Ryan is concerned, she is a mere trustee for Kutz, and was used by him as a means of secreting the money, or to

render it more difficult for the complainant to follow it, and she has no greater rights than he has.

In answer to the objection that the bill is multifarious, it is only necessary to say that the claim set up is against the fund originally in the hands of the trust company, part of which is yet in its hands, and part in the hands of the other defendants; and all of the holders of said fund may be made parties, under the statutory rule of the court of chancery adopted in 1915 (Pamph. Laws 1915, p. 187), which provides: "Any person may be made a defendant who either jointly, severally, or in the alternative is alleged to have or claim an interest in the contro-

versy, or in any part thereof, adverse to the complainant; or whom it is necessary or proper to make a party for the complete determination or settlement of any question involved therein."

This rule applies to the present controversy, and therefore the objection referred to has nothing to rest on. In fact, it is hardly to be doubted that, under the statute and rules now governing the Court of Chancery, the old-time objection of multifariousness has been, substantially, done away with.

Pleading—multifariousness.

The order appealed from is affirmed, with costs.

ANNOTATION.

Validity of agreement to pay an officer or employee of a bank or trust company to disclose the existence of, or to assist one to establish, a deposit.

An extended search has revealed no case upon this question other than the reported case (GIERTH v. FIDELITY TRUST CO. ante, 976). An official or employee of a bank or trust company whose duties are concerned with depositors' accounts would seem to hold, if not a confidential position in the strict sense, at least a semiconfidential position toward a depositor. And if, as in the reported case, he learns of the deposit through his relationship to the bank or trust company, and conceals that relationship from the depositor at the time he makes the

agreement with the latter, he comes within the spirit, if not the letter, of the principle as formulated in 12 R. C. L. 311, that "where a relation of trust and confidence exists between the parties, it is the duty of the party in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question, and any concealment of material facts by him is a fraud, although the transaction could not have been impeached had no such relation existed." G. H. P.

CRANE TOWNSHIP EX REL. FRANKLIN J. STALTER, Prosecuting Attorney, et al., Plffs. in Err.,

v.

SECOY et al., Township Trustees, et al.

Ohio Supreme Court—July 12, 1921.

(— Ohio St. —, 132 N. E. 851.)

Office — liability for malfeasance in office — leaving blank warrants in hands of clerk.

1. Township trustees who leave signed warrants blank as to payee and amounts in the hands of the clerk, when the statute requires the warrants

to be properly filled up before signature, are guilty of malfeasance in office which will render them liable for losses due to wrongful use of the warrants by the clerk.

[See note on this question beginning on page 982.]

Appeal — misjoinder of parties — waiver.

2. Going to trial without raising the question of misjoinder of parties defendant waives such objection.

[See 2 R. C. L. 85.]

Office — liability for loss beyond term.

3. Members of different boards of

township trustees whose malfeasance in office permitted misappropriation of public funds by the clerk are not, in the absence of anything to show collusion between them, individually liable for any misappropriation occurring before or after their respective terms of office.

ERROR to the Court of Appeals for Wyandot County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiffs in a suit brought to hold defendants liable for losses due to the wrongful use of warrants by the township clerk, alleged to have been carelessly and wrongfully signed by defendants in blank and delivered to him. *Reversed.*

Statement by the Court:

This suit was brought in the court of common pleas of Wyandot county by the plaintiffs in error to recover from the defendants in error the sum of \$2,308.91, based upon a finding of the bureau of inspection and supervision of public offices in the department of the auditor of state.

The report of the bureau shows that the defendants carelessly, wrongfully, and unlawfully signed warrants in blank, and delivered them into the custody of the township clerk, contrary to law, and, further, did not require itemized bills to be presented and allowed for all claims, leaving that matter to the judgment of the township clerk, by reason of which illegal and excessive warrants were drawn upon the funds of the township in the amount aforesaid. The defendants answered jointly.

Upon trial had to a jury a verdict was returned, and judgment rendered thereon against the several defendants for above amount.

Motion for new trial was interposed and overruled. Error was prosecuted to the court of appeals, which court reversed the judgment below on the theory that the evidence showed mere negligence upon the part of the defendants, and that that was not a sufficient legal basis

for recovery against them as trustees, under the laws of the state of Ohio.

Error is prosecuted to this court to reverse that judgment.

Messrs. Franklin J. Stalter and A. K. Hall for plaintiffs in error.

Mr. D. C. Parker for defendants in error.

Per Curiam:

It is pretty well settled under the American system of government that a public office is a public trust, and that public property and public money in the hands of, or under the control of, such officer or officers, constitute a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust fund. Surely the public rights ought to be as jealously safeguarded as the rights of any individual made the beneficiary of a trust by the private party creating such trusts.

It is, at least, a novel claim to urge that, when one violates the plain, pertinent provisions of his trust, such violation is mere negligence, and that where the law points out the official duty in clear, understandable terms, and the official duty is as clearly ignored, or undone, or disregarded by the public officer, and a loss of money or funds proximately results therefrom, such vio-

lation of public duty upon the part of the public trustee constitutes no such wrong as may be made the basis of a suit at law to recover for the public the money so lost or misappropriated by the failure of the public officer to do his plainly prescribed duty under the law.

Of course, if the matter is one of discretion in the performance of duty, that would present quite a different question; but the law does not vest a trustee with discretion as to the issuance of warrants in this respect, but plainly outlines and defines exactly what the trustee shall do touching claims against the public fund.

It is quite proper to say that matters in general that are committed to the pure discretion of a public officer, and loss to the public in funds or character of service, could not be availed of in a suit against the public officer or his bondsmen. But such a case is not presented here.

The evidence unmistakably shows, even in the majority opinion of the court of appeals, that there was a plain failure of the clear duty on the part of the board of trustees. The majority opinion uses this language: "In this case the township clerk misappropriated various sums of money belonging to the township. His misappropriation was accomplished by procuring the signature of the township trustees to orders upon the treasurer, which orders were left in blank both as to amount and as to payee. This method he had pursued over a considerable space of time, and had been able to conceal from the eyes of the state inspectors his wrongs until the last examination."

To say that this is negligence does violence to the simplest forms of English. It is malfeasance in office—undoubted dereliction of a

clear public duty; and the fact that it had been going on for years does not make it any less culpable so far as the public interests are concerned.

This court in a comparatively recent case, *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N. E. 822, laid down the following proposition of law in the syllabus: "(1) All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law."

It is quite evident from the foregoing that the trustees knowingly and openly permitted and aided the township clerk in thus misappropriating public moneys of the township. That they should respond to the public for this disregard of plain public duty there can be no doubt.

But it is claimed that the judgment of the common pleas court should have been reversed upon another ground, and that is a misjoinder of parties defendant. No demurrer was interposed by the defendants as to misjoinder of parties defendant, nor was that issue raised by any answer. They went to trial upon a joint answer, and the ordinary rule would

Appeal—misjoinder of parties—waiver.

therefore be that they have waived any right to afterwards complain of a joint judgment against them. This court, however, must read into the petition the law of Ohio, which recognizes the fact that but three of them could be acting as a board of trustees at any one time. There is nothing in the record to show that either board was in collusion or conspiracy with the other board—that there was any common or joint purpose between them as to their course of business in the matter complained of.

The interests of law, as well as justice, therefore, demand that the judgment of the Court of Appeals, finding no liability upon the ground of negligence in the discharge of a plain public duty, should be reversed, and that this cause should be remanded to the Court of Com-

Office—liability for malfeasance in office—leaving blank warrants in hands of clerk.

mon Pleas, with instructions to hear and determine the amount of liability to be assessed against each trustee, measured by the misappropriation herein involved, in which

**Office—liability
for loss beyond
term.**

he participated during his official term, under the evidence and the law as outlined in this opin-

ion, and for which he is legally liable.

Judgment reversed, and cause remanded to the Court of Common Pleas.

Marshall, Ch. J., and Johnson, Hough, Wanamaker, Robinson, Jones, and Matthias, JJ., concur.

ANNOTATION.

Liability of township trustees for loss of public funds.

Generally, as to liability of public officer or his bond for the defaults and misfeasances of his clerks, assistants, or deputies, see annotation in 1 A.L.R. 222.

The numerical weight of authority is to the effect that a township trustee is an insurer of public funds received by him in his official capacity, so that he is liable for a loss thereof, no matter what the cause of the loss. The following cases have expressly adopted this strict rule of liability: *Morbeck v. State* (1867) 28 Ind. 86; *Rock v. Stinger* (1871) 36 Ind. 346; *Inglis v. State* (1878) 61 Ind. 212; *McClelland v. State* (1894) 138 Ind. 321, 37 N. E. 1089.

Thus, in *Morbeck v. State* (Ind.) supra, applying the rule that a public officer, who is required to give bond for the proper payment of money that may come into his hands as such officer, is not a mere bailee of the money, exonerated by the exercise of ordinary care and diligence, but that his liability is fixed by the bond, it was held that the fact that public money has been stolen from a township trustee without his fault does not relieve him from his obligation to pay such money over to his successor in office, he having given a bond to pay all money belonging to the township, and received by him, "out according to law."

And in *Rock v. Stinger* (1871) 36 Ind. 346, applying the same rule, it was said that a township trustee is liable to account for and pay over whatever amount comes to his hands by virtue of his office, "whether the

same has been stolen or burned, without his fault, or loaned out to a litigious borrower, from whom he is unable to collect." In this case the money had been loaned. And again, in *Robbins v. Dishon* (1862) 19 Ind. 204, where a township trustee converted township funds by unauthorizedly loaning the same, it was held that he thereby made himself responsible therefor on his bond, but that in such a case, if he takes a note for the money loaned, the township cannot sue thereon, even though it was made payable to the trustee, as such. And see *Goodwin v. State* (1881) 81 Ind. 109, for a statement to the effect that, if a township trustee invests township funds in his private business, he becomes a defaulter liable on his bond in case he fails to turn the same over to his successor at the end of his term, even though he succeeds himself. And rental paid to himself by a township trustee, for the use of his own property, and money paid for services that were never rendered, have been held misappropriated by such trustee, so as to render him liable therefor. *Miller v. Jackson Twp.* (1912) 178 Ind. 503, 99 N. E. 102. And again, in *State ex rel. Cicero Twp. v. Finney* (1890) 125 Ind. 427, 25 N. E. 544, a township trustee was declared liable on his official bond for public funds misapplied by him.

And under the rule of absolute liability for public funds not paid out according to law, it has been held that a township trustee is liable for any funds paid out under a contract not legally authorized, as, for instance,

pursuant to an invalid appropriation for a public improvement, or in the absence of any appropriation. *Miller v. Jackson Twp.* (1912) 178 Ind. 503, 99 N. E. 102; *State ex rel. Sailor v. Blind* (1914) 181 Ind. 689, 105 N. E. 225. And see *State ex rel. Thorlton v. Puckett* (1919) 70 Ind. App. 591, 123 N. E. 650.

And the rule that a township trustee is not a bailee of township funds, but is absolutely liable for a loss thereof under any circumstances, has been held to apply to funds lost by the failure of a bank in which he had, while such bank was solvent, deposited them in good faith and without fault. *Inglis v. State* (1878) 61 Ind. 212; *McClelland v. State* (1894) 133 Ind. 321, 37 N. E. 1089.

In *State ex rel. The Township v. Powell* (1878) 67 Mo. 395, 29 Am. Rep. 512, where the nature of the bond and of the controlling statute does not appear, a trustee of a school township was held liable for school funds lost through failure of a reputed solvent bank, in which he had placed them on general deposit while exercising due care and prudence, since, when he made the general deposit, "the bank simply became indebted to him in his general capacity, and he took the risk of being able to collect it when he required it."

Applying the general rule that pub-

lic moneys in the hands of a public officer constitute a trust fund, for which the official, as trustee, should be held responsible to the same degree as a trustee of a private trust fund, it was held in the reported case (*CRANE TWP. EX REL. STALTER v. SECOY*, ante, 979) that township trustees who leave signed warrants, blank as to payee and amounts, in the hands of the clerk, when the statute requires the warrants to be properly filled up before signature, are guilty of malfeasance in office which will render them liable for losses due to wrongful use of the warrants by the clerk. It will be observed that the court in this case adopted and applied the trust-fund test, rather than the rule of absolute liability, which is adhered to in most of the cases which have passed upon the specific question under consideration in this annotation.

Where public funds have been paid out by a township trustee in proper channels, which payment nevertheless was wrongful so as to render the trustee liable therefor, it has been held that the legislature may relieve the trustee and his bond from liability. See *State ex rel. Sailor v. Blind* (1914) 181 Ind. 689, 105 N. E. 225, where the payment was unlawful because made without the advice of the advisory board, and without appropriation.

G. J. C.

HENDERSON ELEVATOR COMPANY et al., Appts.,

v.

CITY OF HENDERSON et al.

Kentucky Court of Appeals—February 24, 1920.

(187 Ky. 453, 219 S. W. 809.)

Highway — title to abandoned street.

1. The title to an abandoned street vests in the abutting owner, not in the original dedicator.

[See note on this question beginning on page 1008.]

—condition as to dedication — right to accept.

2. A city cannot accept a dedication of a street subject to conditions that it shall not extend, widen, or in part close it, since that would be an at-

tempted relinquishment of the power to regulate and control its streets.

—right to object to closing.

3. Abutting owners cannot prevent the closing of a street which has been

dedicated to public use, if the closing is necessary for the public good.

[See 13 R. C. L. 68.]

Appeal — right to complain — question raised by appellant.

4. An appellant cannot complain of the determination in a case of a question raised by him, although it was not properly in the case.

— effect of agreement as to use of street.

5. An agreement between a city and persons dedicating land for a highway that the dedicator shall have the continued use of the street cannot prevail over the right of the abutting owner to take title to the street when it is discontinued.

APPEAL by plaintiffs from a decree of the Circuit Court for Henderson County in favor of defendants in an action brought to restrain them from enforcing an ordinance providing for the conveyance of all or any portion of a certain street to defendant Waller & Company, which was consolidated with an action by the city, in which the plaintiff elevator company intervened, to close a portion of said street. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. John C. Worsham, for appellants:

The owners in fee of a strip of ground dedicated it to the city of Henderson for a public street, and it was formerly accepted by the municipality. The city could not afterwards abandon the street, or use it for a different purpose.

Home Laundry Co. v. Louisville, 168 Ky. 499, 182 S. W. 645; 13 Cyc. 498; *Hopkinsville v. Jarrett*, 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85.

Property which has been dedicated to a city for a public purpose cannot be treated as private property of the municipality.

Campbell County Ct. v. Newport, 12 B. Mon. 538; *Augusta v. Perkins*, 3 B. Mon. 437.

Where an easement in property is granted for street purposes, and the property is afterwards abandoned, the title and possession revert to the grantor and his heirs.

Halley v. Scott County Fiscal Ct. 25 Ky. L. Rep. 1471, 78 S. W. 149.

The city of Henderson, having entered into a contract by which, for a certain consideration, it agreed to accept and maintain a passway as a city street, must be held to the obligation devolving upon such municipality at the time the contract was made, and cannot escape fulfilling its contract by reason of a law passed subsequent to the execution of the instrument.

Augusta v. Perkins, supra; *Ludlow v. Peck-Williamson Heating & Ventilating Co.* 116 Ky. 608, 76 S. W. 377.

The appellants and the appellee, A. Waller & Company, and others, were the owners, as tenants in common, of

the fee of the passway accepted by the city of Henderson as a city street. If the city were authorized to, and did, abandon or close any part of same, the part so abandoned or closed reverted to the common tenants, and not to any one of them.

Williams v. Johnson, 149 Ky. 409, 149 S. W. 821; *Ballard v. Louisville*, 3 Ky. Op. 31.

Messrs. B. S. Morris, Dorsey & Dorsey, and Yeaman & Yeaman for appellees.

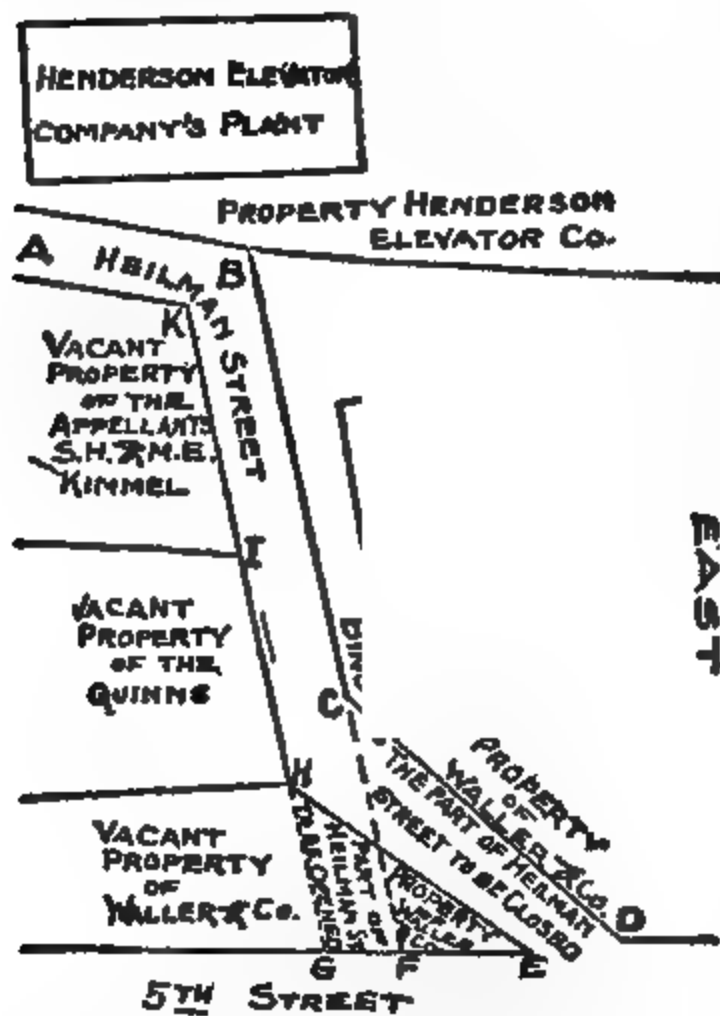
Settle, J., delivered the opinion of the court:

Henderson is a city of the third class, possessing, under the Constitution and statutes of the state, the privileges and powers, and owing to the public all the governmental duties, that appertain to other municipalities of its class. By virtue of those powers and duties it maintains within its corporate boundaries a system of streets, alleys, and sewers, among the former being Heilman street, a short thoroughfare running from Third to Fifth streets in the vicinity of a depot grounds and numerous railroad tracks known as "Union Station," maintained by the Louisville, Henderson, & St. Louis and Illinois Central Railroad Companies. The greater part of Heilman street, originally limited, however, to a width of 25 feet, seems to have been first established as a street or passway May 1, 1895, by the heirs at law of Joel Lambert, de-

ceased, the then owners of the land over which it in large part ran. This is shown by a deed of partition made between them, whereby each heir was conveyed his or her part of the land, and from which it is apparent that, though the street or passway was established primarily for the convenience of the Lambert heirs, no restrictions were imposed upon its free use by the public. Indeed, such use of it appears to have been enjoyed by the public for quite a number of years before the partition of the Lambert lands. The map here furnished, though without artistic merit, will give a fairly accurate understanding of the location of Heilman street, its topography, and a description of the lands bordering it, as well as the names of the respective owners thereof:

on the map, it turns eastwardly and runs on an oblique course to its intersection with Fifth street at D. It also appears from the map that the land bordering Heilman street on the east from B to C, thence to D, and also on the west side thereof from E to H, is owned by the appellee Waller & Company; that the vacant lot bordering the street on the west from H to I is owned by one Quinn; that the vacant lot on the same side, running from I to K, adjoining the Quinn lot, is owned by the appellants S. H. & M. E. Kimmel; and that the land lying north of and bordering the bend in Heilman street from A to B, thence in an easterly course, and with the northern boundary of the land of Waller & Company to a point not indicated on the map, is owned by the appellant Henderson Elevator Company.

The several owners of the lots, respectively described above, derived title to same, directly or remotely, through deeds of conveyance from the heirs at law of Joel Lambert, each of which seems to have conveyed to the grantee named therein whatever right the grantor had in the passway now included in Heilman street. Both the Henderson Elevator Company and Waller & Company have been duly incorporated under the laws of this state, and are engaged in the business of buying, selling, and storing grain; each owning and operating upon its own premises, elevators, concrete bins, and other equipment necessary to such business. After the property now owned by the appellant Henderson Elevator Company was acquired by its immediate vendor, C. M. Bullett, of Mrs. M. N. Elliott, one of the Lambert heirs, and before its conveyance to that company by Bullett, the latter, by a deed or other writing that passed between him and the other Lambert heirs, or their grantees, then owning the remaining lots on Heilman street, entered into an agreement whereby he and they contributed enough additional ground from their respective lots bordering



As originally established by the heirs at law of Joel Lambert, deceased, so much of the open way, later called Heilman street, as we are required to consider, extends, as indicated on the map, from the letters A to B, thence to C, thence to D, where it connects with Fifth street; but at the letter C, as shown.

the street, to increase its width from 25 to 50 feet, beginning on the map, say, at the letter A, and ending at the letter C, from which point to the letter D it remained, as theretofore, only 25 feet in width. The execution of this agreement and accompanying acts of the parties seem to have been intended as a dedication of Heilman street to the city of Henderson for use as such by the public. But whether or not such was its legal effect is not material, as a dedication of the street was subsequently formally made by the several owners of the lots bordering thereon, or their grantees, by deed duly executed June 24, 1912, whereby they, respectively, conveyed to the city of Henderson whatever title they had to Heilman street, and also so much ground from their respective lots bordering it as would be necessary for the construction of a sewer required for the city's needs, in consideration of which it agreed to accept, keep in repair, and maintain the street for the use of the public, which it admittedly has since done.

In 1917, however, the common council of the city of Henderson, deeming it necessary to widen and straighten that part of Heilman street from a point shown on the map by the letter C to Fifth street, duly passed an ordinance, requiring that this be done by discontinuing and closing so much of the street as turns eastward at C and runs obliquely to Fifth street at D, and in lieu of the part so closed to continue the street from C in a straight line, on new ground 50 feet in width, to Fifth street at F, and from H to Fifth street at G. The ground on each side of that part of Heilman street directed to be closed is owned by the appellee Waller & Company, which is, or was until it was conveyed to the city of Henderson for that purpose, likewise the owner of the ground on which the new part of the street is to be opened.

The ordinance directed that, upon the opening of the new or changed part of Heilman street, the part dis-

continued to be conveyed by the city of Henderson by proper deed to the appellee Waller & Company, and also directed the city attorney to institute an action in the circuit court to carry into effect so much thereof as directed the discontinuance of that part of Heilman street where it deflects from a straight line to C, and runs on an easterly course obliquely to Fifth street at D; this course of procedure being required by the charter of the city of Henderson. That city being one of the third class, it is given, by Ky. Stat. § 3290, subsec. 7, through its common council, power "to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean, sprinkle and keep in repair streets, alleys, lanes, avenues and sidewalks, or to have the same done; . . . and to make appropriations for same."

The manner of exercising the above-enumerated powers is defined by § 3449 and other subsequent sections of the statute, all of which were amended and the powers they confer enlarged in numerous particulars by an act of the general assembly of March 7, 1916 (Acts 1916, p. 28), which act, in so far as necessary to be here considered, provides: "That § 3449 of the Kentucky Statutes be, and the same is, hereby amended and re-enacted to be read as follows: The common council, or the board of commissioners in cities which have adopted or may adopt, the commission form of government, shall have and exercise exclusive control and power over the streets, roadways, sidewalks, alleys, landings, wharves, public grounds and highways of the city; to establish, open, alter, widen, extend, close, grade, pave, repave, clean and keep in repair the same; to prevent and remove all encroachments thereon or obstructions thereof; to put drains and sewers in the same, and to regulate and prohibit the building of vaults and areas under sidewalks; to enforce and regulate connection with sewer, gas, and water mains and conduits of all kinds laid in or

under the streets and highways of the city for any purpose. Upon the adoption of an ordinance by the common council, or said board of commissioners, authorizing and directing the closing of the whole or any portion of a street or alley or other public highway within the limits or jurisdiction of the city, it shall be the duty of the city attorney to institute an action in the circuit court for the purpose of having the same closed, and to such action all the owners of ground in the squares or lots divided by such street, alley, or highway, or the portion thereof proposed to be closed, shall be made defendants; and if all defendants competent to act for themselves shall fail to object to the closing prayed for, then the court shall render a decree accordingly, but if any of said defendants object, or are under disability other than coverture, the court shall impanel a jury, which shall hear evidence and determine the amount of compensation in the form of damages to be paid to each of such defendants. The court shall thereupon direct that said street, alley, or other highway be closed upon payment to each of such defendants of the amount of damages awarded to him, or, if any defendant refuses to accept such payment, or be for any reason unable to do so, upon payment into court of the amount awarded such defendant or defendants, it shall be the duty of the court to give such proceedings precedence over other cases."

As previously indicated, the city of Henderson, before the passage of the act supra, possessed under § 3290, subsection 7, of its charter, as well as the other sections thereof amended by the act, ample authority to improve, open, widen, extend, or close a street, alley, or other public highway within its corporate limits, and the object of the amendatory act was to broaden and make more specific the powers already possessed by the city over its streets, alleys, and other public highways, and especially to regulate the procedure to be followed by the city

authorities in the exercise of its power to close, in whole or in part, a street, alley, or other public highway, as well as to provide a remedy for the protection of persons whose rights as owners of the real estate abutting the public way proposed to be closed might be affected by the closing thereof; hence, its requirement that the street be closed by the institution in the circuit court of an action by the city attorney, to which the property owners to be affected must be made parties. This provision of the act, as is patent from its language, only requires that persons owning the real estate abutting each side of that part of the street proposed to be closed shall be made defendants to the city's action.

While the city attorney was preparing to bring the action as required by the ordinance, but before he had an opportunity to file the petition, the appellants Henderson Elevator Company and S. H. and M. E. Kimmel, on December 22, 1917, instituted an equitable action in the Henderson circuit court against the city of Henderson, its mayor, each of the twelve members of its common council, the city attorney, and A. Waller & Company, in which it was alleged that the city of Henderson, its mayor, and common council were without power to convey, or cause to be conveyed, such part of Heilman street as might be discontinued to A. Waller & Company, and that the latter company was not entitled to take or hold the title thereto. By the prayer of the petition the court was asked to temporarily restrain and permanently enjoin the city, its mayor, common council, and city attorney from attempting to enforce so much of the ordinance as provides for the conveyance of any portion of Heilman street to the defendant A. Waller & Company; and for such other relief as the plaintiffs might be entitled to receive.

By an amended petition additional allegations, challenging the right of the city authorities even to discontinue that part of Heilman street contemplated by the ordinance,

were made, and their power to take such action denied, the pleading closing with a prayer that the enforcement of that provision of the ordinance, directing the discontinuance of a part of Heilman street, as well as the part directing the conveyance to A. Waller & Company of the discontinued portion thereof, be enjoined.

The appellees filed a general demurrer to the petition as amended, which was overruled by the court, to which ruling they excepted. They thereupon answered, traversing the averments of the petition as amended.

December 27, 1917, five days after the above action was brought and before the granting of the temporary injunction therein, the city attorney of Henderson, as directed by the ordinance referred to, instituted in its behalf in the Henderson circuit court the action looking to the closing of a part of Heilman street, making the appellee A. Waller & Company, sole owner of the ground bordering each side of that part of the street to be discontinued, a defendant. The appellants filed in the action an intervening petition, and were upon their motion made defendants to same, and the intervening petition taken as their answer. That pleading, after reiterating the averments of the appellants' petition and amended petition in the first action, regarding the alleged absence of power in the city of Henderson to close any part of Heilman street, or to convey to A. Waller & Company that part directed to be closed, set forth in greater detail than was therein stated the grounds upon which these contentions were rested, which, briefly stated, are as follows: First, that as, according to the written instrument by which the ground embraced in Heilman street was dedicated to the city for street purposes, the principal consideration for the latter's agreement to accept the dedication and maintain the street was the right to lay its sewer pipe under it and along the land of the grantors abutting the

street, and to go upon the land for the purpose of repairing the sewer, and the city laid its pipe and exercised its right to go upon the land for the purpose of repairing the sewer, it cannot, after receiving the benefits of the contract and now being in the enjoyment of the same, evade its obligation to maintain the ground dedicated as a city street its entire length as then opened to travel. Second, that, as the grantors of the ground now embraced by the street were, as tenants in common, entitled to the common possession and use of the passway at the time of its dedication as a street, if the city of Henderson has the right to change the street, and thereby discontinue or close any part thereof, all the grantors are or will be equally entitled as tenants in common to that part of the street which may be discontinued or closed; hence, the appellee A. Waller & Company cannot be given by the city exclusive possession of that part of the street so discontinued or closed, nor has the city the power to convey it to that company by deed.

After the filing in the second action of such responsive pleadings as were necessary to complete the issues, the two actions were, by agreement of the parties, consolidated and tried together; the evidence, by further agreement, being introduced orally. By the decree rendered it was adjudged by the court: (1) That the city of Henderson had the right to close that part of Heilman street sought to be discontinued, and neither the appellants nor others would be damaged thereby; (2) that the temporary injunction granted at the beginning of the suit be dissolved; (3) that the plaintiffs in the two actions pay their respective costs; (4) that, upon the closing of that part of the street sought to be discontinued, the title to the portion so closed should, by deed from the city of Henderson, be conveyed to and vest in the appellee A. Waller & Company, in fee simple. The appellants complain of the judgment; hence this appeal. Tak-

ing up these contentions in the order stated, it may be said of the first that the writing whereby Heilman street was conveyed, or, more properly speaking, dedicated, by the appellants and other abutting property owners to the city of Henderson, imposed no restriction upon its right to extend, straighten, widen, or in part close it, as proposed by its common council; nor could it legally have accepted the dedication of the street under such a limitation upon its legislative discretion, as it would have amounted to an attempted relinquishment of the power to

Highway—
condition as to
dedication—
right to accept.

regulate and control
its streets and high-
ways, or one of
them, which public

necessity and convenience demand shall at all times be maintained by its municipal authorities. Louisville City R. Co. v. Louisville, 8 Bush, 415.

It is as much the duty of the city of Henderson to maintain Heilman street for the use of all other inhabitants within its corporate boundaries as for that of the appellants, and so long as it is maintained as a public street, whether in the same condition as when dedicated, or a changed one better adapted to the needs of the public, the appellants' right to its use, being neither greater nor less than that of all others who travel it, is one that may be enjoyed in common with that of the public.

In Henderson v. Lexington, 132 Ky. 390, 22 L.R.A. (N.S.) 20, 111 S. W. 318, the matter involved was the right of the city of Lexington to close an alley which had been dedicated to and accepted by it under a deed providing that it should always remain free and open as a public street or alley. The closing of the alley was strongly resisted by the owners of the abutting lots. The charter of the city of Lexington contains provisions similar in all respects to those of the city of Henderson set out above in this opinion. One of the important questions passed on in the case, *supra*, was as

to the right of the city authorities to close the alley, where it was made to appear that the closing was necessary for a public purpose. In respect to this question the court said: "On the other hand, when a municipal corporation invested by the legislature with the power to close streets, alleys, and highways, or to acquire property, undertakes to exercise the power, the presumption will be indulged that it is in the interest of and for the benefit of the public, and that the proceeding is not for private or individual use or advantage. And so, if a municipality ordains that an alley or highway shall be closed, or a street opened, it will be presumed that it is done in the interest of the public, and necessary for public purposes, and the burden of showing to the contrary will be put upon the persons who object to the proceeding, and the courts should usually permit the defendants to make the issue and present evidence in support of it."

Another question decided in the case was whether the provision of the deed of dedication, requiring that the alley should always remain free and open as a public highway, prevented that city from closing it. In holding that the provision in question did not prevent the closing of the alley by the city, the court further said: "It is further insisted that, as Ayers alley was conveyed to and accepted by the city under a deed providing that 'it shall always remain free and open as a public street or alley,' the city had no power to close it in violation of the express conditions under which it was accepted. This argument, if sound, would in many instances impose upon municipalities unnecessary and unreasonable burdens. If a street or highway dedicated to a city should cease to be either useful or convenient for the public, and yet the city be obliged to keep it open and maintain it in sufficient repair, it would be imposing upon the public a useless expense; and to so hold would be opposed to both reason and public policy. In our opinion the

correct doctrine is that the city has the same control over highways deeded to it, as was Ayers alley, that it does over its other public ways, whether acquired by gift, purchase, or condemnation. In short, all the streets and public ways of a city, however acquired, are subject equally and alike to the control and regulation of the municipal authorities. In accepting the alley under the conveyance, the city did not bind itself irrevocably to keep it open. That is not the fair meaning of the contract. The city assumed the duty of keeping it open as other streets and alleys were kept open, and the right to close it as it might close other streets and alleys."

The soundness of the reasoning supporting the right of the city of Lexington to close the alley, set forth by the opinion in the case

—right to object
to closing.

supra, is equally applicable to the facts of the instant case, and therefore conclusive of the right of the appellee city of Henderson to close that part of Heilman street proposed to be discontinued by it. As already remarked, there is nothing in the instrument by which it was dedicated to public use as a street that militates against the right of the city to close it, as attempted; and it is not claimed, or attempted to be proved by appellants, that they have suffered individual loss or will sustain any damage by reason of the closing of that part of the street proposed to be discontinued, but only insisted that it will cause inconvenience to them and the public, and be of no benefit to the city. Our examination of the evidence fails to convince us of the merit of this contention. In our opinion its weight fairly conduces to prove that the public, including the appellants, will be benefited by the extension and straightening of Heilman street as contemplated, and that neither inconvenience nor injury can result to appellants or others from the closing of that part of the street proposed to be discontinued. On the contrary, the change in

the street, when established, will straighten it from appellants' lots to where it will intersect Fifth street, put the street on better ground than it formerly occupied, and make the distance from appellants' lots to Fifth street several hundred feet shorter than it was over that part of the street to be closed.

We also find ourselves unable to sustain appellants' second contention. Obviously, the fact that they owned, previously to its dedication to the city as and for a public street, a considerable part of the highway embraced in Heilman street, can give them no right to any part of the street to be closed. They never owned the ground abutting either side of that part of Heilman street. On the contrary, the whole thereof, as well as that to be occupied by the street as changed, is owned by the appellee Waller & Company, which acquired title to all of it, as well as to the ground included in that part of the street to be closed, subject to the public easement while used as such, from a vendee of one of the heirs at law of Joel Lambert, deceased, who received it through the deed of partition from the other heirs; so, in point of fact, the title of the appellee Waller & Company is from the same source as that of appellants. This, however, is not material; it is sufficient that its lot borders each side of that part of the

street to be closed, —title to abandoned street.

which of itself, and as a matter of law, makes it the owner of the abandoned or closed part of the street. Therefore, if it be conceded that appellants, under their respective titles from the heirs of Lambert, had the right to use that part of Heilman street to be closed, before its dedication to the city as a street, and while it remained a mere passway, after it was accepted by the city as a street, that right ceased when it became closed by the city.

In *Trustees of Hawesville v. Lander*, 8 Bush, 679, we held that

"the common-law rule, as laid down by Mr. Washburn, is that 'where land is sold bounded on a highway, or upon or along a highway, the thread or center line of the same is presumed to be the limit and boundary of such land, in strict analogy with the case of a stream of water not navigable;' and the same rule applies to a private street, as well in the city as in the county, opened by the grantor, upon which he sells house lots bounding upon it." Tiedeman, Real Prop. 3d ed. § 601; 2 Washb. Real Prop. 636; Schneider v. Jacob, 86 Ky. 106, 5 S. W. 350; Jacob v. Woolfolk, 90 Ky. 429, 9 L.R.A. 551, 14 S. W. 415; Copping v. Manson, 144 Ky. 634, 139 S. W. 860; Williams v. Johnson, 149 Ky. 409, 149 S. W. 821; Blalock v. Atwood, 154 Ky. 395, 46 L.R.A. (N.S.) 3, 157 S. W. 694.

In Williams v. Johnson, 149 Ky. 409, 149 S. W. 821, the facts are nearly analogous to those of the case at bar. It appears in that case that the city of London, having by proper authority converted a public road within its limits, upon which the appellants' lots fronted, into a macadamized street, and in doing so abandoned the use of part, but at no point more than the whole of the roadbed in front of the lot, the appellee, their grantor, by actions in ejectment against the appellants severally, sought to recover such part of the old roadbed as lay between their lot and the new street, upon the ground that its abandonment as a public highway entitled him to same. We held, however, that, as the deeds by which appellee conveyed the lots described them as fronting and abutting on the old road, and the street was substituted for the old road, its construction and establishment by the city operated to include the abandoned roadbed in appellants' lots, respectively, and extend the boundaries thereof to the edge of the street. In the opinion it is in part said: "It seems to be the universally recognized rule that the conveyance of land bordering upon a public highway conveys title to

the center of the highway, subject to its use by the public, whether it is so expressed in the deed or not; and where a conveyance, or a bond to convey, designates the public highway [or street] as one of the boundaries of the tract, it will, in the absence of language showing a contrary intention, be construed as including the highway itself, to the center or middle thereof."

Under the doctrine announced, the appellee Waller & Company is clearly entitled to that part of Heilman street ordered closed; and the agreement of the city of Henderson to convey it to that company by deed, in exchange for the ground the latter deeded it for the change in the street, was unnecessary. However, appellants cannot complain that that question was determined in these cases, as it was raised by them.

Appellants' claim that their right to the continued use of that part of Heilman street adjudged to be closed, notwithstanding the change in the street, arises out of some sort of agreement alleged to have been made to that effect with the city of Henderson when the street was dedicated to the city, cannot prevail. The testimony of C. M. Bullett, president of the appellant Henderson Elevator Company, and that of the witness Higdon, constituting substantially the only evidence offered by appellants on this point, was too vague to show the definite making of any such agreement. On the other hand, such of the city authorities as testified denied the alleged agreement, or said they had no knowledge of it. Moreover, it was not expressed in the writing between appellants and the city of Henderson, and evidently could not have been communicated to appellants' able and painstaking attorney, by whom the writing was prepared, who, upon being interrogated about the matter on the trial, frankly admitted his want of recollection regarding it.

But, if such agreement had been

Appeal—right to complain—question raised by appellant.

established by the evidence, it could not have interfered with the right of the appellee Waller & Company to claim and take that part of the street ordered closed, which was and is fixed by the law because of its ownership of the abutting lots on either side thereof.

We find no error in the judgment, and it is affirmed in each of the cases appealed.

NOTE.

The general question of reversion of title upon abandonment or vacation of public street or highway is treated in the annotation following *PRALL v. BURCKHARTT*, post, 1008. For cases which, like the reported case (*HENDERSON ELEVATOR CO. v. HENDERSON*, ante, 983), involved the question of reversion to the dedicator or adjoining owner, see subdivision III. of that annotation.

JOHNSON S. PRALL

v.

SAMUEL BURCKHARTT, JR., et al., Appts.*Illinois Supreme Court — June 22, 1921.*

(299 Ill. 19, 132 N. E. 280.)

Highway — vacation — vesting of title.

1. Under statutes vesting in the municipality the fee of streets shown on plats, and providing that upon vacation of them the lot immediately adjoining them shall extend to the center of the way vacated, the title, upon vacation of the streets, vests in the abutting owner.

[See note on this question beginning on page 1008.]

States — suit against government officials — right to maintain.

2. The immunity from suit of the United States does not extend to officers of the government holding for public purposes the possession of real estate which is claimed as his own by the plaintiff in the action.

[See 26 R. C. L. 1460.]

United States — right to question title to land held by it.

3. The right and title of the United States government to real estate held for public purposes may be determined in a suit by the alleged owner against the agents of the government who have possession of the property.

[See 26 R. C. L. 1460.]

Eminent domain — acquiring title to streets and alleys.

4. No title as against the former owner is acquired of streets and alleys on a plat by condemnation proceedings in which no mention is made of any right of such former owner in the streets, or award made for any interest therein.

Highway — dedication — vesting title in municipality — duration.

5. A statute providing that the execution and recording of a plat of real estate shall vest in the municipality the fee title to the streets and alleys shown on the plat vests such title only so long as they are devoted to public use.

— title — dedication.

6. Merely an easement passed to the municipality by dedication of the highway at common law, the fee remaining in the dedicator and passing by his conveyance of abutting lots.

[See 13 R. C. L. 31, 116, 126.]

Boundaries — effect of bounding on highway.

7. Bounding a grant on a highway carries title to the center.

[See 4 R. C. L. 78; see note in 2 A.L.R. 6.]

Real property — limiting fee upon fee.

8. The legislature may provide for a fee to be limited upon a fee by deed.

—power to change rules of conveyancing.

9. The legislature may alter or annul any of the common-law rules of conveyancing at pleasure, as well as the character and quality of the estates thereby created.

Constitutional law — provision that vacated highway shall vest in abutting owners — rights of dedicator.

10. One dedicating highways to the public by filing plats showing them located thereon is not unconstitutionally deprived of his property by a statutory provision that, upon vacation of the highway, the title shall vest in the abutting owner, where, under the statute, the dedicator parts with all his title by the act of dedication and vests it in the municipality.

Judgment — stare decisis — who can claim benefit of.

11. A dedicator of streets cannot, upon their vacation, claim any protection under the rule of stare decisis to his alleged rights to a reversion of the fee, from decisions rendered after his dedication was made.

Dedication — possibility of reverter — how far an estate.

12. The possibility of reverter in

one who has dedicated the fee of highways to the public is not an estate within the protection of any constitutional limitation.

[See 23 R. C. L. 1101.]

Judgment — effect of stare decisis on constitutional question.

13. The rule of stare decisis will not prevent the court from reviewing a constitutional question, where the facts before it are slightly different from those in former decisions.

[See 7 R. C. L. 1002, 1003.]

—when rule not followed.

14. The rule of stare decisis should not be followed if the evils arising from adhering to the former decisions will be greater than would arise from a correct statement of the law.

[See 7 R. C. L. 1009.]

Constitutional law — impairing obligation of contract — change of decision.

15. A change of decision with respect to the constitutionality of a statute vesting in abutting owners the title to dedicated streets when vacated, rather than in the dedicator, does not unconstitutionally impair the obligation of a contract.

[See 6 R. C. L. 332.]

(Stone, Ch. J., and Cartwright and Dunn, JJ., dissent.)

APPEAL by defendants from a judgment of the Circuit Court for Lake County (Edwards, J.) in favor of plaintiff in a suit brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Charles F. Clyne, James R. Glass, and Myer Linker, for appellants:

Where the entire record in an action shows that the real party defendant is the United States, though not named as a defendant, the action is against the United States.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Kansas v. United States, 204 U. S. 331, 51 L. ed. 510, 27 Sup. Ct. Rep. 388; Louisiana v. McAdoo, 234 U. S. 627, 58 L. ed. 1506, 34 Sup. Ct. Rep. 938.

State courts have no jurisdiction in actions against the United States, nor can the United States be sued except by its own consent or by virtue of a United States statute.

United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; 13 A.L.R.—63.

Stanley v. Schwalby, 147 U. S. 519, 37 L. ed. 263, 13 Sup. Ct. Rep. 418.

Land acquired by the United States under the laws of the states, for forts, arsenals, or other needful buildings, comes under the exclusive jurisdiction of Congress.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 530, 29 L. ed. 266, 5 Sup. Ct. Rep. 995; Palmer v. Barrett, 162 U. S. 399, 40 L. ed. 1015, 16 Sup. Ct. Rep. 837.

The statutes of Illinois in force at the time of the dedication by the plaintiff controlled and qualified the dedication.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Lynch v. Baltimore & O. S. W. R. Co. 240 Ill. 567, 88 N. E. 1034; Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep. 134; Abilene Nat. Bank v. Dolley,

228 U. S. 5, 57 L. ed. 709, 33 Sup. Ct. Rep. 409.

Section 4, chap. 143, of the Illinois statute, did not take away any property from the plaintiff.

Hart v. Lake, 273 Ill. 60, 112 N. E. 286; Gebhardt v. Reeves, 75 Ill. 301; North v. Graham, 235 Ill. 178, 18 L.R.A.(N.S.) 624, 126 Am. St. Rep. 189, 85 N. E. 267; Dees v. Chevronts, 240 Ill. 486, 88 N. E. 1011; Berwyn v. Berglund, 255 Ill. 498, 99 N. E. 705; Lyford v. Laconia, 75 N. H. 220, 22 L.R.A.(N.S.) 1062, 139 Am. St. Rep. 680, 72 Atl. 1085.

Where a party has no vested interests or rights in property he has no such rights which the legislature cannot abolish.

Randall v. Kreiger, 23 Wall. 137, 23 L. ed. 124; Henson v. Moore, 104 Ill. 403; McNeer v. McNeer, 142 Ill. 388, 19 L.R.A. 256, 32 N. E. 681; Jackson v. Jackson, 144 Ill. 283, 36 Am. St. Rep. 427, 33 N. E. 51; Billings v. People, 189 Ill. 477, 59 L.R.A. 807, 59 N. E. 798.

It was not essential that the streets and alleys set forth in the condemnation petitions be described in the verdict or judgment, because the city of Fort Sheridan held the fee to these lands as trustee for the public.

Re Albers, 113 Mich. 640, 71 N. W. 1110; 1 Nichols, Em. Dom. § 182; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201; Nahant v. United States, 69 L.R.A. 723, 70 C. C. A. 641, 136 Fed. 273; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9; Re New York, 196 N. Y. 286, 37 L.R.A.(N.S.) 281, 89 N. E. 829; Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366.

The plaintiff is estopped by the judgment herein, even though the streets and alleys were not mentioned therein, if they were described in the petition for condemnation.

McGillis v. Willis, 39 Ill. App. 311; Bell v. Mattoon Waterworks & Reservoir Co. 163 Ill. App. 618; Godschalck v. Weber, 247 Ill. 269, 93 N. E. 241; Harvey v. Aurora & G. R. Co. 186 Ill. 283, 57 N. E. 857; Leopold v. Chicago, 150 Ill. 568, 37 N. E. 892; People ex rel. Smith v. Locklin, 273 Ill. 106, 112 N. E. 285.

Plaintiff is further estopped by reason of his acceptance of the award in the former condemnation proceeding.

2 Nichols, Em. Dom. § 475; Cape Girardeau & T. Bridge Terminal R. Co. v. Southern Illinois & M. Bridge Co. 215 Mo. 286, 114 S. W. 1084; Chicago G. W. R. Co. v. Kemper, 256 Mo. 279, 166 S. W. 291, Ann. Cas. 1915D, 815; Kansas City Southern R. Co. v. Second Street Improv. Co. 256 Mo. 386, 166 S. W. 296.

It is a presumption of law that every judgment condemning land will be deemed to include a full and final compensation for all damages incident to the taking.

Allen v. Haley, 169 Ill. 532, 48 N. E. 478; Chicago & A. R. Co. v. Springfield & N. W. R. Co. 67 Ill. 142; Doyle v. Baughman, 24 Ill. App. 614; Chicago, R. I. & P. R. Co. v. Smith, 111 Ill. 363; Chicago Sanitary Dist. v. Alderman, 113 Ill. App. 29.

Private property in land is the right of user and disposition and dominion to the exclusion of all others.

Drainage Dist. v. Knox, 237 Ill. 148, 86 N. E. 636; Rigney v. Chicago, 102 Ill. 64; Weeks v. Grace, 194 Mass. 296, 9 L.R.A.(N.S.) 1092, 80 N. E. 220, 10 Ann. Cas. 1077; United States v. Dunnington, 146 U. S. 338, 36 L. ed. 996, 13 Sup. Ct. Rep. 79.

Title acquired by the appropriation of land without judicial proceeding has been held to be a "taking" of land. Such "taking" vests title in the United States, and creates an implied contract to pay just compensation.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Manigault v. Springs, 199 U. S. 484, 50 L. ed. 280, 26 Sup. Ct. Rep. 127; United States v. Cress, 243 U. S. 328, 61 L. ed. 753, 37 Sup. Ct. Rep. 380; Scranton v. Wheeler, 179 U. S. 154, 45 L. ed. 134, 21 Sup. Ct. Rep. 48; Richards v. Washington Terminal Co. 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049; Chicago & W. I. R. Co. v. Englewood Connecting R. Co. 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. 246.

When property is "taken" by the United States government it is not necessary for payment to be made in advance of the "taking."

United States v. O'Neill, 198 Fed. 677; Cherokee Nation v. Southern

(299 Ill. 19, 132 N. E. 280.)

Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488; United States v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 Sup. Ct. Rep. 380.

Messrs. Pringle & Terwilliger, for appellee:

A proper construction of chapter 143 in question requires the United States to purchase or condemn the interest of the owners of streets and alleys, as well as the interest of the owners of lots and tracts.

United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Stanley v. Schwalby, 147 U. S. 519, 37 L. ed. 263, 13 Sup. Ct. Rep. 418; McConnell v. Wilcox, 2 Ill. 344.

Where the title of an act is specific the act cannot depart therefrom, even though the matters covered by the act might have been included in a general title.

People ex rel. Stuckart v. Chicago, B. & Q. R. Co. 290 Ill. 327, 125 N. E. 310; People ex rel. Graff v. Institution of Protestant Deaconesses, 71 Ill. 229; Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; Sutter v. People's Gaslight & Coke Co. 284 Ill. 634, 120 N. E. 562; Galpin v. Chicago, 269 Ill. 27, L.R.A. 1917B, 176, 109 N. E. 713.

The legislature cannot, by direct legislative action, transfer the interest of a dedicator of a statutory plat.

Jacksonville v. Jacksonville R. Co. 67 Ill. 540; St. John v. Quitzow, 72 Ill. 334; Gebhardt v. Reeves, 75 Ill. 301; Helm v. Webster, 85 Ill. 116; Hyde Park v. Borden, 94 Ill. 26; Matthiessen & H. Zinc Co. v. La Salle, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; People v. Chicago & N. W. R. Co. 239 Ill. 42, 87 N. E. 946; Hill v. Kimball, 269 Ill. 398, 110 N. E. 18; Corbin v. Baltimore & O. R. Co. 285 Ill. 439, 120 N. E. 800; People ex rel. Burton v. Corn Products Ref. Co. 286 Ill. 226, 121 N. E. 574; St. Paul v. Chicago, M. & St. P. R. Co. 63 Minn. 330, 34 L.R.A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; Rigney v. Chicago, 102 Ill. 64; Chicago v. Wells, 236 Ill. 132, 23 L.R.A. (N.S.) 405, 127 Am. St. Rep. 282, 86 N. E. 197; Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Gilman v. Tucker, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Forster v. Scott, 136 N. Y. 579, 18 L.R.A. 543,

32 N. E. 976; Scott v. Sandford, 19 How. 450, 15 L. ed. 719; State v. Chicago, M. & St. P. R. Co. 36 Minn. 402, 31 N. W. 365.

The legislature has no power to divert property granted for a specified public use, to any other purpose, either public or private, inconsistent with the particular use.

Presbyterian Soc. v. Auburn & R. R. Co. 3 Hill, 569; St. Paul v. Chicago, M. & St. P. R. Co. 63 Minn. 330, 34 L.R.A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; Princeville v. Auten, 77 Ill. 325; Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77; United States v. Illinois C. R. Co. 2 Biss. 174, Fed. Cas. No. 15,437; Davis v. Nichols, 39 Ill. App. 610; Riverside v. MacLain, 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408; South Park Comrs. v. Ward, 248 Ill. 299, 93 N. E. 910, 21 Ann. Cas. 127; People ex rel. Branson v. Walsh, 96 Ill. 232, 36 Am. Rep. 135.

It is a rule of property in Illinois that the legislature cannot transfer a reversionary interest of the dedicator of a statutory plat to the abutting owner upon vacation of the plat. The doctrine of stare decisis requires that this rule should be adhered to.

Koch v. Sheppard, 223 Ill. 175, 79 N. E. 52; Fleming v. Ross, 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314; Braxon v. Bressler, 64 Ill. 493, 13 Mor. Min. Rep. 163; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Havemeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Harmon v. Auditor, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161.

The government is estopped from claiming that the money deposited for the property described in the judgment was for other property than that described in the judgment.

Union Mut. L. Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222.

Were the government claims to be the owner of the land occupied by it and denies the plaintiff's title, there is no implied contract on which the plaintiff can maintain a suit against the government in the Federal courts, or otherwise.

Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Hill v. United States, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011; United States

v. Lynah, 188 U. S. 464, 47 L. ed. 546, 23 Sup. Ct. Rep. 349.

Carter, J., delivered the opinion of the court:

The appellee, Johnson S. Prall, brought an ejectment suit in the circuit court of Lake county against the appellants, Samuel Burckhardt, Jr., and F. B. Carrithers, to recover possession of a number of pieces of land which originally comprised streets and alleys of a subdivision platted by the appellee, and, upon a trial by the court without a jury, there was a judgment for the appellee, from which this appeal is prosecuted.

Defendants filed a special appearance, alleging that they were not the owners of the property in question, but were in possession thereof as officers of the United States Army commanding at Ft. Sheridan, and that the land at Ft. Sheridan is occupied as a military post of the United States of America and is public property of the United States, and they thereupon moved to quash the summons. The motion was overruled, and the defendants afterward filed pleas alleging that they were commandant and adjutant, respectively, of the United States Army, occupying the premises as a military post, and that the suit was to all intents and purposes a suit against the United States, and therefore could not be maintained. The plaintiff replied, denying the ownership of the land by the United States, and upon a trial, judgment having been entered for the plaintiff, the defendants took a new trial under the statute, and by leave of court filed a plea of the general issue, and upon the second trial the judgment appealed from here was entered.

Except where Congress has so provided, the United States cannot be sued, but the

States—suit
against govern-
ment officials—
right to main-
tain.

exemption does not apply to officers and agents of the United States holding for public purposes the possession of property, when sued by a person claiming to be the owner. In

such a case the right and title of the United States to the property may be determined by a court of competent jurisdiction and adjudged accordingly. In an ejectment proceeding involving the title to the Arlington estate, it was held in *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, that ejectment being in its essential character an action of trespass, and the defendant not being sued as an officer, but as an individual, the court was not ousted of jurisdiction because he asserted authority as an officer.

United States—
right to question
title to land
held by it.

Stanley v. Schwalby, 147 U. S. 519, 37 L. ed. 263, 13 Sup. Ct. Rep. 418, was also an ejectment suit against Army officers, and it was decided that the action could be brought against them as soon as they entered into possession of the ground claimed by the plaintiff, and therefore their plea of the Statute of Limitations (*Hurd's Rev. Stat.* 1919, chap. 83) was a good plea. The same doctrine was laid down by this court in *McConnell v. Wilcox*, 2 Ill. 344, which was an action of ejectment in the circuit court of Cook county to recover possession of land on which old Ft. Dearborn was situated and where the title of the United States was in dispute. The circuit court of Lake county had jurisdiction in this cause.

The case was tried on an agreed statement of facts, which was substantially as follows: June 21, 1889, the plaintiff owned in fee a tract of land which he subdivided into lots, blocks, streets, and alleys, and caused a plat of the subdivision to be recorded on June 25, 1889. He sold part of the lots, and he and all the other lot owners joined in a vacation of the plat and made and recorded another plat of the same subdivision later, in 1889. The streets and alleys on the plat were accepted by the city of Ft. Sheridan, in which the subdivision was located. The United States filed its amended petition in the United States district court for the north-

ern district of Illinois on August 3, 1906, describing the several lots in the subdivision and the ownership of the same, and praying for the ascertainment of compensation to be paid for them. Most of the lots had been sold, but the plaintiff still owned some, and he and the other owners were made defendants, as was also the city of Ft. Sheridan, which it was alleged had an interest in the tract of land described in the petition, constituting the public streets and alleys, either as owner in trust for the public or as the owner of public easements in the same. There was no averment that the plaintiff had any right, title, interest, or estate in the streets or alleys, and no attempt to condemn the same or ascertain compensation therefor. There was a judgment fixing and awarding compensation for each one of the lots to the owner, and the compensation was paid, but there was no award of compensation, either to the city of Ft. Sheridan or to the plaintiff, for any right or interest in the streets and alleys. The city of Highwood, which had succeeded the city of Ft. Sheridan, on May 10, 1910, passed an ordinance vacating the streets and alleys constituting the land now in controversy. The defendants, as commandant and adjutant of the Ft. Sheridan military reservation, were in possession of the land when this suit was brought, and claimed title by the condemnation proceedings.

It is conceded by counsel that no right in the streets and alleys on said plat was acquired by virtue of the condemnation proceeding. The petition did not allege that the appellee here had any right, title, or interest, either in reversion or otherwise, in said streets and alleys, and no award of compensation was made to him for any interest.

The question whether or not the judgment of the trial court should be sustained depends very largely upon the validity of § 2 of chapter

145 of the Illinois Revised Statutes, in relation to the vacation of streets. That section provides that, when any street, alley, lane, or highway, or any part thereof, is vacated, the lot or tract of land immediately adjoining on either side shall extend to the center line of such street, alley, lane, or highway, or part thereof, so vacated, etc. Appellee platted the land here in question and filed the plat of the subdivision on December 23, 1889, under the provisions of chapter 109 of the Revised Statutes. The provisions of the Plat Act and the Vacation Act, heretofore referred to, were both then in force and must be construed in *pari materia*; and it would seem to follow that appellee, in making and recording the plat of 1889, must be held to have done so in contemplation not only of the Plat Act, but also of the Vacation Act. Section 3 of the Plat Act provides, as it did then, that the execution and recording of a plat shall be held to be a conveyance to the municipality, in fee simple, of the streets and alleys shown on the plat. This court, in construing that section, has held that it vested in the municipality not a fee-simple title absolute, but a qualified, base, or determinable fee, which may continue forever, but is determined by the vacation of the plat. The fee vests in the municipality so long, and only so long, as the land is devoted to the public use. *Hunter v. Middleton*, 13 Ill. 50; *St. John v. Quitzow*, 72 Ill. 334; *Gebhardt v. Reeves*, 75 Ill. 301; *Helm v. Webster*, 85 Ill. 116; *Hyde Park v. Borden*, 94 Ill. 26; *Matthiessen & H. Zinc. Co. v. La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81. The crux of the question here involved is whether, when a plat is vacated, the fee in the streets and alleys reverts to the dedicator or to the one who owns the adjoining land at the time of vacation.

At common law the dedication of a street or alley passed to the

Highway—
dedication—
vesting title in
municipality—
duration.

Eminent domain
—acquiring title
to streets and
alleys.

municipality merely an easement. The dedicator still continued to own the fee, subject to the easement. A deed of an abutting lot passed the title to the center of the street,—or included the entire street, as the case might be,—burdened, of course, with the easement. If the street was abandoned or vacated by the municipality, the abutting owner continued to hold his title to the center of the street just as he had held it before, but now freed from the easement. It seems to have been early considered by the legislature of this state that the public interests would be better subserved if a municipality were to have a more complete control over its streets and alleys than was possible where it had only an easement therein. Accordingly, as far back as 1833 (Rev. Laws 1833, p. 600) the legislature passed an act embodying substantially the same provisions as those of § 3 of the Plat Act, providing that the making and recording of a plat should be held to be a conveyance of the streets and alleys in fee to the municipality. Thereafter it was found that a new difficulty arose, that from time to time conditions changed, and that it might be desirable to vacate streets and alleys which had been dedicated by plat. The dedication and acceptance had vested a determinable fee in the streets and alleys in the municipality, and the question arose what was to become of the title to the land included in such streets and alleys when they were vacated. This problem had arisen in construing deeds. Frequently the calls in a deed ran to a road and then "along said road." When later the road was abandoned or vacated the scattered heirs of the grantor would lay claim to the road, and, as was noted in a dissenting opinion in *Buck v. Squiers*, 22 Vt. 484: "A bootless, almost objectionless, litigation shall spring up to vex and harass those who in good faith had supposed themselves se-

cure from such embarrassment." This principle was favorably commented on by this court in *Gebhardt v. Reeves*, 75 Ill. 301, where the court said (page 307): "His conveyance, by operation of law, carries the title to the center of the highway, as a part and parcel of the grant, if there be no words of limitation. The fee is his to grant, and the rule is founded on a presumption that prevails as to the intention of the grantor, as well as the policy of the law. No doubt the rule, in its practical operations, subserves the public good by preventing the existence of strips of land of no great value, formerly a part of the highway, but on the abandonment of which would induce profitless and vexatious litigation. 3 Kent, Com. 433."

To prevent the existence of such strips of land along highways, and to discourage this bootless and annoying litigation, the courts adopted a rule that, when a call in a deed goes to a monument, it shall be construed as going to the center of the monument; that is, a line which runs to a road was held to run to the center of the road, and the words "thence along said road" were held to mean "thence along the center of said road." Mindful, doubtless, of the litigation under such circumstances, the legislature in 1851 (Acts 1851, p. 112) passed an act relating to vacations, and later, in 1865 (Laws 1865, p. 130), passed the present Vacation Act, which, with certain modifications, has since remained in force. The Vacation Act was thus made as much a part of the statutory law relating to the making of plats and the devolution of the title of streets and alleys shown thereon as the Plat Act had been. The two acts were simply two parts of one and the same subject-matter. Both acts were necessary to express the entire legislative will in respect to the devolution of the title to the streets and alleys shown on the plat. The

—title—
dedication.

Boundaries—
effect of bound-
ing on highway.

intention of the legislature manifested by these two statutes—the Plat Act and the Vacation Act—seems perfectly plain and simple. So long as the strip of ground designated as a street on a statutory plat remained a street, the determinable fee was to be vested in the municipality, but as soon as the street was vacated the title was to devolve in the same manner as it would have done if the plat were a common-law plat. In this way it was manifest that all controversies over abandoned and vacated streets would be eliminated. In *Thomas v. Hunt*, 134 Mo. 392, 32 L.R.A. 857, 35 S. W. 581, the court, in speaking of a statute with substantially the same provisions, said: "The statute is founded upon the same principle of public policy as the rule which, under other circumstances, vests in the abutting owners, respectively, the title to the center of the street." If both the Plat Act and the Vacation Act be construed in *pari materia*, all plats thereafter made must be construed under both acts; and the dedicator, by the making and recording of the plat in statutory form, grants to the municipality the title to the streets and alleys shown upon the plat, to have and to hold the same in fee so long as the same shall be used for streets and alleys, but upon condition that, in case any street or alley shall be vacated, then the title thereto shall pass, by way of a conditional limitation, to the then owners of the lots abutting thereon.

Highway—
vacation—
vesting of title.

The legislature has the authority to provide by statute that a fee may be limited upon a fee by deed. The methods of conveyancing and the character and quality of the estates thereby created are matters which are entirely within the control of the legislature. This control is not circumscribed by any constitutional limitations, and there

Real property—
limiting fee
upon fee.

is nothing sacred about the rules of conveyancing which obtained at common law. The legislature may alter or annul any of those common-law rules at pleasure; and our legislature, in fact, has many times modified them. Thus at common law a deed to A without words of inheritance conveyed a life estate and left a reversion in the grantor, which, if not otherwise disposed of, descended to his heirs. *Jones v. Bramblet*, 2 Ill. 270; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505. Section 13 of the Conveyance Act (Hurd's Rev. Stat. 1919, chap. 30) provides that words of inheritance shall no longer be necessary to convey a fee simple; that a deed without words of inheritance conveys a fee unless a less estate is limited by express words or by construction or operation of law. The constitutionality of this section of the Conveyance Act has never been questioned in the courts of this state, so far as we are advised.

At common law, also, a deed to two or more persons created a joint tenancy with the right of survivorship. *Svenson v. Hanson*, 289 Ill. 242, 124 N. E. 645. The Illinois statutes have changed this rule, and provided that such a deed should create a tenancy in common unless it was expressly declared in the deed that it was the intention to create a joint tenancy. Section 6 of the Conveyance Act has also changed the common law with reference to estates tail. The principle involved in these statutes in changing the common-law rule as to conveyances of property or real estate has never been held unconstitutional on the ground that it deprives an interested party of property without due process of law. See to same effect, *Kales, Estates & Future Interests*, 2d ed. § 293. By the same line of reasoning it would seem to follow that § 2 of the Vacation Act does not deprive the dedicator who

Constitutional law—provision that vacated highway shall vest in abutting owners—rights of dedicatior.

made the plat of any constitutional rights in that regard. The principles involved in the construction of § 13 of the Conveyance Act would appear to be on all fours with those involved in the construction of § 2 of the Vacation Act. Both the Plat Act and the Vacation Act are necessary to express the legislative intention in respect to the devolution of the title to the streets and alleys shown on the plat. Under the provisions of these two acts the dedicatior, in making a plat in conformity with such provisions, parts with all of his title to the ways shown on the plat. He grants the title to the streets, alleys, and ways under the provisions of the Plat Act to the municipality, to have and to hold the same so long as the same shall be used for streets, alleys, and ways. Under the provisions of § 2 of the Vacation Act, in case the streets shall be vacated, then the title thereto passes, by way of a conditional limitation, to the then owner of the lots abutting thereon. Just as under § 13 of the Conveyance Act, upon the happening of the future event, the death of A, the reversion was made to pass to A's heirs or assigns, so here, upon the happening of the future event, to wit, the vacation of the streets and alleys, the title is made to pass to the owners of the abutting property. See the reasoning of this court in *Roberts v. Dazey*, 284 Ill. 241, 119 N. E. 910. In upholding the validity of a similar statute the supreme court of Missouri, in *Thomas v. Hunt*, *supra*, said (134 Mo. on page 402): "It is entirely competent for the legislature to prescribe the legal effect of voluntary dedications of streets and to prescribe the quantity of interest in the streets the dedicatior parts with as well as that taken by the public." Similar reasoning is used in discussing the Plat Act and the Vacation Act of this state in *Kales on Estates & Future Interests*, 2d ed. last

paragraph of § 293. After the dedicatior has executed and recorded the plat in conformity with the statute, and there has been an acceptance, he has neither a reversion nor a possibility of reverter in the streets. He has completely disposed of all of his interest. When, then, the street is afterwards vacated, the dedicatior, having no interest of any kind therein, is not deprived of any property without due process of law. The proprietor, by reason of dedicating a part of the premises for streets, enhances the value of the lots to which such streets give access. His grantees pay the enhanced value, and the proprietor thereby receives a consideration not only for the precise amount of the land described in each lot, but also, in effect, for that embraced in the street upon which the lots abut. Having been once paid for the land embraced in a street, he ought not to be permitted, on vacation, to assert title thereto as against one who has paid him the consideration therefor. *Olin v. Denver & R. G. R. Co.* 25 Colo. 177, 53 Pac. 454. The same conclusion seems to have been reached in construing similar statutes in other jurisdictions. See *Challiss v. Atchison Union Depot & R. Co.* 45 Kan. 398, 25 Pac. 894; *Southern Kansas R. Co. v. Showalter*, 57 Kan. 681, 47 Pac. 831; *Day v. Schroeder*, 46 Iowa, 546; *Scudder v. Detroit*, 117 Mich. 77, 75 N. W. 286; *Re Public Road*, 5 Pa. Dist. R. 771. As a matter of original construction, under a long line of decisions of this state on similar questions, beyond doubt this would be the fair, reasonable, equitable, and constitutional construction of the provisions of the Plat Act and § 2 of the Vacation Act. However, it is strenuously urged by counsel for appellee that this court has held unconstitutional the provisions of § 2 of the Vacation Act in various decisions. It therefore becomes necessary to consider whether those decisions have so held. We will refer to them briefly.

In *Illinois & M. Canal v. Haven*,

11 Ill. 554, and *Hunter v. Middleton*, 13 Ill. 50, there had been no vacation of the streets therein involved, and therefore no question arose as to the devolution of title to vacated streets. In both of these cases this court held that by the making and recording of the plats the legal title to the streets shown thereon became vested in the municipality. Where the title to the streets would go on vacation, the court in the *Haven Case* declined to discuss, and in the *Hunter Case* said, on page 54: "The title may, perhaps, revert to the former owners . . . on the abandonment of the . . . streets." This statement, of course, shows that the opinion did not decide the question involved, and that the statement as to where the title would "perhaps" go on the abandonment of the streets was dictum. Both of these decisions were decided long before the Vacation Act of 1865 was passed and with reference to two plats made in 1825 and 1835, respectively, where there had been no attempt shown to vacate the streets thereon.

In *St. John v. Quitzow*, 72 Ill. 334, the facts are somewhat obscurely stated in the opinion, but it would seem that, when Mrs. St. John conveyed lot 63 in question, "she expressly reserved the right in the deed to vacate the streets, which is equivalent to a reservation of all her title thereto." The street in question was vacated in 1869, and Quitzow claimed that under the Act of 1865, he as the owner of that part of lot 63 abutting thereon, was entitled to hold to the center of the street. The court held this untenable, apparently because Mrs. St. John in making her deed had expressly reserved the right to vacate the street, and this right was equivalent "to a reservation of all her title thereto," and, of course, a title so expressly reserved by her, the opinion held, "could not be divested by direct legislative action."

In *Gebhardt v. Reeves*, 75 Ill. 301, the court construed the Vacation Act of 1851, which gave the munic-

ipality, upon vacation, the power to quitclaim the interest of the city in the vacated street to the abutting property owners, and held that the only authority given the city by the act was to release to the abutting owners the city's interest in the vacated street (an interest which, under the decisions of this court, ceased at the time of the vacation), and that the act did not purport to authorize the city to grant the fee in the street for private purposes. The court was undoubtedly right in so holding, but it is argued that the opinion in that case passed on the vital question in this case, and has been referred to with approval on this last point by this court in other decisions, so that, it is insisted, unless that decision is overruled, the decision of the trial court in this case must be sustained. As the reasoning in that case is considered conclusive on the point here involved, we will later take up and discuss the facts there involved and the reasoning of the court at some length. It may, however, be noted in this connection that it is assumed on page 306 of the opinion in that case that the decisions of this court in *Hunter v. Middleton*, and *St. John v. Quitzow*, *supra*, decided the exact question involved, and were therefore controlling. From what has already been said it is clear that this court never intended to decide this question in the *Hunter Case*, and that the facts were so different in the *St. John Case* that that opinion cannot be held conclusive on the question here before us.

In *Helm v. Webster*, 85 Ill. 116, one Holmes conveyed a strip of ground to the city of Quincy in 1855 to be used for a street, it being provided in the deed that in case the street was vacated the title should revert. Afterwards the legislature passed the Vacation Act of 1865. Subsequently the street was vacated, and this court held that the legislature could not by the subsequent enactment deprive the dedicant of his property. But in that case Holmes had expressly reserved

the reversion in his deed of 1855 as a condition of the grant, and the court did not hold or intimate that § 2 of the Vacation Act was void when applied to a street dedicated by a plat made subsequent to 1865 and afterwards vacated. While the court in that case did quote with approval the doctrine laid down in *Gebhardt v. Reeves*, supra, we shall show hereafter that the reasoning in support of that doctrine as laid down in the *Gebhardt Case* was in a large measure, if not entirely, unsound.

In *Hyde Park v. Borden*, 94 Ill. 26, the dedication of a street was made in 1852, before the present Vacation Act was passed, and the street was vacated February 16, 1865. The decision, therefore, could have no bearing upon the construction of the Plat Act or the Vacation Act.

In *Mathiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81, a controversy arose in respect to the rights in streets dedicated by a plat made by the commissioners of the Illinois and Michigan canal under the Acts of 1836 and 1837. This court there decided that the fee of such streets was in the municipality, and that the owners of lots abutting thereon had no right to tunnel under the streets for the purpose of mining coal or other minerals. There had been no vacation of any of the streets involved, and therefore the provisions of § 2 of the Vacation Act had nothing to do with the controversy before the court. This court, however, did say in that case something that was unnecessary for the decision there involved (117 Ill. on page 418): "The title vested in the town by the statutory dedication is absolutely for the purpose of the statutory trust until the street shall be subsequently vacated, when it will revert to the dedicator, or, it may be, in cases like the present, to the adjacent lot owner. Possibly at some time in the future there may be a reverter, but this is no reversion." It is plain from that state-

ment that the court at that time did not consider that the former decisions of the court, including *Gebhardt v. Reeves*, supra, had positively decided that on the vacation of streets under the Vacation Act of 1865 or the Vacation Act now and then in force the title to the vacated property would necessarily revert to the dedicator.

In *Hamilton v. Chicago, B. & Q. R. Co.* 124 Ill. 235, 15 N. E. 854, the streets under consideration were offered to be dedicated by a plat made and recorded in 1835, and were vacated by an ordinance passed in 1871. It appeared that the streets and alleys had never been accepted by the municipality, and this court held that the title thereto never became vested in the city, but the conveyance of the abutting lots carried to the grantees the title to the streets and alleys, and that upon vacation such title became perfect in the abutting owners, freed from the easement. The decision has no application to the question of the validity of § 2 as applied to plats made subsequent to 1865: First, because there seems to have been no acceptance of the streets in that case, and the title thereto never became vested in the city, and the plat never became a complete statutory plat; and, second, because the plat was made in 1835 before the passage of the Act of 1865.

In *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18, there had been a vacation by Highland Park of a large number of streets and alleys in a subdivision of that city. Hill filed a bill to enjoin the closing of the vacated streets and alleys on the ground that the vacation ordinance was void, and that, even if the vacation was valid, he had a special or private easement in the vacated ways, distinct from the public easement. It was stipulated that the plat was a statutory plat. It appeared that Kimball not only owned practically all of the abutting lots, but that he also had a deed to the vacated streets and alleys from the

original subdivider, made subsequent to the vacation. The particular mode by which Kimball became vested with the title to the vacated streets was a matter of slight importance, and the validity of § 2 of the Vacation Act was not a controverted point in the case. The court in that case, without any discussion and without specifically referring to § 2, held that the fee of the vacated street in a statutory plat reverted to the dedicator, his heirs, or assigns, and that neither the legislature nor the city could divest him of such title, citing Gebhardt v. Reeves; Helm v. Webster; and Hyde Park v. Borden, supra. That last question was not involved in that case, and therefore the reference to the former decisions on the question here under consideration was necessarily dicta.

It is not argued by appellants that, if a street is granted to a municipality by deed on condition that if it is vacated the title shall revert to the grantor, or if other rights are reserved in the deed, the title thereto will pass to the abutting property owners notwithstanding such conditions or reservations. The Vacation Act was never intended to apply to such cases.

Appellee is not entitled to claim any protection by reason of any decision of this court rendered since his plat was executed and recorded,

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who can claim
benefit of.**

in 1889. Oliver Co. v. Louisville Realty Co. 156 Ky. 628, 51 L.R.A. (N.S.) 293, 161 S. W. 570, Ann. Cas. 1915C, 565. In People v. Chicago & N. W. R. Co. 239 Ill. 42, 87 N. E. 946, the legislature in 1853 passed an act authorizing the city of Chicago to vacate certain streets in a subdivision laid out by the canal commissioners, and to convey by deed the interest which said city "may have had" in the streets vacated. The court there held the Act of 1853 valid on the ground that the state might dispose of its property in any way it saw fit.

That decision has no direct application to the facts in this case.

We have now referred to and stated briefly the holdings in the decisions of this court which seem to have a direct bearing on the issue here involved, and under which counsel insist this court is bound in this case, on the doctrine of stare decisis, to uphold the judgment of the lower court. Before passing on that vital question, we desire to refer at some length to the reasoning of this court in Gebhardt v. Reeves, supra.

Reeves's subdivision, which was involved in the Gebhardt Case, was recorded in June, 1856, and certain alleys and streets therein were vacated by an ordinance passed by the city of Chicago in August, 1864. The Vacation Act of 1851, which was in force at the date of this vacation ordinance passed in 1864, provided that upon the vacation of a street the corporate authorities of the city shall have power "to convey, by quitclaim deed, all interest which the city may have had in the street or part of street so vacated, to the owner or owners of lots and lands next to and adjoining the same." Laws of 1851, p. 112. Assuming for the sake of argument that the plat in that case was a statutory plat, upon the recording of the plat and acceptance of the streets and alleys by the city, a base or determinable fee to the streets and alleys became vested in the city. Upon the vacation of the streets and alleys in question in the Gebhardt Case the title of the city thereto, under the Vacation Act of 1851, ceased, and upon that vacation the city was not empowered to convey the fee to the streets and alleys vacated, but was authorized by said act only to convey by quitclaim deed all interest which the city "may have had" in the streets and alleys vacated. By the terms of the act, upon vacation the title of the city to the vacated streets and alleys absolutely determined, and, even if the city made a quitclaim deed conveying the streets

and alleys to the abutting lot owners, the determinable quality of the title would follow the title into the hands of the grantees. *Lee v. Roberson*, 297 Ill. 321, 130 N. E. 774. The court in its opinion in the *Gebhardt Case* therefore correctly interpreted the Act of 1851 and correctly applied the law and held that the act did not give to the city the right to convey the fee. The court also held that under the provisions of the Plat Act the title to the streets vested in the municipality a base or determinable fee, and the title thus vested may endure forever, or, as said in the opinion (page 306): "Until the municipality shall elect to abandon the use of the streets and alleys, the former owner has no interest whatever in the land embraced within them, —absolutely nothing, within any definition of estate or property, that he could sell and convey. It had all passed to the corporation by the former grant, subject only to the possibility it might revert to him, if the contingency ever happened the municipality should ever abandon the trust." Thereafter, after the execution and recording of a statutory plat and acceptance of the streets and alleys by the municipality, nothing remained in the dedicator but a mere possibility of reverter. This possibility of reverter is not an estate, but is only the possibility to have an estate at a future time. *Hart v. Lake*, 273 Ill. 60, 112 N. E. 286. It is inalienable, not assignable, not subject to be sold on execution, and not devisable unless made so by statute. *North v. Graham*, 235 Ill. 178, 18 L.R.A. (N.S.) 624, 126 Am. St. Rep. 189, 85 N. E. 267; 21 C. J. 1018. "It is well settled that a mere expectation of property in the future is not a vested right, and may be changed, modified, or abolished by legislative action." *McNeer v. McNeer*, 142 Ill. 388, 19 L.R.A. 256, 32 N. E. 681. In the *McNeer Case* the court was considering the estate of tenancy by the curtesy initiated as it had existed under the Mar-

ried Women's Act of 1861 (Laws 1861, p. 143). The court held that until curtesy became consummate by the death of the wife it was a mere expectancy, and not an estate, and that therefore the Act of 1874 (*Hurd's Rev. Stat.* 1919, chap. 41, § 1), which abolished curtesy, was constitutional when applied to curtesy initiated under the Act of 1861. The same doctrine laid down in the *McNeer Case* was approved in *Butterfield v. Sawyer*, 187 Ill. 598, 52 L.R.A. 75, 79 Am. St. Rep. 246, 58 N. E. 602, and is in accord with the reasoning of this court in *Henson v. Moore*, 104 Ill. 403, where the court held that the inchoate right of dower was a mere expectancy, and therefore not a vested interest.

It seems clear, therefore, that the possibility of reverter in the streets which remains in a dedicator after the making of a statutory plat, even if the reasoning in *Gebhardt v. Reeves*, 75 Ill. 301, should control, is not an estate, and is not protected by any constitutional limitation; that it is perfectly competent for the legislature to abolish this possibility of reverter, or to change the devolution of title upon the happening of the future contingency in any way it may see fit. So it would seem that the reasoning in the *Gebhardt Case*, that the interest the original dedicator had in the street after the vacation of the plat could not be constitutionally divested and transferred to the adjacent landowners by direct legislative action, was not in harmony with the reasoning of this court as to the interest which the original dedicator had in the land and the right of the legislature to divest it.

The reasoning of the court in *Gebhardt v. Reeves*, *supra*, has been also greatly weakened in other respects. The court assumed that the statutory plat in that case was binding even though it had been made only in substantial compliance with the requirements of the statute.

Dedication—
possibility of
reverter—how
far an estate.

The plat there appears to have been made by a surveyor who was not a certified county surveyor, and the court held that such a plat was a good statutory plat. This part of the decision was later in terms overruled in *Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212, the court basing its conclusion upon *First Evangelical Church v. Walsh*, 57 Ill. 363, 11 Am. Rep. 21, and *Thomas v. Eckard*, 88 Ill. 593. The doctrine of the *Auburn Case* was approved by this court in *Russell v. Lincoln*, 200 Ill. 511, 65 N. E. 1088, and the doctrine of the *Gebhardt Case* that when a plat has been executed, certified, acknowledged, and recorded in substantial compliance with the statute, the title to the streets and alleys designated thereon vests in the municipality in trust for the public, has been substantially repudiated in every subsequent case involving the question as to the statutory requirements that must necessarily be followed in order to uphold a statutory plat. See *Ryerson v. Chicago*, 247 Ill. 185, 93 N. E. 162. Beyond question, under repeated decisions of this court, the holding of the court in the *Gebhardt Case* that the plat was a valid statutory plat was a mistaken conclusion, and it necessarily follows, therefore, that the court was not required to pass upon the question whether the title to the streets and alleys should go to the original dedicator or to adjacent lot owners. If the court had held that the plat was not a statutory plat, in accordance with the now settled rule of this court, because not having been made by the proper authority, the crucial question would have been disposed of, and all that was said thereafter by the court could be considered dictum and not necessary to the decision of the case, and should now only be followed by the court so far as the reasoning was sound.

The correctness of the holding of this court in *Gebhardt v. Reeves*, supra, as to the rights of the original dedicator of the streets and alleys in the plat where the streets

are vacated either under the Act of 1865 or 1874 has been questioned, and has not always received the approval of law writers on the question. In *Kales on Estates & Future Interests*, 2d ed. § 293, there is a quotation from the *Gebhardt Case* as follows (page 308): "The fee plaintiff had in the street and alley could not be divested and transferred to the adjacent lot owners by direct legislative action; nor could authority be given to any agency to do it for private purposes." The author then comments: "The court speaks of this legislation as if it amounted to taking the property of one man and transferring it to another without compensation. Such language was intelligible in *St. John v. Quitzow*, where the dedication had been made prior to 1851, but in *Gebhardt v. Reeves*, where the court recognizes that the dedication was made after the law of 1851 went into force, such language is unintelligible. If applied in the slightest degree to other legislation, it would require some curious results. Why, for instance, would it not make a statutory dedication invalid to pass a fee simple to the municipality? At common law the dedication gives the public only an easement over the land. Why, then, does not the statute deprive the dedicator of his property and transfer it to another without compensation? If the legislature may to a limited extent take the fee out of the dedicator upon a statutory dedication, why may it not take it out of him to the whole extent? And in that case of what consequence is it to him what becomes of it? If the legislature has no power to give a certain legal effect to the dedication, how has it any power to give a particular legal effect to what, under the statute *donis*, would be an estate tail?"

What has heretofore been said with reference to *Gebhardt v. Reeves*, supra, and the other decisions where the question here under consideration was directly or indirectly referred to, would seem to

show quite clearly that the constitutionality of the Vacation Act with reference to a plat made after the acts in question were in force was not decided by the court in any of those decisions, or, if decided, was absolutely unnecessary for the decision of the questions involved. It may be frankly admitted that there are expressions in some of the decisions relied upon that lend support to counsel's position that the court has heretofore intimated that § 2 of the Vacation Act is unconstitutional, but in our judgment this is the first time that the constitutionality of this act has been squarely in the record and necessary for the consideration and decision of this court, and we are confronted with the proposition whether we should follow what is dictum in those cases in construing § 2 of the Vacation Act, and thus follow an erroneous construction of said act. This court has said: "It is highly important that the decisions of the court affecting the right to property should be uniform and stable; but cases will sometimes occur in the decision of the most enlightened judges where the settled rules and reasons of the law have been departed from, and in such cases it becomes the duty of the court, before the error has been sanctioned by repeated decisions, to embrace the first opportunity to pronounce the law as it is." *Fraink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575. The *McNeer Case*, *supra*, is a case particularly in point in support of the reasoning just given. In that case the court overruled the decision of *Russell v. Rumsey*, 35 Ill. 362, which had been followed in *Rose v. Sanderson*, 38 Ill. 247, and *Steele v. Gellatly*, 41 Ill. 39, notwithstanding the decision in the *Russell Case* had stood unchallenged for twenty-eight years, and notwithstanding the opinion in that case squarely decided the question involved that inchoate dower, although only an expectancy, was as completely beyond legislative control as an estate. In *Chicago, D. & V. R. Co. v. Smith*, 62

Ill. 268, 14 Am. Rep. 99, the court discussed at some length the doctrine of stare decisis and authorities in other jurisdictions that bear on that subject where a constitutional question is involved, and from that discussion we think it may be fairly said that the conclusion of the court was that the rule of stare decisis will not prevent the courts from reviewing a constitutional question where the facts in the instant case are slightly different from those in former decisions. In *Arnold v. Knoxville*, 115 Tenn. 195, 3 L.R.A. (N.S.) 837, 90 S. W. 469, 5 Ann. Cas. 881, the court considered the same doctrine as to the necessity of recognizing to the fullest extent and adhering to that doctrine in passing upon and construing the provisions of the organic law, but stated that when it is clear that the court has made a mistake it "will not decline to correct it, even though it may have been reasserted and acquiesced in for a long number of years." In *Paul v. Davis*, 100 Ind. 422, the court said (page 427): "The law is a science of principles, and this cannot be true if a departure from principle can be perpetuated by a persistence in error." In *The Genesee Chief v. Fitzhugh*, 12 How. 443, 456, 13 L. ed. 1058, 1064, the court said: "It is the decision in the case of *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it we follow an erroneous decision into which the court fell when the great importance of the question as it now presents itself could not be foreseen, and the subject did not, therefore, receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when the case was decided." See also on this same subject *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809, 14 Am. Neg. Cas. 167,

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question.

and Imperial Securities Co. v. Morris, 57 Colo. 194, 141 Pac. 1160.

Counsel for appellee argue in this connection that, if § 2 of the Vacation Act is now held valid, it will cause great confusion in titles. For a long period of years this court has held with consistent rigor that a plat, unless made and recorded in strict conformity with the statute, was not a statutory plat. Ryerson v. Chicago, supra. It is recognized by all those who have had any experience in the matter that usually vacations of plats are made at the instance of abutting property owners, and that before carrying through such vacation proceedings they will ascertain with some care whether or not the original dedicator has any interest in the title, and if there be any question on that point and they cannot secure quitclaim deeds from the dedicator or his heirs, they will establish the title to the property under the streets and alleys, before vacating them, by appropriate court proceedings. It would hardly seem, therefore, that the laying down of the correct rule as to the proper construction of the Plat Act and the Vacation Act would cause any great confusion or much litigation as to the question of titles to the vacated strips. While it may, perhaps, be fairly said that former decisions of this court have cast doubt upon the validity of § 2 of the Vacation Act, it would seem clear from the previous discussion in this opinion that this court has never squarely decided that question where the constitutionality of the act was necessary for decision of the case. Where the error of a previous decision is recognized, the question whether or not the rule of stare decisis shall be followed becomes a simple choice between relative evils. The rule should be adhered to unless it appears that the principle established must be productive of greater mischief to the community than can possibly ensue from not following previous decisions on the subject. 7 R. C. L. 1009. The rule

of stare decisis is founded largely on considerations of expediency and sound principles of public policy, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument, and the courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one. 15 C. J. 918. In view of what has already been said, we can reach no other conclusion than that the evils arising from adhering to any former statements in the opinions as to the unconstitutionality of § 2 of the Vacation Act will be greater than would arise hereafter by giving a correct construction to that act.

The suggestion seems also to be made that a change of judicial decision as to the construction or validity of a statute now is an impairment of the obligation of a contract within the meaning of the Federal Constitution. We do not think that question is involved in this case. Moreover, "a judicial decision changing the settled construction of a statute as declared by the highest court of the state is regarded by some authorities as equivalent to a change in the statute itself, and therefore as a law impairing the obligation of contracts made in reliance on the previous construction. This view, however, after a good deal of confusion in the decisions, has been finally repudiated by the United States Supreme Court, and the rule has been established that even a decision of the highest court of a state overruling a previous decision construing a statute and declaring void a contract made in reliance on the previous decision does not constitute a law impairing the obligation of contracts. Cases of

—when rule not followed.

Constitutional law—impairing obligation of contract—change of decision.

the United States Supreme Court in apparent conflict with this view are explained on the theory that they were cases originating in the Federal courts, and, jurisdiction having been acquired on other grounds, the Supreme Court, in the exercise of its co-ordinate jurisdiction to construe the state law, chose to follow the earlier rather than the later decisions of the state courts as the correct exposition of the law." 12 C. J. 990. This question has been decided in accordance with the doctrine thus laid down in *Corpus Juris*, in *National Mut. Bldg. & L. Asso. v. Braham*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532.

In view of our conclusion that § 2 of the Vacation Act is valid and must be construed in *pari materia* with the Plat Act, under which this plat was made and dedicated by appellee, and that § 2 of the Vacation Act is not unconstitutional, the conclusion follows that the circuit court wrongly entered judgment in this case in favor of appellee.

The judgment of the Circuit Court will therefore be reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Stone, Ch. J., and Cartwright and Dunn, JJ., dissent.

Petition for rehearing denied October 11, 1921.

ANNOTATION.

Reversion of title upon abandonment or vacation of public street or highway.

- I. Scope and introduction, 1008.
- II. Reversion to municipality, 1009.
- III. Reversion as between dedicator and adjoining owner:
 - a. In general, 1010.
 - b. As affected by description in conveyance of adjoining property:

III. b—continued.

- 1. Description by plat:
 - (a) Generally, 1013.
 - (b) Under statutes vesting fee in municipality in trust, 1014.
- 2. Bounding land conveyed by street, etc., 1017.

IV. Express statutory regulation, 1020.

I. Scope and introduction.

The purpose of the present annotation is to cover the general concrete question as to whom, i. e., whether to the original owner, to the abutting owner, or to the municipality, the title to the land in a street or highway reverts upon the discontinuance, abandonment or vacation of the public use therein. Broadly speaking, the reversion is to the owner of the fee, so that, from a practical point of view, the important question is, In whom is the absolute fee to the way at the time of the vacation thereof? The latter question, dealing, as it does, with boundaries, etc., is not, on its facts, one which is distinctive to cases dealing with reversion of land in streets and highways, but upon examination of the case it appears that the courts have in a great measure looked to cases involving the vacation of pub-

lic ways for support for their conclusions, so that, after all, the cases passing upon the right of reversion of vacated ways form a somewhat distinctive class. In view of this seeming tendency of the courts to rely to some considerable extent, at least, upon decisions which have involved facts similar to those under consideration, and of the fact that the cases themselves are very complex, little more than division of the cases into general groups has been attempted. And as a matter of fact any classification is to a considerable degree unsatisfactory in that it separates in some instances rather closely related cases. In consequence the reader, if he is looking for specific cases which have involved facts similar to those in his own case, is advised to make a more extended examination of the annota-

tion than ordinarily would be necessary.

II. *Reversion to municipality.*

Under the civil law where the title to all roads and highways remained in the sovereignty, the rule was that upon abandonment the abutting owner could not claim the title to the middle, even as against one who entered the same as vacant public domain. *Mitchell v. Bass* (1870) 33 Tex. 258.

And the general rule is to the effect that where the absolute and unqualified fee is in the municipality, it divests the original owner of his entire interest, so that upon discontinuance of the way as such the title does not revert to the grantor, but remains in the municipality unaffected by the vacation. *Avery v. United States* (1900) 44 C. C. A. 161, 104 Fed. 711; *Krueger v. Ramsey* (1919) 188 Iowa, 861, 175 N. W. 1 (holding that where a city obtained an absolute title to a street by deed, it could, on vacation of the street, deed the land to an abutting owner); *Mitchell v. Einstein* (1905) 105 App. Div. 413, 94 N. Y. Supp. 210, reversing (1904) 42 Misc. 358, 86 N. Y. Supp. 759 (holding that where the city by deed acquired the fee to a street, the legislature could, upon vacating the same, add it to the abutting lands); *Huber v. Gorg* (1918) 181 App. Div. 369, 168 N. Y. Supp. 834 (holding that upon vacation of the street the municipality retains title to the fee; but that it should be released to the adjoining owners); *Knight v. Thomas* (1909) 35 Utah, 470, 101 Pac. 383. And see *Burbach v. Schweinler* (1882) 56 Wis. 386, 14 N. W. 449; also *Jones v. Tuckersmith* (1917) 45 Ont. L. Rep. 67, 47 D. L. R. 684, which reversed (1915) 33 Ont. L. Rep. 634, 23 D. L. R. 569.

And where the fee is in the city by virtue of the fact that it was laid out by the government on government lands and subsequently passed to the city under its charter, it has been held that the title does not revert or pass to the abutting owners by the mere vacating of the way. *Pooler v. Sammet* (1909) 180 App. Div. 650, 115 N. Y. Supp. 579. This case involved the old 18 A.L.R.—64.

Harlem road, which was laid out by the Dutch, and which thereafter passed to the British Crown and subsequently to the city of New York by the Dongan Charter.

And where a city, by condemning and appropriating land for a street, acquires the fee thereto, it has been held that upon vacating the same it could pass the fee to the abutting owners as against the claims of the successors in title of the prior owners of the fee to the street. *Mott v. Ene* (1905) 181 N. Y. 346, 74 N. E. 229, reversing (1904) 97 App. Div. 580, 90 N. Y. Supp. 608 (holding that the city of New York, by virtue of proceedings under Laws 1847, chap. 203, acquired the fee to certain parts of the Bloomingdale road so that, upon abandonment thereof, it could incorporate the same with the adjoining property).

And under statutes providing that the platting of a town vest the title of all streets in the town, it has been held that vacation of a street leaves the title in the municipality as against the original dedicator or his grantees. *Pettingill v. Devin* (1872) 35 Iowa, 344; *Lake City v. Fulkerson* (1904) 122 Iowa, 569, 98 N. W. 376; *Harrington v. Iowa C. R. Co.* (1905) 126 Iowa, 388, 102 N. W. 139 (holding that the city could dispose of the vacated street for railroad purposes); *Tomlin v. Cedar Rapids & I. C. R. & Light Co.* (1909) 141 Iowa, 599, 22 L.R.A. (N.S.) 530, 120 N. W. 93 (holding that the city could convey the vacated lands to the state for university purposes); *Kenwood Park v. Leonard* (1916) 177 Iowa, 337, 158 N. W. 655 (holding that Iowa Code 1897, §§ 914-932, related only to cities and incorporated towns, and not to unincorporated villages or town sites); *Lindsay v. Omaha* (1890) 30 Neb. 512, 27 Am. St. Rep. 415, 46 N. W. 627 (applying a statute (Comp. Stat. chap. 14, §§ 104, 105) which provided that the recording of a plat is equivalent to a deed in fee simple of such portions as are set apart for public streets).

This rule, however, is subject to the proviso that the municipality has accepted or shown an intention to accept the dedication, at least, where the stat-

ute, as in Iowa, requires an acceptance. *Brown v. Taber* (1897) 103 Iowa, 1, 72 N. W. 416 (holding that the title remained in the dedicator where the street was vacated before acceptance thereof by the municipality); *Kenwood Park v. Leonard* (1916) 177 Iowa, 337, 158 N. W. 655.

And in Nebraska it has been held that title to platted streets which have never been accepted by the municipality or used as streets does not pass to the municipality, but reverts to the adjoining owners, where they vacate the same under a statute providing that the proprietors who have filed a plat may vacate the same before the sale of any lots therein, or by having the owners of sold lots join therein, and may inclose the same to the adjoining lots in equal proportion, which vacation "shall divest all public rights in the streets . . . laid out or described in the plat," notwithstanding the statute also provides the original filing of the plat "is equivalent to a deed in fee simple" to the municipality of the streets laid out thereon. *Hart v. Ainsworth* (1911) 89 Neb. 418, 131 N. W. 816 (holding that there is a distinction between mere "paper" streets and streets which have actually become such by municipal acceptance or actual user); *Johnson v. Bushman* (1915) 98 Neb. 236, 152 N. W. 403 (decision in preceding case re-examined and approved and held applicable to and decisive of the case under consideration). In *Pettingill v. Devin* (Iowa) *supra*, in holding that the title to a street did not, upon vacation, revert to the dedicator, but remained in the municipality, the court said: "The position of appellant [dedicator] is that, whenever this vacation is effected, the land vacated reverts. Such a doctrine would be fraught with very serious consequences. It is impossible to anticipate the extent to which cities might be thereby fettered and impeded, and their material prosperity impaired. If the interests of a city demand, or would be promoted by, an alteration or vacation of a street, and the adjoining proprietors do not object, or are fully compensated, what good reason is there

why the vacation or change should not be made? None occurs to us. Why should every attempt at change of the location of a street, no matter how important to the interests of a city, or how beneficial to all the property owners in any way affected, be attended by a forfeiture of all right in or control over the portion vacated by the change? The proper rule here is, as in the case before named, to leave the streets under the control of the city authorities, subject to the right of those interested to be compensated in damages, or to control their action by injunction. And, perhaps, also saving to the dedicator the right to enforce, in a court of equity, the use of the dedication, for the purposes contemplated in the grant."

For cases which hold that the title reverts to either the dedicator or the adjoining owner, notwithstanding the fee title to the street or highway was in the municipality, see the following subdivision of this annotation.

III. Reversion as between dedicator and adjoining owner.

a. In general.

Generally speaking, the absolute title to land comprising a vacated street, which consisted of a mere easement or servitude, reverts to the owner of the fee, whether he be the abutting owner or the adjoining owner. See *Steenerson v. Fontaine* (1908) 106 Minn. 225, 119 N. W. 400; *Blain v. Staab* (1901) 10 N. M. 743, 65 Pac. 177; and *Jackson v. Hathaway* (1818) 15 Johns (N. Y.) 447, 8 Am. Dec. 263.

Consequently, where a mere easement of use as a public highway is taken or granted so that the fee of the soil remains in the original owner, who retains the title to and possession of the adjoining lands, vacation or discontinuance of the highway as such restores exclusive possession thereof to such owner.

United States.—*Barclay v. Howell* (1832) 6 Pet. 498, 8 L. ed. 477; *Harris v. Elliott* (1836) 10 Pet. 25, 9 L. ed. 333.

Illinois.—See *Waller v. River Forest* (1913) 259 Ill. 223, 102 N. E. 290.

Iowa. — *Kenwood Park v. Leonard* (1916) 177 Iowa, 337, 158 N. W. 655.

Kentucky.—*West Covington v. Freking* (1871) 8 Bush, 121; *Halley v. Scott County Fiscal Ct.* (1904) 25 Ky. L. Rep. 1471, 78 S. W. 149.

Massachusetts. — See *Emmonds v. Smith* (1797) 5 Dane, Abr. 567, as set out in 10 Decem. Dig. p. 156.

Minnesota. — *White v. Jefferson* (1910) 110 Minn. 276, 32 L.R.A.(N.S.) 778, 124 N. W. 373, 641, 125 N. W. 262.

Nevada.—*Shearer v. Reno* (1913) 36 Nev. 443, 136 Pac. 705 (at least, as against an intruder who has settled thereon and is claiming title thereto).

And, of course, the original owner may expressly reserve the fee to the street so that it will revert to him upon vacation thereof. *Helm v. Webster* (1877) 85 Ill. 116; *Plumer v. Johnston* (1886) 68 Mich. 165, 29 N. W. 687; *Brown v. Oregon Short Line R. Co.* (1909) 36 Utah, 257, 24 L.R.A.(N.S.) 86, 102 Pac. 86. And see *Knight v. Thomas* (1909) 35 Utah, 470, 101 Pac. 383, and *Sowadzki v. Salt Lake County* (1909) 36 Utah, 127, 104 Pac. 111.

And it has been held that the reservation by the dedicant in a deed of a lot abutting on a dedicated street, of the right to vacate the street, is equivalent to a reservation of all his title thereto, so that, upon vacation of the street, the title will revert to such original owner instead of to the abutting owner. *St. John v. Quitzow* (1874) 72 Ill. 334.

As between the original and the abutting owner the decided weight of authority is to the effect that, in the absence of statutory disposition, abandonment or vacation of a public street vests the absolute possession and title in the adjoining owner, and not in the original owner; at least, unless the latter is the abutting owner at the time of the vacation or has expressly reserved the right of reversion upon vacation.

Arkansas. — *Beebe v. Little Rock* (1900) 68 Ark. 39, 56 S. W. 791; *Dickinson v. Arkansas City Improv. Co.* (1906) 77 Ark. 570, 113 Am. St. Rep. 170, 92 S. W. 21; *Matthews v. Blood-*

worth (1914) 111 Ark. 545, 165 S. W. 263.

Colorado.—*Olin v. Denver & R. G. R. Co.* (1898) 25 Colo. 177, 53 Pac. 454; *Overland Mach. Co. v. Alpenfels* (1902) 30 Colo. 163, 69 Pac. 574; *Bothwell v. Denver Union Stockyards Co.* (1907) 39 Colo. 221, 90 Pac. 1127.

Connecticut — *Benham v. Potter* (1884) 52 Conn. 248.

Florida.—*Robbins v. White* (1906) 52 Fla. 613, 42 So. 841; *Smith v. Horn* (1915) 70 Fla. 484, 70 So. 435.

Georgia. — *Bayard v. Hargrove* (1872) 45 Ga. 342; *Cincinnati & G. R. Co. v. Nims* (1883) 71 Ga. 240; *Harrison v. Augusta Factory* (1884) 73 Ga. 447; *Marietta Chair Co. v. Henderson* (1904) 121 Ga. 399, 104 Am. St. Rep. 156, 49 S. E. 312, 2 Ann. Cas. 83; *Adair v. Spellman Seminary* (1913) 13 Ga. App. 600, 79 S. E. 589.

Illinois. — *Thomsen v. McCormick* (1891) 136 Ill. 135, 26 N. E. 373; *Sullivan v. Atchison, T. & S. F. R. Co.* (1911) 251 Ill. 108, 95 N. E. 1081 (both of these cases hold that such is the rule where there had been a common-law dedication). And see *Lockwood & S. Co. v. Chicago* (1917) 279 Ill. 445, 117 N. E. 81; *People ex rel. Canal Comrs. v. Pittsburg, Ft. W. & C. R. Co.* (1910) 244 Ill. 166, 91 N. E. 48, error dismissed for want of jurisdiction in (1914) 235 U. S. 689, 59 L. ed. 427, 35 Sup. Ct. Rep. 205; and *PRALL v. BURCKHARTT* (reported herewith) ante, 992.

Indiana.—*Jose v. Hunter* (1913) 60 Ind. App. 569, 103 N. E. 392, reversing on other grounds on rehearing (1913) — Ind. App. —, 101 N. E. 665, and rehearing denied in (1914) 60 Ind. 589, 103 N. E. 852; *Brackney v. Boyd* (1919) — Ind. App. —, 125 N. E. 238, denying rehearing of (1919) — Ind. App. —, 123 N. E. 695. And see *Decker v. Evansville Suburban & N. R. Co.* (1893) 133 Ind. 493, 33 N. E. 349.

Iowa. — *Kitzman v. Greenhalgh* (1914) 164 Iowa, 166, 145 N. W. 505.

Kentucky.—*West Covington v. Freking* (1871) 8 Bush, 121; *Bright v. Palmer* (1898) 20 Ky. L. Rep. 771, 47 S. W. 590; *HENDERSON ELEVATOR Co. v. HENDERSON* (reported herewith) ante, 983.

Michigan. — *Michigan C. R. Co. v. Miller* (1912) 172 Mich. 201, 137 N. W. 555.

Missouri. — See *Second Street Improv. Co. v. Kansas City S. R. Co.* (1914) 255 Mo. 519, 164 S. W. 515.

New York.—*Re John Street* (1839) 19 Wend. 659; *Wallace v. Fee* (1872) 50 N. Y. 694; *Wheeler v. Clark* (1874) 58 N. Y. 267; *Haberman v. Baker* (1891) 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370; *Van Amringe v. Barnett* (1861) 8 Bosw. 357.

Ohio. — *Stephens v. Taylor* (1894) 51 Ohio St. 593, decided on the authority of *Stevens v. Shannon* (1892) 6 Ohio C. C. 142; *Kinnear Mfg. Co. v. Beatty* (1901) 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341; *Hamilton, G. & C. Traction Co. v. Parish* (1902) 67 Ohio St. 181, 60 L.R.A. 531, 65 N. E. 1011.

Pennsylvania. — *Paul v. Carver* (1855) 24 Pa. 211, 64 Am. Dec. 649, on subsequent appeal in (1856) 26 Pa. 223, 67 Am. Dec. 413; *Cox v. Freedley* (1859) 33 Pa. 124, 75 Am. Dec. 584; *Ball v. Ball* (1850) 4 Clark, 424, 1 Phila. 36, 7 Phila. Leg. Int. 26; *Barnes v. Philadelphia, N. & N. Y. R. Co.* (1905) 27 Pa. Super. Ct. 84. See *Black v. Pittsburgh & B. Street R. Co.* (1907) 34 Pa. Super. Ct. 416.

Rhode Island. — *Healey v. Babbitt* (1884) 14 R. I. 533.

Tennessee.—*State ex rel. Beckham v. Taylor* (1901) 107 Tenn. 455, 64 S. W. 766.

Texas.—*Mitchell v. Bass* (1862) 26 Tex. 372 (common-law rule); *Day v. Chambers* (1884) 62 Tex. 190; *American v. Missouri, K. & T. R. Co.* (1916) — Tex. Civ. App. —, 182 S. W. 54. And see *Houston v. Bammel* (1909) 53 Tex. Civ. App. 336, 115 S. W. 661.

Utah.—See *Brown v. Oregon Short Line R. Co.* (1909) 36 Utah, 257, 24 L.R.A. (N.S.) 86, 102 Pac. 86.

Washington. — See *Bradley v. Spokane & I. E. R. Co.* (1914) 79 Wash. 455, L.R.A. 1917C, 225, 140 Pac. 688.

Wisconsin. — *Kimball v. Kenosha* (1855) 4 Wis. 321; *Weisbrod v. Chicago & N. W. R. Co.* (1864) 18 Wis. 35, 86 Am. Dec. 743; *Burbach v. Schweinler* (1882) 56 Wis. 386, 14 N. W. 449.

Canada. — *Cormier v. Vaillant* (1913) Rap. Jud. Quebec 24 B. R. 161.

In *Stevens v. Shannon* (1892) 6 Ohio C. C. 142, *supra*, the court discussed the necessity for the rule as follows: "Vacation of the streets and alleys does not affect the rights of the adjacent proprietor, or rehabilitate the original owner with the title to the lands included therein. If it did it would follow that upon the vacation of a street the original proprietor would have the right to take possession thereof, fence it in, cultivate crops thereon, or make any other use of it which an owner in fee simple may lawfully make of real estate, and the abutting owners would have no remedy except to incur the expense and trouble of procuring the establishment of new streets; and this, notwithstanding they had purchased their lots upon the faith of their right to have the streets kept open for their benefit. Such is certainly not the law. Convenience and necessity, if no other consideration, require that where highways are vacated the title thereto shall vest in the abutters. Vacation is an abandonment of the rights of the public to have and use the streets and alleys as public highways, but not a relinquishment of the rights of abutting owners therein. Section 2654 of the Revised Statutes provides that the order of vacation of a street or alley shall 'operate as a revocation of the acceptance thereof by the council; but the right of way and easement therein of any lot owner shall not be impaired thereby.' This indicates an intention that vacation shall not deprive abutters of rights incident to their ownership."

In *Jose v. Hunter* (1913) 60 Ind. App. 569, 103 N. E. 392, rehearing denied in (1915) 60 Ind. App. 589, 103 N. E. 852, the court pointed out that an essential to application of the rule that a way reverts upon vacation to the abutting owner is that the street or highway was dedicated or laid off by one who at the time of such dedication owned the abutting land in question. It said: "While some of the authorities contain some general statements to the effect that the abut-

ting lot owners on a street own to the center of such street, we have no doubt that such statements are too broad and general, and were in each case intended to have general application to owners of lots along such street only as had been laid out or dedicated by a person who, at the time of such dedication, owned the abutting land on either side of such street, or where the abutting property owners on each side of the street had donated or dedicated their half of the land over which the street passed."

In Quebec the rule is that upon abandonment of a public highway the land therein returns to the lot from which it was taken, but if not taken from the adjoining land it is added to the lots between which it is located, half going to each. *Cormier v. Vailant* (1913) *Rap. Jud. Quebec* 24 B. R. 161.

b. As affected by description in conveyance of adjoining property.

1. Description by plat.

(a) Generally.

An unrestricted conveyance by lot or block number, or according to a plat, has been held to pass the fee to the center of a street on which the conveyed lands abut, so that upon vacation of the street the land therein reverts to the owner of such abutting lands rather than to the original owner.

Arkansas. — *Dickinson v. Arkansas City Improv. Co.* (1906) 77 Ark. 570, 113 Am. St. Rep. 170, 92 S. W. 21; *Matthews v. Bloodworth* (1914) 111 Ark. 545, 165 S. W. 263.

Colorado. — *Olin v. Denver & R. G. R. Co.* (1898) 25 Colo. 177, 53 Pac. 454; *Overland Mach. Co. v. Alpenfels* (1902) 30 Colo. 163, 69 Pac. 574; *Bothwell v. Denver Union Stockyards Co.* (1907) 39 Colo. 221, 90 Pac. 1127.

Florida. — *Smith v. Horn* (1915) 70 Fla. 484, 70 So. 435.

Georgia. — *Bayard v. Hargrove* (1872) 45 Ga. 342; *Cincinnati & G. R. Co. v. Mims* (1883) 71 Ga. 240; *Harrison v. Augusta Factory* (1884) 73 Ga. 447.

Indiana. — *Decker v. Evansville Sub-*

urban & N. R. Co. (1893) 133 Ind. 493, 33 N. E. 349 (provided the abutting owner becomes such subsequent to the dedication); *Jose v. Hunter* (1913) 60 Ind. App. 569, 103 N. E. 392, reversing on other grounds on rehearing (1913) — Ind. App. —, 101 N. E. 665, and rehearing denied in (1914) 60 Ind. App. 589, 103 N. E. 852 (same proviso); *Brackney v. Boyd* (1919) — Ind. App. —, 125 N. E. 238, denying rehearing of (1919) — Ind. App. —, 123 N. E. 695.

Kentucky. — *Bright v. Palmer* (1898) 20 Ky. L. Rep. 771, 47 S. W. 590; *HENDERSON ELEVATOR CO. v. HENDERSON* (reported herewith) ante, 983. And see *Jacob v. Woolfolk* (1890) 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415.

Michigan. — See *Scudder v. Detroit* (1898) 117 Mich. 77, 75 N. W. 286.

Ohio. — *Stephens v. Taylor* (1894) 51 Ohio St. 593, decided on the authority of *Stephens v. Shannon* (1892) 6 Ohio C. C. 142; *Kinnear Mfg. Co. v. Beatty* (1901) 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341; *Hamilton, G. & C. Traction Co. v. Parish* (1902) 67 Ohio St. 181, 60 L.R.A. 531, 65 N. E. 1011.

Pennsylvania. — *Paul v. Carver* (1855) 24 Pa. 211, 64 Am. Dec. 649. See *Black v. Pittsburgh & B. Street R. Co.* (1907) 34 Pa. Super. Ct. 416.

Tennessee. — *State ex rel. Beckham v. Taylor* (1901) 107 Tenn. 455, 64 S. W. 766.

Texas. — See *American v. Missouri, K. & T. R. Co.* (1915) — Tex. Civ. App. —, 182 S. W. 54.

Washington. — See *Bradley v. Spokane & I. E. R. Co.* (1914) 79 Wash. 455, L.R.A. 1917C, 225, 140 Pac. 688.

Wisconsin. — *Kimball v. Kenosha* (1855) 4 Wis. 321; *Weisbrod v. Chicago & N. W. R. Co.* (1864) 18 Wis. 35, 86 Am. Dec. 743; *Burbach v. Schweinler* (1882) 56 Wis. 386, 14 N. W. 449.

And where the dedication creates merely an easement or right to use the way as such, and the dedicatory subsequently conveys the lands abutting thereon, describing them by block and as subject to the easement for the highway, the title to the way upon vacation has been held to vest in the

dedicator's grantee as against one to whom the original dedicator quit-claimed the way subsequent to the conveyance of the tract as a whole. *Kitzman v. Greenhalgh* (1914) 164 Iowa, 166, 145 N. W. 505.

In some states this rule has been based upon the so-called doctrine of "accretion" by necessity. For instance, in Ohio, the court in *Hamilton, G. & C. Traction Co. v. Parish* (1902) 67 Ohio St. 181, 60 L.R.A. 531, 65 N. E. 1011, said: "The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an increased price for lots by reason of the easement in the street, it is only just that when the street becomes vacated, the easement should be preserved to them by adding the vacated street to the lots, and therefore this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere."

(b) Under statutes vesting fee in municipality in trust.

Where the abutting lots have been sold according to a plat, the fact that by statute the title to premises designated as a street on a tract platted as a town site shall vest in the municipality, in trust, for the uses expressed in the plat, has been held (contra to the Illinois cases set out *infra*) not to change the rule that streets upon vacation shall revert to the abutting owners rather than to the original dedicator.

In so holding, the court in *Olin v. Denver & R. G. R. Co.* (1898) 25 Colo. 177, 53 Pac. 454, said: "The law in force at the time these premises were platted will be found in art. 11, chap. 84, pp. 618 et seq., of the Revised Statutes of 1868. Section 5 of this article provides, in effect, that the title to the premises designated as

streets on a tract platted as a town site shall vest in the city, in trust, for the uses expressed in the plat, and, the statute thus specifically directing where the title to the streets shall vest, it is argued by counsel for appellant that the grantee of lots in such plat only takes title to the ground actually included within the boundaries thereof, and no interest in the street abutting, and the title of the latter being held in trust by the city, that upon vacation it reverts to the original proprietor of the town site. When a vendee purchases a lot marked upon a plat, reference being made to such plat for a description of the premises conveyed, the construction of the intention of the grantor making such conveyance is that his vendee is entitled to all the appurtenant advantages and rights which the plat proclaims to exist, so far as the land included in it is owned by the grantor.

. . . The conveyance under which appellee acquired title to the lots abutting upon the premises in dispute refers to the plat, so that under the authorities cited, such plat became a part of these deeds. By this plat, it was apparent that the land so platted as streets was for the benefit of the owners of the lots embraced in such plat, as well as for the use of the public, and there being no reservation in any deed through which title was acquired to the lots abutting upon that part of B street subsequently vacated, whatever title the original dedicator of this street had therein passed to those who acquired title to such lots, the general rule being that where a grantor conveys a parcel of ground, bounded by a street, his grantee takes title to the center of such street, to the extent that the grantor has any interest therein, unless, by the terms of the grant, the boundary of the granted premises is restricted to the line of such street. . . . It is contended, however, by appellant, that this rule is not applicable in this case, for the reason that the fee to the disputed premises was vested in the city, in trust, subject to a reversion to her grantor, if vacated as a street, at the

time he parted with his title to the lots abutting thereon. This proposition is based upon the assumption that, the fee of the street being in the city, the proprietor of the town site had no interest in the street to convey, when he granted title to the abutting lots, and therefore granted none in such street. This proposition is defeated by the express words of the statute above cited. The platting of these premises as a town site, in accordance with the provisions of this statute, merely vested in the city the title to the ground therein reserved as streets, in trust, for the purposes expressed in the plat thereof, namely, for the benefit and use of the abutting lot owners and the public, for street purposes, whereby the city only acquired a qualified fee in such streets for these purposes; so that there still remained in the proprietor a reserved right in such streets which was capable of being transferred by deed to the purchaser of abutting lots as rights appurtenant thereto. . . . And under the rule above announced, governing the rights which the vendee of a lot acquires in the street upon which such lot abuts, E. W. Olin, when he conveyed title to the lots abutting the premises in controversy, without any reservation, granted all his interest in the street which now included such premises, subject to the easements created by the statute, . . . and when such street was vacated, the trust of the corporate authorities ceased to exist, and the land embraced therein reverted to the adjoining owner, the one for whose benefit such trust was created. Whatever may be the interest of the proprietor of a town site in the lots designated as streets, whether in esse or in futuro, they having been specially set apart for the benefit of lot owners, it is necessary for their protection that whatever rights such proprietor may have in such streets, in the absence of a reservation to the contrary, must be held to pass to the owners of such lots; and our conclusion is that when the streets designated on a plat of premises platted under the Statute of 1868 are vacated, the title to the center

of such streets vests in the owners of the lots abutting that portion of the streets so vacated." And see to the same effect, *Bothwell v. Denver Union Stockyards Co.* (1907) 39 Colo. 221, 90 Pac. 1127.

And a similar statute has received a like construction in Kansas. *Belleville v. Hallowell* (1889) 41 Kan. 192, 21 Pac. 105, as explained in *Challiss v. Atchison Union Depot & R. Co.* (1891) 45 Kan. 398, 25 Pac. 894.

This is also the Wisconsin rule. *Kimball v. Kenosha* (1855) 4 Wis. 321.

And in Utah, in construing a statute (Laws 1890, p. 77, chap. 50; Act March 13, 1890, § 4) which provided that the filing of a plat vested the "fee" of the streets, etc., marked thereon as such, in the public, it was held that the term "fee" in such a case does not mean the fee in the corpus of the land itself, but only the fee to the surface for public use as a way, so that upon abandonment of the street the fee will revert to the owners of the adjoining lots who hold under deeds describing the lands according to the plat. *So-wadzki v. Salt Lake County* (1909) 36 Utah, 127, 104 Pac. 111. The court said: "Counsel for respondent, however, seem to lay some stress upon the claim that by virtue of the Act of 1890, under which Wabash avenue was dedicated, the fee to or in the avenue passed to the public. From this counsel no doubt draw the inference that the title to land to which the fee has passed cannot be lost by mere nonuser or abandonment, but, if lost at all, it must be by operation of law or by adverse possession. That the general rule is to this effect is conceded, but we cannot construe § 4 of the Act of 1890 as counsel construe it. While the word 'fee' is used in the section, it is clear from what follows that it was not intended that the fee of the corpus or land itself should pass, but only the fee to the surface, and this only for public use for all purposes of a street or highway. The fee mentioned in the statute was thus what is known as a limited or determinable fee, and was created for a special purpose or purposes only, and hence was subject of abandonment. This was

also the construction that the owner of the land placed upon this statute in making the dedication of Wabash avenue as a street. In the dedication he says: 'Do hereby dedicate to the perpetual use of the public,' etc. This is not an absolute grant, but one only for a special purpose; namely, for use as a public street. . . . It is quite true that the original owner may not, after selling lots abutting on a dedicated street or highway, reclaim that portion of the land included within the highway in case it is vacated or abandoned. In parting with his title to the lots the fee passes to the purchaser to the center of the highway, and, if the highway is vacated or abandoned, the land belongs to the abutting lot or land owner, and not to the original owner, unless an express reservation to that effect was made in the dedication or conveyance. This is also the effect of § 1120, Comp. Laws 1907, which expressly provides that by taking or accepting land for a highway the public obtains only the right of way, and that the fee to the center of the highway passes to the purchaser of the adjoining land. The question, therefore, in case a public highway has been vacated or abandoned, and where there is no express reservation of the fee to the land on the highway, is not whether the abutting owner can establish title to the land included within the highway by adverse possession, but it is whether he owns the fee to the center of the vacated or abandoned highway."

And see *Wanzer v. Blanchard* (1853) 3 Mich. 11.

But there is some authority to the effect that upon abandonment or vacation of a public way which has been dedicated pursuant to a statute vesting the title in the public in trust for highway purposes, the fee reverts to the original owner who dedicated it to the public, and not to the abutting owner who has succeeded to the title to the adjoining lands, although there was neither an express reservation that it should do so, nor a statute providing therefor. *Wirt v. McEnery* (1884) 21 Fed. 233 (holding such to be the law of Illinois); *St. John v.*

Quitow (1874) 72 Ill. 334; *Gebhardt v. Reeves* (1874) 75 Ill. 301; *Helm v. Webster* (1877) 85 Ill. 116; *Hyde Park v. Borden* (1879) 94 Ill. 26; *Hill v. Kimball* (1915) 269 Ill. 398, 110 N. E. 18; *Tri-City Artificial Ice Co. v. Day* (1920) 292 Ill. 545, 127 N. E. 106; *PRALL v. BURCKHARTT* (reported herewith) ante, 992. And see *Inyo County v. Given* (1920) 183 Cal. 415, 191 Pac. 688.

In the Illinois cases which have adhered to this rule, it appeared that the statute which vested the fee of dedicated streets in the municipality in trust for the public was the determining element in reaching this conclusion. For instance, in *St. John v. Quitow* (1874) 72 Ill. 334, the court said: "The law, at the date of these transactions, vested the fee of the streets in the municipality. The lot owner took no interest under his deed in the street, other than what he had in common with the public. The limits of his lot were his boundary, beyond which his title did not extend. Hence, if the street was vacated, the fee returned to the original proprietor." And in *Gebhardt v. Reeves* (1874) 75 Ill. 301, the court said: "Under our statute, by the making, acknowledging, and recording of the plat of a town, addition, or subdivision of lots, the owner of the land voluntarily parts with all his title to the streets and alleys, and transfers it to the corporation. The legal effect is precisely the same as if he had made a direct conveyance to the corporation, in trust for the public. All interest in the estate that was in the owner becomes vested in the corporation. No limitation is fixed to the existence of the trust. It may endure forever. Until the municipality shall elect to abandon the use of the streets and alleys, the former owner has no interest whatever in the land embraced within them,—absolutely nothing, within any definition of estate or property, that he could sell and convey. It had all passed to the corporation by the former grant, subject only to the possibility it might revert to him if the contingency ever happened the municipality should

ever abandon the trust. Logically it follows, by the grant of the adjacent lot, the grantee takes no interest under his deed in the street or alley, other than what he acquires in common with the public. An easement may pass, without express mention, as an incident to the grant of the adjacent premises; but there can be no authority found, either in reason or justice, for the proposition, the fee in one piece of land, not mentioned in the deed, passes as appurtenant to another tract granted by an accurate description, giving it a definite and limited boundary."

But even under this rule there must have been more than a statutory dedication and subsequent vacation, since, in the absence of an acceptance by the municipality of the street, no title passed to it, so that by a conveyance after the dedication the grantor's rights would pass to the abutter, in consequence of which, upon vacation of the dedicated street without it ever having been accepted by the municipality as a street, the title would be in the abutting owner instead of reverting to the original owner. *Hamilton v. Chicago, B. & Q. R. Co.* (1888) 124 Ill. 235, 15 N. E. 854. See this case as set out in *PRALL v. BURCKHARTT* (reported herewith) ante, 992. And in *Sullivan v. Atchison, T. & S. F. R. Co.* (1911) 251 Ill. 108, 95 N. E. 1081, the court expressly ruled that where the dedication was a common-law one rather than under the statute, a conveyance of an abutting lot conveys to the middle of the highway subject only to the public easement, and that when such easement is abandoned, the title, with all the incidents of ownership, becomes perfect in the adjacent lot owner. And the distinction between a common-law and a statutory dedication was pointed out in *Hill v. Kimball* (1915) 269 Ill. 398, 110 N. E. 18. And again in *Lockwood & S. Co. v. Chicago* (1917) 279 Ill. 445, 117 N. E. 81, the court said that where a city lawfully vacates a street or alley, the fee in the same will revert either to the dedicant or to the owner of the adjoining land, dependent upon whether the city received the use

of the street by common-law or statutory dedication. In *Tri-City Artificial Ice Co. v. Day* (1920) 292 Ill. 545, 127 N. E. 106, the court approved the rule that in case of a statutory dedication and subsequent vacation, the title ordinarily reverted to the original dedicant, rather than his grantee. *PRALL v. BURCKHARTT* (reported herewith) ante, 992, reviews the earlier Illinois authorities at length, and in effect lays down the law applicable, in the absence of express statutory regulation, as follows: In case of statutory dedication and subsequent vacation, the title reverts to the dedicant; in case of common-law dedication the title passes to the abutting owner.

2. *Bounding land conveyed by street, etc.*

The rule which permits the abutting owner to hold to the center of a vacated street would seem to be especially applicable where the street consisted of a mere easement and the abutting owner's deed expressly conveyed to the center of the street. *West Covington v. Freking* (1871) 8 Bush (Ky.) 121. And see *Wheeler v. Clark* (1874) 58 N. Y. 267.

And where land is described generally as bounded by a street or highway, the general rule is that the grantee, upon vacation thereof, acquires the reversion therein.

Thus, in *Healey v. Babbitt* (1884) 14 R. I. 533, where the north line of a highway was M's line, and he sold the land south of the highway describing the north boundary as "on such highway," it was held that upon vacation of the highway the grantee acquired the title to the whole of the highway as against an assignee of the original grantor. The court said: "The plaintiffs claim that upon discontinuance of the highway, Mrs. Healey became entitled to the whole of the land in question, by reason of her ownership of the adjoining lot; namely, No. 89. The defendant Babbitt, on the other hand, claims title to the lot by conveyances from Martin and his assignees, made subsequent to the discontinuance of the highway, and contends that in no event can the plaintiffs recover more than the one

half in width of the strip adjoining the land of Mrs. Healey. This presumption, however, that the grantee takes the fee of the soil to the center of the highway, is not absolute and conclusive. It is created, or rather allowed, in the absence of proof, and is based upon the idea that when the street or highway was laid out, the proprietors upon each side contributed their land for the purpose, in equal portions. When it appears that such was not the fact, the presumption does not arise. . . . The same considerations of policy which have led the courts, in the absence of words manifesting a different intention in the parties; and in the absence of proof in relation to the title to a highway, to adopt as a rule of construction that when a deed bounds land on a highway, the grantee takes, as a parcel of the grant, the fee to the middle line of the highway, would seem to be equally applicable to like cases in which the grantor's ownership in the highway appears, to the extent of such ownership, whether it falls short of, extends to, or goes beyond the middle line of the highway, or includes its entire width, unless it should also appear that the grantor owned land on the other side of the highway, bounding upon it, and opposite to the land described in the deed. We apprehend, therefore, that if a deed bounds land upon a highway, and there is nothing in its terms restricting its operation within narrower limits, and the grantor owns no land on the other side of the highway, bounding upon it, opposite to the land described in the deed, the grantee takes the fee in the highway, adjoining the land described, to the extent of his grantor's ownership." Again in *Rowe v. James* (1912) 71 Wash. 267, 128 Pac. 539, where an owner platted lands bounded by a street beyond which he did not own, it was held that a conveyance of lots bounded by the street carried the fee to the entire street rather than to the middle thereof, and that vacation vested the same in the grantee of such abutting lots.

And in *Brown v. Oregon Short Line R. Co.* (1909) 36 Utah, 257, 24 L.R.A.

(N.S.) 86, 102 Pac. 86, it was held that the common-law rule was that where a grant was described as bounded by a street or highway which is expressly referred to in the conveyance as such, the title to the center of the way passes so that upon vacation the land reverts to the abutting owner. To the same effect is *Sowadzki v. Salt Lake County* (1909) 36 Utah, 127, 104 Pac. 111. And that the same is true where the land is described as bounded by a certain road, see *Van Amringe v. Barnett* (1861) 8 Bosw. (N. Y.) 357, and *Mitchell v. Bass* (1862) 26 Tex. 372, on subsequent appeal in (1870) 33 Tex. 259; at least, at common law.

And a grantee of land described as "fronting on C street" has been held entitled to take to the center of the street upon vacation of the public easement therein. *Wallace v. Fee* (1872) 50 N. Y. 694.

And a similar conclusion has been reached where the description read, "along the R road." *Haberman v. Baker* (1891) 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370. And see *Halloway v. Southmayd* (1893) 139 N. Y. 390, 34 N. E. 1047, 1052.

And in *Bayard v. Hargrove* (1872) 45 Ga. 342, the court expressed the opinion that upon abandonment of a public street the soil would revert to the abutting owner rather than to the dedicator, even though the conveyance to such abutting owner was by metes and bounds.

And in Pennsylvania the general presumption that a conveyance in which a public street or highway is used as a boundary conveys to the middle thereof has been held to apply, although the description bounds the land by the "side" of the street. *Cox v. Freedley* (1859) 26 Pa. 124, 75 Am. Dec. 584 (holding that while the parties might, by explicit description, confine the conveyance to the side of a road, merely bounding the land by the "side" of the road, or running a boundary line to a "stake" by the side of a street, and thence along the side thereof, was not sufficient to control the general rule of law which carries the title to the center of it); *Paul v. Carver* (1856) 26 Pa. 223, 167 Pac. 413

(holding that bounding a tract of land by the "side" of a street was not sufficient to bar the grantee from claiming to the center upon vacation, although, in addition to the side being a boundary, the measurement of the distance set forth in the conveyance brought the line only to the side of the street). And in *Ball v. Ball* (1850) 4 Clark (Pa.) 424, 1 Phila. 36, 7 Phila. Leg. Int. 26, where the description carried the land from the intersecting corner of two streets along the "line" of one of such streets, a similar conclusion was reached, the court expressing an opinion that an express declaration, or something equivalent thereto, was required in order to create an inference that the grantor intended to withhold his interest in the street itself after parting with the adjoining land. In *Paul v. Carver* (Pa.) supra, the court said: "If the streets were to be vacated, of what value would they be to the original grantors, unless for the purposes of annoyance to the lot owners? A long strip of ground 50 or 100 feet wide and perhaps several miles in length, without any access to it except at each end, is a description of property which it is not likely either party ever contemplated as remaining in the grantor of the lots on each side of it. Influenced by these considerations, the law has carried out the real intention of the parties by holding that the title passed to the center of the street, subject to the right of passage. Where a street is called for as a boundary it is regarded as a single line. The thread of the road is the monument or abuttal. . . . Measurements are of small importance where monuments are called for. Monuments control measurements. There is no doubt whatever as to the existence of the general rule; but it is thought by the plaintiff in error that where the deed calls for a particular side of a street the case is taken out of the rule. In our opinion this is a circumstance entirely too insignificant to produce a result so inconvenient and so contrary to the practice of the people. This very question was decided when these parties were here, in another form of

action. It is therefore unnecessary to examine in detail either the English or American decisions on the subject. While they all fully recognize the existence of the rule that a conveyance of land bounded by a highway passes to the grantee a title to the center of the way, there is some difference of opinion in the application of it to particular cases. A rule founded upon policy, and tending to guard against inconveniences of the most alarming character, ought not to be frittered away by distinctions founded on differences in phraseology, which might readily escape attention. The paramount intent of the parties, as disclosed from the whole scope of the conveyance, and the nature of the property granted, should be the controlling rule. Although the measurement of the distance set forth in the conveyance brings the line only to the side of the road, that is not sufficient to control the rule of law which carries the title to the center of it."

However, it also has been held that conveyances by metes and bounds do not presumptively carry anything outside thereof, so that where an abutter's line is the side of the street, he is not presumed to take to the center so as to bring him within the general rule that an abutting owner, upon vacation of a street, acquires title to the center thereof.

At least, in *Baltimore & O. R. Co. v. Gould* (1887) 67 Md. 60, 8 Atl. 754, it was held that the original owner, and not his grantee, the abutter, was entitled to one half the land occupied by a street, where such grantee's deed bounded his land by the "side" of the street adjoining it.

And in *Buck v. Squires* (1850) 22 Vt. 484, in holding that a conveyance of land described as bounded on the west by a "line" running on the "easterly side" of a highway could not be presumed to carry any interest in the fee of the highway so as to entitle the grantee thereto upon abandonment of the way, the court (Redfield, J., dissenting) said: "Now upon what ground can it be fairly said the parties intended, by the 'easterly side,' the center line of the highway? The

language, as commonly used and understood, certainly does not import that; and it seems to us that when the case is viewed in the light of the authorities upon the subject, the great majority of them are against giving this deed such a construction as the defendant claims for it. . . . Where, then, is the starting point in the deed? In the first place it is to be on the northerly side of said branch, and, as we understand the terms used, they must refer to the bank, and not to the center or thread of the stream. The line leading from this point is to follow the easterly side of the highway, which, as already stated, in our opinion, is to be construed to mean the eastern edge or line of the road, and not the center line of the road. We come to the conclusion, therefore, from the language used in this deed, that the true starting point is at the intersection of the northerly bank of the stream and the eastern side, or edge, of the road, and that no land lying south of that point was intended to be conveyed by the deed; and also that no part of the highway was intended to be included in the deed."

And in *Van Amringe v. Barnett* (1861) 8 Bosw. (N. Y.) 357, it was held that describing land by metes and bounds as along the "side" of a certain road precluded the passing of any interest in the road itself which would entitle the grantee to claim the same upon abandonment of the easement of right of way in the road.

Likewise, where the land conveyed was expressly limited to the east "line" of a highway. *Pettibone v. Purdy* (1832) 7 Vt. 514.

So, in *Downes v. Dimock & F. Co.* (1902) 75 App. Div. 513, 78 N. Y. Supp. 348, it was held that a conveyance of land "to land marked 'street'" on plat did not convey any rights in the street which could be claimed on vacation or abandonment thereof.

And in *Lankin v. Terwilliger* (1892) 22 Or. 97, 29 Pac. 268, where land was sold by definite metes and bounds and the description excluded a road by using the side as a monument, it was held that the adjoining owner acquired no rights therein, and that up-

on abandonment of the public easement the land reverted to the original owner.

And in New York it has been held that a conveyance of land adjoining an ancient road, which describes the same as running to a monument at the "side" of and along such road, does not carry the fee to the center of the street so as to entitle such adjoining owner to title, upon vacation of the road, as against the original owner of the fee held subject to the easement of way. *Jackson v. Hathaway* (1818) 15 Johns. (N. Y.) 447, 8 Am. Dec. 263.

And see *Alden v. Murdock* (1816) 13 Mass. 256, wherein it was held that the fact that a lot was bounded by a road in a deed thereof did not, upon abandonment of the road, entitle the grantee of the lot as against his grantor to claim to the middle of the road.

IV. Express statutory regulation.

In a number of jurisdictions statutes have been enacted which expressly provide that upon vacation of a public street the title shall revert to the owners of the adjacent property.

Generally speaking, it may be said that such statutes are valid and that they vest title in the abutting owners as provided. See the following cases:

United States.—*Atchison, T. & S. F. R. Co. v. Shawnee* (1910) 105 C. C. A. 377, 183 Fed. 85 (construing Oklahoma Statute 1893, § 584 [Okla. Comp. Laws 1909, § 688]).

Idaho.—*Canady v. Coeur D'Alene Lumber Co.* (1911) 21 Idaho, 77, 120 Pac. 830 (applying Idaho Rev. Codes, § 2238, subd. 26).

Illinois.—*PRALL v. BURCKHARTT* (reported herewith) ante, 992 (upholding and applying Illinois Rev. Stat. chap. 145, § 2); *Counselman v. Wisconsin Lime & Cement Co.* (1921) 299 Ill. 84, 132 N. E. 289, following the *PRALL CASE*.

Iowa.—*Day v. Schroeder* (1877) 46 Iowa, 546 (construing Iowa Laws 1862, chap. 78, § 3, which provided that when any part of a town plat, etc., shall be vacated, "the proprietors of the lots so vacated may inclose the

streets . . . adjoining such lots, in equal proportions").

Kansas.—*Atchison, T. & S. F. R. Co. v. Patch* (1882) 28 Kan. 470 (construing Kansas Laws 1881, chap. 37, § 34, which related to cities of the first class); *Challiss v. Atchison Union Depot & R. Co.* (1891) 45 Kan. 398, 25 Pac. 894 (construing same provision contained in Kansas Gen. Stat. 1889, ¶ 582); *Showalter v. Southern Kansas R. Co.* (1892) 49 Kan. 421, 32 Pac. 42, reaffirmed on subsequent appeal in (1897) 57 Kan. 681, 47 Pac. 831 (holding that the Kansas Act, March 8, 1871, extended the right to title, on vacation of a street, to abutters in cities of the third class, and that similar rights were accorded in cities of the second class by Kansas Act March 13, 1872); *Southern Kansas R. Co. v. Sharpless* (1900) 62 Kan. 841, 62 Pac. 662 (involving the same lands affected by the preceding case); *Wallace v. Cable* (1912) 87 Kan. 835, 42 L.R.A.(N.S.) 587, 127 Pac. 5 (reaches the same conclusion, but does not refer to the statute); *Hutchinson v. Danley* (1913) 88 Kan. 437, 129 Pac. 163 (applying Kansas Laws 1877, chap. 190, § 5); *Haseltine v. Nuss* (1916) 97 Kan. 228, 155 Pac. 55 (applying Kansas Laws 1877, chap. 190, § 5 [Comp. Laws 1885, § 6545]).

Michigan. — *Scudder v. Detroit* (1898) 117 Mich. 77, 75 N. W. 286 (construing and applying 1 How. Stat. §§ 1474, 1478).

Missouri.—*Thomas v. Hunt* (1896) 134 Mo. 392, 32 L.R.A. 857, 35 S. W. 581 (construing and applying Missouri Acts 1866, § 2, p. 201, Acts 1877, p. 186). See this case as set out and quoted in *PRALL v. BURCKHARTT* (reported herewith) ante, 992.

Nebraska.—*Bellevue v. Bellevue Improv. Co.* (1902) 65 Neb. 52, 90 N. W. 1002 (applying Nebraska Comp. Stat. chap. 14, art. 1, § 69); *State ex rel. Lincoln v. Chicago, R. I. & P. R. Co.* (1913) 93 Neb. 263, 140 N. W. 147, 1136 (applying Comp. Stat. 1893, chap. 13a, art. 1, § 67, subd. IV.).

New York. — *Mitchell v. Einstein* (1905) 105 App. Div. 413, 94 N. Y. Supp. 210, reversing (1904) 42 Misc.

358, 86 N. Y. Supp. 759 (applying Laws 1867, p. 1749, chap. 697, § 3).

Oklahoma.—*Blackwell, E. & S. W. R. Co. v. Gist* (1907) 18 Okla. 516, 90 Pac. 889 (construing, upholding, and applying Wilson's Stat. (Okla.) 1903, art. 8, chap. 2, § 48); *Arkansas Valley & W. R. Co. v. Bullen* (1911) 31 Okla. 36, 119 Pac. 414 (construing and applying Oklahoma Comp. Laws 1909, § 688; Rev. Laws 1910, § 588); *Edwards v. Smith* (1914) 42 Okla. 544, 142 Pac. 302 (same as next preceding case).

Pennsylvania. — *Flick's Estate* (1891) 6 Kulp, 329 (applying Pa. Act 1849, Purdon's Dig. 1502, pl. 44); *Re Vacation of Public Road* (1896) 5 Pa. Dist. R. 771 (same).

Utah.—*Sowadzki v. Salt Lake County* (1909) 36 Utah, 127, 104 Pac. 111 (construing and applying Utah Comp. Laws 1907, § 1120).

Washington. — *Norton v. Gross* (1909) 52 Wash. 341, 100 Pac. 734 (applying 2 Ballinger's Anno. Codes & Stat. § 5521; Pierce's Code, § 1156); *Rowe v. James* (1912) 71 Wash. 267, 128 Pac. 539 (construing Rem. & Bal. Code, §§ 7842, 7843); *Hagen v. Bolcom Mills* (1913) 74 Wash. 462, 133 Pac. 1000, rehearing denied in (1913) 74 Wash. 475, 134 Pac. 1051 (construing Rem. & Bal. Code, § 7846); *Bradley v. Spokane & I. E. R. Co.* (1914) 79 Wash. 455, L.R.A.1917C, 225, 140 Pac. 688 (applying Rem. & Bal. Code, §§ 1269, 1270, 7846).

Wisconsin. — *Paine Lumber Co. v. Oshkosh* (1895) 89 Wis. 449, 61 N. W. 1108 (construing Wisconsin Rev. Stat. chap. 52, §§ 1294, 1294a, 1296).

Canada.—*Re Toronto Plan M.* 188 (1913) 28 Ont. L. Rep. 41, 11 D. L. R. 424 (construing Surveys Act, § 44; 1 Geo. V. chap. 42, as amended by 2 Geo. V. chap. 17, § 32, which vests in the abutting owners the land included in any platted streets which "has not been established by by-law of the municipal corporation, or otherwise assumed by it for public use," and is closed).

In *PRALL v. BURCKHARTT* (reported herewith) ante, 992, it was held that Illinois Rev. Stat. chap. 145, § 2, known as the Vacation Act, which provided that upon vacation of a dedicated

street the fee thereto shall vest in the abutting owners, was not unconstitutional as a legislative grant of property of the landowner who had made a statutory dedication of the street; since the possibility of reverter was not an estate protected by the Constitution, but rather amounted to a mere possibility of an estate at a future time. In reaching this conclusion the court, after quoting and discussing the early Illinois case of Gebhardt v. Reeves (1874) 75 Ill. 301, expressly overruled the holding therein to the effect that a statute authorizing a municipality to vacate a street and convey the same to the abutting owners was unconstitutional because violative of the original owner's right of reversion upon vacation. Also criticized is the so-called dicta in Hill v. Kimball (1915) 269 Ill. 398, 110 N. E. 18, supporting the Gebhardt Case. And in another Illinois case, the court seems to have expressed views which cannot be reconciled with the decision in the PRALL CASE. Thus, in Helm v. Webster (1877) 85 Ill. 116, it was said that the Illinois Statute of 1865, which provided that upon vacation of a street "the lot or tract immediately adjoining shall extend to the center line of any such street so vacated, unless otherwise specially provided in the act vacating the same," did not avoid the original grantor's right of reversion upon vacation of a street under the statute. PRALL v. BURCKHARTT was followed in Counselman v. Wisconsin Lime & Cement Co. (1921) 299 Ill. 84, 132 N. E. 289, and the land in a vacated street was held to revert to the then owners of the abutting lands, and not to the dedicator or his heirs.

In Oklahoma it is held that the land embraced in a vacated street attaches itself in the nature of an accretion to the adjoining real estate in proportion to the frontage. Blackwell, E. & S. W. R. Co. v. Gist (1907) 18 Okla. 516, 90 Pac. 889 (holding that the city upon vacation of a street cannot grant the same to a railroad company as a right of way free from the claim of the adjoining owner to damages for the taking); Bullen v. Arkansas Valley & W. R. Co. (1908) 20 Okla. 819,

95 Pac. 476, on subsequent appeal in (1911) 31 Okla. 36, 119 Pac. 414 (following the decision in the Gist Case); Arkansas Valley & W. R. Co. v. Johnson (1911) 31 Okla. 41, 119 Pac. 416 (decided upon the authority of the second appeal in the Bullen Case); Edwards v. Smith (1914) 42 Okla. 544, 142 Pac. 302 (holding that upon vacation by a city of a dedicated street the land reverted to the adjoining owner, and not to the dedicator).

In Scudder v. Detroit (1898) 117 Mich. 77, 75 N. W. 286, it was held that the grantee of a dedicator of lands for street purposes who reserved the reversion in event of vacation of such streets was entitled to such lands upon vacation of a street, under a statute providing that the recording of a plat shall vest the fee of streets in the municipality in trust for street purposes, and that when a street is vacated the same shall be attached to the lots bordering thereon, and the title shall vest in the owners thereof on each side to the middle of the street, the reservation having been to the grantor, his heirs, or assigns; it being argued that in such case the grant of the abutting lot conveyed all that the grantor had reserved by the dedication.

In Showalter v. Southern Kansas R. Co. (1892) 49 Kan. 421, 32 Pac. 42, on subsequent appeal in (1897) 57 Kan. 681, 47 Pac. 831, under a statute providing that upon vacation of a street the same shall revert to the owners of the real estate thereto adjacent on each side in proportion to frontage, except where the street shall have been taken and appropriated to public use in a different proportion, in which case it shall revert to adjacent lots in proportion as it was taken from them, it was held that the proviso applied only where the street was taken from the adjacent lots for use as such; so that where the site was platted and the abutting lots were sold with reference to the plat, it could not be said that the street was taken from the lots so as to entitle the owner thereof to share the vacated street in unequal proportions under the proviso in the statute.

In Wisconsin it has been held that

Rev. Stat. chap. 52, §§ 1294, 1294a, which provided that when a highway shall be abandoned and discontinued it shall revert to the abutting owner, applies only to streets laid out by public authority, and is not applicable to streets dedicated or granted by recorded plat operating as a statutory conveyance. *Paine Lumber Co. v. Oshkosh* (1895) 89 Wis. 449, 61 N. W. 1108.

And New York Laws 1895, chap. 1006, which provided that title to the land in a street closed thereunder became vested in private ownership in the owner of the fee if the street was made by dedication (street in such case is a mere easement of way), and in the city of New York if it were opened by statutory proceedings for that purpose, have been construed in a number of instances. See *Re New York* (1898) 28 App. Div. 143, 52 N. Y. Supp. 588, affirmed in (1898) 157 N. Y. 409, 52 N. E. 1126 (holding that the act was constitutional and the statute valid as against the objection that it took private property for a private use, and that a dedicated street upon vacation reverted to the owner of the fee, and that such owner was entitled to compensation for the taking thereof); *Swain v. Schonleben* (1908) 109 N. Y. Supp. 223, affirmed in (1909) 130 App. Div. 521, 115 N. Y. Supp. 23, which was affirmed without opinion in (1910) 198 N. Y. 622, 92 N. E. 1103 (holding that in the case under consideration the fee reverted to the owner of the fee, and that a subsequent conveyance by him of the lot which was described as bounded by the line of the vacated street did not convey any rights in the fee of such street to such subsequent grantee); and *Re East 168th Street* (1898) 28 App. Div. 143, 52 N. Y. Supp. 588, appeal dismissed in (1898) 156 N. Y. 677, 51 N. E. 1092, but subsequently affirmed in (1898) 157 N. Y. 409, 52 N. E. 1126 (holding

that the closing of a street under the act is for a public purpose). This act also provided that when the city has title to the fee of a discontinued street which it does not need for public purposes, it may convey the same to abutting owners upon payment by the latter of the value of such interest. See *People ex rel. Brown v. Metz* (1907) 119 App. Div. 271, 104 N. Y. Supp. 649, affirmed without opinion in (1907) 189 N. Y. 550, 82 N. E. 1131; and *Re East 168th Street* (N. Y.) *supra*.

And statutes have been passed in a few instances authorizing a municipality to vacate a certain street or streets, and to convey the land to the abutting owners. Illustration of a statute of this kind is found in *Marietta Chair Co. v. Henderson* (1904) 121 Ga. 399, 104 Am. St. Rep. 156, 49 S. E. 312, 2 Ann. Cas. 83, wherein the constitutionality of the statute was upheld.

But where the statute merely authorizes the city to quitclaim to abutting owners upon petition by them for vacation of a street, the title which it has, and such title consists of a fee in trust for the public for highway purposes, subject to reversion to the original owner upon vacation, it has been held that a municipality does not cut off the original owner's right of reversion by vacating a street and quitclaiming the same to the abutting owners. *Gebhardt v. Reeves* (1874) 75 Ill. 301.

And where the street is merely an easement so that the abutting owner of the fee is entitled to reversion upon abandonment, it has been held that a statute attempting to vest a vacated street in the municipality is unconstitutional and void in that it deprives the abutting proprietor of property without due process of law. *Re John Street* (1839) 19 Wend. (N. Y.) 659.

G. J. C.

EMMA F. CURTIS, Respt.,

v.

A. D. HOLEE

and

RUTH GOLD, Appt.

California Supreme Court (Dept. No. 2)—January 26, 1921.

(184 Cal. 726, 195 Pac. 395.)

Limitation of actions — sufficiency of promise to arrest running.

1. An agreement by one who took title to real estate subject to a mortgage, which he did not agree to pay, written on the back of the mortgage note, which on its face refers to the mortgage, reciting that, in consideration of a raise in interest rates, the due date of the note is extended, constitutes an unqualified acknowledgment of the mortgage and debt secured thereby, which will arrest the running of the Statute of Limitations.

[See note on this question beginning on page 1027.]

— mortgage debt — contract for extension — owner subject to mortgage.

2. One taking title to real estate subject to a mortgage has, although he does not agree to pay the debt, such an interest in it that he may contract for an extension of time for payment, which will be valid as against himself and his successors in interest.

— mortgage — transfer subject to — proof.

3. The execution of an extension agreement by the owner of the equity of redemption in mortgaged property, coupled with a payment in reduction of the principal of the debt, is a sufficient acknowledgment that the property was transferred to him subject to the mortgage.

APPEAL by defendant Gold from a judgment of the Superior Court for Los Angeles County (Shenk, J.) in favor of plaintiff in an action brought to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. L. C. Woods for appellant.

Messrs. Joseph H. Call and Asa V. Call for respondent.

Lennon, J., delivered the opinion of the court:

The pleaded facts of the plaintiff's case, briefly stated, are these: The defendant A. D. Holee, on June 20, 1912, executed a note, secured by a mortgage on real property, in favor of one M. M. Arthurs, in the sum of \$2,500. The mortgage note by its terms was due and payable "on or before three years after date," and the interest thereon, at the rate of 6 per cent per annum, was to commence running from July 1, 1912. The mortgage was duly recorded in the county recorder's office of the county wherein the mortgaged property was located. The mortgagor,

Holee, conveyed the mortgaged property to one Haymond on or about the 1st of July, 1915, when he was still the owner in fee simple, subject to the mortgage, of the mortgaged property. Haymond made and entered into an agreement in writing with M. M. Arthurs, the original and then owner of the said note and mortgage. This agreement, which was written on the back of said note, provided that, in consideration of a raise in the rate of interest, provided for in and by said note, from 6 to 7 per cent from the date of said agreement, namely, July 1, 1915, the time for the payment of the note was extended to June 20, 1916. At the time of the execution of said agreement of extension, namely, on July 1, 1915, the

sum of \$75 was paid on account of interest, and \$500 was paid on account of the principal of said note. Subsequent to the execution of said agreement of extension, on August 16, 1915, the said Haymond conveyed the mortgaged property by grant deed to F. E. Lindblom, which deed, after specifically describing the mortgaged property, expressly stated that it was conveyed "subject to a mortgage to secure a note for \$2,500 . . . in favor of M. M. Arthurs, upon which note there has been paid the sum of \$500 on the principal," and that "the note was extended for one year from July 1, 1915, and the interest rate raised to 7 per cent in place of 6 per cent." This deed from Haymond to the Lindbloms was duly acknowledged and recorded in the recorder's office of the county wherein the mortgaged property and the property mentioned in the deed is situated. The Lindbloms thereafter conveyed said property by grant deed, also expressly subject to said mortgage and the extension heretofore mentioned, to one Werner. Werner subsequently conveyed said property by grant deed, also subject to said mortgage and extension, to the appealing defendant herein, Ruth Gold. On October 29, 1917, M. M. Arthurs, the original owner of the note and mortgage, sold and assigned the same to this plaintiff and respondent, which assignment was thereafter duly recorded in the county wherein the property is situated.

This action to foreclose the mortgage as extended was instituted and filed August 29, 1919. Pending the hearing and determination of defendant's demurrer to the plaintiff's complaint, the defendant A. D. Holee entered into a stipulation with the plaintiff that her default might be entered and a judgment might be taken by plaintiff against her upon condition that no deficiency judgment should be entered against her.

Answering the plaintiff's complaint, the defendant Ruth Gold ad-

mitted the truth of the allegation that Holee, the mortgagor, did, by grant deed, convey the mortgaged property to Haymond, but, while conceding that all the subsequent conveyances of the property were made subject to the mortgage, affirmatively alleged that it did not appear from the grant deed to Haymond that the conveyance to the latter was made subject to the said mortgage. For lack of information and belief, the answer denied that Haymond and Arthurs agreed in writing at any time, or at all, that the payment of said note and mortgage should be extended to June 20, 1916. Further answering, the defendant Ruth Gold interposed the defense of the Statute of Limitations, pleading that the plaintiff's cause of action was barred by the provisions of § 337, subd. 1, and § 360 of the Code of Civil Procedure, and also by § 2911 of the Civil Code of the state of California. Upon the issues thus framed, a trial was had, and judgment rendered for the plaintiff upon findings made in favor of, and in substantial accord with, the allegations of the plaintiff's complaint and against the defense of the Statute of Limitations. From the judgment of foreclosure and sale the defendant Ruth Gold has appealed.

As previously indicated, the question of the liability of the original mortgagor has been eliminated from the case, and the question of the liability of appellant for a deficiency judgment does not arise upon this appeal, for no deficiency judgment was rendered.

It is a stipulated fact in the case that Haymond, as the grantee of the defendant Holee, did not, when taking a conveyance of the mortgaged property, agree to pay the note in suit, or assume the mortgage by which it was secured, and because of this fact it is insisted, upon behalf of appellant, that the agreement between Haymond and Arthurs, the owner of the mortgage, for an extension of the time within which the

note would mature, is insufficient, under the provisions of § 360 of the Code of Civil Procedure, as evidence of a continuing contract which would take the case out of the operation of the Statute of Limitations. The insufficiency is claimed to result from the fact that Haymond was under no legal obligation in the first instance, or at all, to pay the note or assume the mortgage, and therefore the extension agreement, in so far as it related to him, was not signed by a party to be charged with the original indebtedness. In other words, it is the contention of the appellant that the grantee of a mortgagor who does not assume the mortgage is a stranger to the mortgage debt, to whom the provisions of § 360 of the Code of Civil Procedure do not apply, and that, therefore, the legal life of a mortgage note cannot be continued by the written agreement of such a grantee of the mortgagor.

As previously stated, it is admitted that Haymond did not agree to pay the note and mortgage, and never became personally liable thereon, but, since the mortgage was on record at the time of the conveyance of the property to Haymond, the property itself continued subject to the lien of the mortgage after it was acquired by him. While under such circumstances the grantee is not personally liable for the debt, nevertheless, in view of the fact that our laws render the land primarily liable for the payment of a mortgage debt (*Crisman v. Lanterman*, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89), the grantee of land subject to a mortgage, as long as he is the owner of the thing which is the fundamental source of satisfaction of the debt, is, to a limited extent, charged with the debt and interested in its payment. For this reason the grantee of the mortgagor who takes subject to a mortgage is not such a stranger to the mortgage or the mortgage debt that he cannot, while he is the owner of the mortgaged property, extend and con-

tinue the same as against himself and his successors in interest. *Fitzgerald v. Flanagan*, 155 Iowa, 217, 135 N. W. 738, Ann. Cas. 1914C, 1104.

Limitation of actions—mortgage debt—contract for extension—owner subject to mortgage.

Therefore, it is not necessary, in order to take a mortgage out of the operation of the Statute of Limitations as against the grantee of the mortgagor and his successors, that the grantee who signs the acknowledgment thereof should have personally assumed the payment of the mortgage.

We turn, then, to a consideration of the form of acknowledgment in the present case. If the grantee acknowledged the existence of the debt in writing with sufficient certainty, that will suffice to take the debt out of the operation of the statute. *Chaffee v. Browne*, 109 Cal. 211, 218, 41 Pac. 1028; *State Loan & T. Co. v. Cochran*, 130 Cal. 245, 251, 62 Pac. 466, 600; *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40. An actual promise to pay is not necessary. *Foster v. Bowles*, 138 Cal. 346, 71 Pac. 494, 649. When such an acknowledgment is made before the note becomes barred by the Statute of Limitations as applied to the date originally designated for the payment of the note, it constitutes a continuation of the life of the original obligation beyond the operation of the Statute of Limitations as applied to the original obligation. *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Daniels v. Johnson*, 129 Cal. 415, 79 Am. St. Rep. 123, 61 Pac. 1107; *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42. The acknowledgment of the mortgage is an acknowledgment of the debt secured by the mortgage. *Foster v. Bowles*, *supra*; *Girard Trust Co. v. Dixon*, 89 Neb. 557, 131 N. W. 912. And, conversely, it must be that an acknowledgment of the debt by the mortgagor's grantee, with knowledge on his part of the existence of the mortgage, as admittedly was done by the grantee of the mortgagor in the instant case, constitutes

an acknowledgment of the mortgage itself, and takes the same out of the operation of the Statute of Limitations, for the mortgage is merely an incident of the debt evidenced by the note. While the extension agreement in the instant case does not, in so many words, make mention of the mortgage, still that agreement was written upon the back of the mortgage note, and made express reference thereto. The note, upon its face, bore the caption, "Note secured by mortgage," and therefore, considered and construed in connection with the note to which it referred,

~~—sufficiency of
promise to
arrest running.~~ the agreement to extend the time for the payment of the note constituted an unqualified acknowledgment of the mortgage and the debt secured thereby, sufficiently direct and distinct to arrest the running of the Statute of Limitations.

It was not essential that the plaintiff's complaint should allege, or the trial court should find, that the conveyance from Holee, the mortgagor, to Haymond, his grantee, was made subject to the mortgage in suit.

The complaint alleged that the mortgage was recorded prior to the transfer to Haymond, and, moreover, the execution of the extension agreement, particularly when coupled with the payment of a part of the principal and some of the interest due upon the mortgage note, was a sufficient acknowledgment that the property conveyed was transferred subject to the mortgage. Fitzgerald v. Flanagan, supra; McLane v. Allison, 60 Kan. 441, 56 Pac. 747. It likewise operated to toll the Statute of Limitations as against the successors in interest of Haymond, all of whom took the mortgaged property expressly and affirmatively subject to the mortgage and to the agreement extending the legal life of the mortgage note.

~~—mortgage—
transfer subject
to—proof.~~

What we have thus far said, in effect, adversely disposes of the remaining points presented in support of the appeal.

The judgment is affirmed.

We concur: Wilbur, J.; Sloane, J.

ANNOTATION.

Limitation of actions: acknowledgment, new promise, or payment by grantee of mortgaged premises.

- I. Introduction, 1027.
- II. As to liability of grantee or successors in interest:
 - a. Where grantee has assumed mortgage, 1028.
 - b. Where grantee has not assumed mortgage, 1030.
- III. As to liability of mortgagor or grantor:

I. Introduction.

The present annotation purports to cover only the question as to whether the grantee of mortgaged premises may make such an acknowledgment of, or payment on, the debt as will remove or interrupt the bar of the Statute of Limitations; and does not cover the question of the sufficiency of the acknowledgment or payment in any particular case, assuming that

III.—continued.

- a. Cases holding that running of statute is not interrupted, 1033.
- b. Cases holding that running of statute is interrupted, 1035.
- IV. Acknowledgment or payment by purchaser of part of mortgaged premises, 1036.
- V. Miscellaneous, 1037.

such grantee is a proper person to make the acknowledgment or payment. See Byrnes v. Payne (Wash.) and Wallber v. Caldwell (Neb.) under V. infra.

In general, an acknowledgment or new promise to pay must, in order to take a case out of the Statute of Limitations, be made by the person to be charged, or by some person legally authorized by him so to act; and a

similar rule applies with respect to partial payments, which should be made by some person who has the right to acknowledge the debt, or make the new promise; in other words, by the debtor himself or his authorized agent. See 17 R. C. L. §§ 273, 299. Acknowledgments or payments by a stranger are, of course, insufficient.

The question, then, arises, whether a grantee of the mortgaged premises is a person to be charged with the debt, or has such an interest that he can, under the above rules, suspend the running, or remove the bar, of the Statute of Limitations. In solving this question, particular attention should be paid to the points (1) whether the action is to recover on the personal obligation of the mortgagor, or is one to enforce the mortgage against the grantee or his successors in interest; and (2) whether the grantee has assumed and agreed to pay the debt.

II. As to liability of grantee or successors in interest.

a. Where grantee has assumed mortgage.

It appears to be well settled that acknowledgment of or payment on the debt by the grantee of mortgaged premises may interrupt the running of the Statute of Limitations with respect to his liability, or that of the property, to the holder of the mortgage debt, where the grantee has assumed and agreed to pay the debt. (Generally, with several exceptions, the suits have been to foreclose the mortgage rather than to enforce a personal liability against the grantee.)

Arkansas. — See Conley v. Archil-
lion (1920) 146 Ark. 64, 225 S. W. 5
(vendor's lien).

California.—Fielding v. Iler (1919)
39 Cal. App. 559, 179 Pac. 519;
Daniels v. Johnson (1900) 129 Cal.
415, 79 Am. St. Rep. 123, 61 Pac. 1107.

Connecticut. — Tuttle v. Armstead
(1885) 53 Conn. 175, 22 Atl. 677.

Illinois. — Harts v. Emery (1900)
184 Ill. 560, 56 N. E. 865; Murray v.
Emery (1900) 187 Ill. 408, 58 N. E.
327; Blackburn University v. Weer
(1886) 21 Ill. App. 29.

Iowa. — Senninger v. Rowley (1906)

138 Iowa, 617, 18 L.R.A.(N.S.) 223,
116 N. W. 695.

Kansas. — Schmucker v. Sibert
(1877) 18 Kan. 104, 26 Am. Rep. 765;
Hendricks v. Brooks (1909) 80 Kan.
1, 133 Am. St. Rep. 186, 101 Pac. 622;
Woodruff v. Albright (1900) 10 Kan.
App. 113, 62 Pac. 250.

Kentucky.—Curry v. Adams (1900)
22 Ky. L. Rep. 256, 57 S. W. 8.

Louisiana. — Collier v. His Credi-
tors (1846) 12 Rob. 398 (assumption
of mortgage debts by purchaser at
execution sale); Ferguson's Succes-
sion (1865) 17 La. Ann. 255; Cockfield
v. Farley (1869) 21 La. Ann. 521;
Levy v. Police Jury (1872) 24 La.
Ann. 292.

Missouri. — Grace v. Gill (1908)
136 Mo. App. 186, 116 S. W. 442.

New Jersey.—Biddle v. Pugh (1900)
59 N. J. Eq. 480, 45 Atl. 626.

North Carolina. — Harper v. Ed-
wards (1894) 115 N. C. 246, 20 S. E.
392.

Tennessee. — Christian v. John
(1903) 111 Tenn. 92, 76 S. W. 906.

Texas. — Clayton v. Watkins (1898)
19 Tex. Civ. App. 133, 47 S. W. 910
(vendor's lien).

Vermont.—Hollister v. York (1886)
59 Vt. 1, 9 Atl. 2.

Canada. — Rogers v. Brann (1905)
6 Ont. Week. Rep. 993. See also
Trust & L. Co. v. Stevenson (1892)
20 Ont. App. Rep. 66.

Where the grantee of mortgaged premises assumes payment of the debt, his contract is an original, absolute promise to pay it, enforceable by the mortgagee, and is not, therefore, discharged merely because the debt, as to the original debtor, has become barred by the Statute of Limitations. Schmucker v. Sibert (Kan.) supra; Hendricks v. Brooks (1909) 80 Kan. 1, 133 Am. St. Rep. 186, 101 Pac. 622.

And where the grantee assumed payment of a specific portion of the encumbrance on the property as a part of the purchase money, it was held in Harts v. Emery (Ill.) supra, that he became personally liable to the holder of the notes as a principal debtor, the same as though he had agreed with such holder directly to pay

this portion; that payments made by him operated to prevent the running of the Statute of Limitations in his favor; and that the fact that an action on the notes could not have been maintained against the original maker thereof, by reason of the operation of the Statute of Limitations as to him, was not a bar to an action against the grantee.

So, where the purchaser of the mortgaged property assumed payment of the mortgage, it was held in *Daniels v. Johnson* (Cal.) *supra*, that this assumption in the deed constituted an agreement to pay the note secured by the mortgage, and not a mere agreement to discharge the mortgage lien; and that the Statute of Limitations was thereby tolled as to the debt as well as to the mortgage, so that an action to foreclose the mortgage, brought within the statutory period after such an agreement was made, was not barred on the theory that the statute had run against the debt, and that when the debt is barred the remedy as to the mortgage is lost.

An acknowledgment of the indebtedness, made by a purchaser of the mortgaged property who has assumed and agreed to pay the mortgage, is not ineffectual to toll the Statute of Limitations against an action to foreclose the mortgage, on the ground that it is made by a stranger to the original note and mortgage; the grantee in a deed of mortgaged premises, by which he assumes and agrees to pay the mortgage indebtedness, becomes primarily liable to the mortgagee; and therefore he is "the party to be charged" within the meaning of the statute. *Fielding v. Iler* (Cal.) *supra*.

Where successive grantees from the mortgagor each assumed and agreed to pay the mortgage as part of the consideration, and interest was paid by the last grantee up to within two years of the suit, although the mortgagor and the immediate grantee had made no payments within sixteen years, it was held in *Biddle v. Pugh* (N. J.) *supra*, that the payments of interest were referable to the bond held by the mortgagee, and oper-

ated, as to a suit on the bond, to toll the Statute of Limitations; and that immediate grantees could not set up the statute as a bar to a suit brought by the holder of the bond for a deficiency arising on a sale of the property on foreclosure.

And where, before the Statute of Limitations had run on vendor's lien notes, the land was conveyed to one who, as part of the consideration, assumed payment of the notes, it was held in *Conley v. Archillion* (Ark.) *supra*, that an action on the notes, brought within the period of limitations after such assumption, was not barred; and that the indebtedness might be enforced by a sale of the land.

In *Tuttle v. Armstead* (Conn.) *supra*, where the grantee of mortgaged premises, as a part of the purchase price, assumed and agreed to pay the mortgage debt, it was held that payments of interest by him interrupted the running of the Statute of Limitations against him on his promise, although the mortgage subsequently proved to be invalid.

Where the grantee has assumed a duly recorded mortgage upon the property, and has kept the debt alive by payments of interest, a purchaser from him stands in no better position than the grantee with respect to the right to plead the Statute of Limitations against an action to foreclose the mortgage. *Murray v. Emery* (1900) 187 Ill. 408, 58 N. E. 327.

A case sometimes cited on the present question is *Heyer v. Pruyn* (1839) 7 Paige (N. Y.) 465, 34 Am. Dec. 355, where the acknowledgment of the debt which, it was held, interrupted the running of the Statute of Limitations against a suit to foreclose a mortgage, was made by a purchaser at execution sale; but the holding that the acknowledgment was effective as against the purchaser and his grantee is apparently similar in principle to that in other cases, not covered in the present annotation, with respect to the question whether a mortgagor's acknowledgment is effective as against a subsequent grantee.

b. Where grantee has not assumed mortgage.

Even though the grantee of property subject to a mortgage does not assume or agree to pay the debt, so as to render him personally liable therefor, it has been held that he has such interest that acknowledgments or payments made by him on the debt may interrupt the running of the Statute of Limitations as to a suit to enforce the mortgage lien. Many of the cases in which, so far as the facts appear, the grantee did not assume the debt, do not, however, discuss this point. But, grouping the cases as the facts appear, the following seem to support the rule indicated:

California. — *CURTIS v. HOLEE* (reported herewith), ante, 1024; *Foster v. Bowles* (1903) 138 Cal. 346, 71 Pac. 494, 649; *Cotcher v. Barton* (1920) — Cal. App. —, 193 Pac. 169.

Colorado. — *Medina v. Phelps* (1907) 39 Colo. 92, 88 Pac. 848.

Florida. — *Phifer v. Abbott* (1917) 73 Fla. 402, 74 So. 488.

Iowa. — *Senninger v. Rowley* (1906) 138 Iowa, 617, 18 L.R.A.(N.S.) 223, 116 N. W. 695 (recognizing rule); *Fitzgerald v. Flanagan* (1912) 155 Iowa, 217, 135 N. W. 738, Ann. Cas. 1914C, 1104.

Kansas. — *McLane v. Allison* (1899) 60 Kan. 441, 56 Pac. 747; *Neosho Valley Invest. Co. v. Huston* (1900) 61 Kan. 859, per curiam opinion in 59 Pac. 643.

Nebraska. — *McLaughlin v. Senne* (1907) 78 Neb. 631, 111 N. W. 377; *Girard Trust Co. v. Dixon* (1911) 89 Neb. 557, 181 N. W. 912.

New Jersey. — *Moore v. Clark* (1885) 40 N. J. Eq. 152; *Colton v. Depew* (1899) 59 N. J. Eq. 126, 44 Atl. 662, affirmed in (1900) 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728.

In the reported case (*CURTIS v. HOLEE*, ante, 1024) it is held that the grantee of property subject to a mortgage has, although he does not agree to pay the debt, such an interest in it that he may contract for an extension of time for payment, which will be valid as against himself and his successors in interest.

And although the grantee of the mortgagor was not personally liable, and the liability of grantor on the bond had been extinguished by his discharge in bankruptcy, it was held in *Colton v. Depew* (N. J.) supra, that payments of interest made by the grantee after the discharge in bankruptcy were necessarily referable to the mortgage, and were an acknowledgment that the grantee held under, or by permission of, the mortgagee, and not adversely; and that, as the right to bring ejectment would continue for twenty years from the time of the last payment, so the right to foreclose the mortgage continued for the same period. In this case the payments were made by a remote grantee, who, as appears from the opinion on the appeal, had taken a conveyance subject to the mortgage, which he expressly assumed as part of the consideration, but the deed to the immediate grantee contained no assumption clause and no agreement that the mortgage money should be taken as part of the consideration; and it was said that, therefore, the remote grantee was under no personal liability.

So, in *Medina v. Phelps* (Colo.) supra, where the conveyance was made subject to a trust deed given as security for a note, and the grantee made payments of interest on the indebtedness, and otherwise acknowledged it as unpaid, it was held that his acts constituted an admission that the land was subject to the deed of trust, and an engagement for the satisfaction of the balance of the note secured thereby out of the mortgaged premises, and operated to suspend the running of the Statute of Limitations against proceedings to foreclose the deed of trust, even though he had not assumed or agreed to pay the indebtedness in such a way as to make him personally liable therefor.

In *Fitzgerald v. Flanagan* (Iowa) supra, where the statute provided that "causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like promise to pay the

same," the court, in discussing the question whether a debt or mortgage might be revived by the grantee of the mortgagor, said: "As the grantee who holds the legal title is the only necessary party, the universal holding is that he is in such privity to the original mortgagor that he may plead the bar of the statute. . . . If such grantee were a mere stranger, he could not plead the statute, as the right to so plead is generally regarded as a personal privilege. . . . Having this right, it is optional with the grantee whether or not he will interpose such a plea, and it is not for his grantor to complain. If he has the right to interpose the plea, it logically follows that he should be allowed to waive the statute, which is one of repose in his behalf, and we think that a grantee from a mortgagor of real estate, the mortgage being of record and a prior lien upon the land, may waive the Statute of Limitations after action brought, or revive the cause of action before suit is commenced, as provided in § 3456 of the Code. Indeed, this seems to have been the holding of all courts where the question has arisen, no matter what their view as to the effect of the statute in general."

And the court took the view in *Senninger v. Rowley* (Iowa) *supra*, that, although a grantee of land does not assume personal liability for the payment of a mortgage thereon, his written admission that it is unpaid is sufficient to toll the Statute of Limitations against foreclosure of the mortgage. In this case, however, it was held that there was a sufficient showing that the grantee had assumed the mortgage, although there was no assumption of the debt in the deed, it being held that the grantee's undertaking to assume and pay the mortgage might be shown by parol, consisting, in this instance, of evidence of payment of interest and principal by him.

In *McLane v. Allison* (1899) 60 Kan. 441, 56 Pac. 747, *supra*, where the deed recited the existence of a mortgage on the premises, but the

conveyance was not expressly made subject thereto, it was held that, although the Statute of Limitations had run as to the mortgagor upon the note secured by the mortgage, payments of interest by the purchaser and her grantee constituted a binding admission that the land was subject to the mortgage, and an agreement for its payment to the value of the mortgaged premises, and suspended the running of the Statute of Limitations against an action to foreclose the mortgage. It was unsuccessfully contended that the doctrine should apply that the right of action to foreclose a mortgage lien is inseparable from the right of action to recover the debt, and that, when suit upon the note is barred, an action upon the mortgage is likewise barred. The counter contention was made, and apparently adopted, that an action to foreclose a mortgage may be maintained without the right—or, at least, without the ability—to recover a money judgment for the debt. To support this proposition, the court cited *Andrews v. Morse* (1893) 51 Kan. 30, 32 Pac. 640, the facts of which, however, place it beyond the scope of the annotation.

And in *Schmucker v. Sibert* (1877) 18 Kan. 104, 26 Am. Rep. 765, the court said that, where the deed specifies that it is made subject to a certain mortgage, an acceptance of the deed is an undertaking that, to the extent, at least, of the value of the granted premises, the grantee shall pay the mortgage, and the statute begins to run only from the execution of the deed.

Where mortgaged land was conveyed by a deed wherein no reference to the mortgage was made, it was held in *Cotcher v. Barton* (1920) — Cal. App. —, 193 Pac. 169, that the mortgage might be foreclosed as against the purchaser, in view of his written acknowledgment of the indebtedness which interrupted the running of the Statute of Limitations, even though the statute had run as against an action on the note secured by the mortgage, and a statute pro-

vided that "a lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." The court said: "While the mortgage may be said to be incidental to the note, it is a distinct and separate contract. Particularly is this true where, as here, the mortgaged property has been conveyed, and is held by one other than the maker of the note and mortgage. The note is a contract to pay money. While the mortgage is a contract creating a lien upon the real estate described therein to secure performance of an act, no personal obligation to perform the same is implied thereby. . . . Facts may exist which toll the statute as to the note, as where the maker is out of the state, but do not apply to a mortgagor who remains in the state. . . . It follows, we think, that, as subsequent grantee of the mortgage, defendant's relation to the mortgage was the same as though he, in the first instance, had executed the same on his own property, thereby creating a lien as security for the performance of the obligation of the Security Investment Company, maker of the note; that the promissory note evidencing the obligation to pay the money and the mortgage creating the lien must, under the circumstances, be deemed separate and distinct contracts, as to which the party to either contract, without affecting the right of the other to plead the statute, might continue or extend the contract to which he was a party by complying with the provisions of said § 360. While it has been frequently held, as provided in said § 2911, that the lien of a mortgage is extinguished when the principal obligation is barred, in none of them, so far as we are advised, was presented the question here involved, namely, the continuance or extension of the mortgage lien by written acknowledgment of its existence, to a time beyond that when the principal obligation is barred. Hence we hold that such cases are not applicable to the facts here presented."

But in *Frase v. Lee* (1910) 152 Mo. App. 562, 134 S. W. 10, where the conveyance made no reference to a trust deed duly recorded on the property, and it was not shown that the grantee had assumed and agreed to pay the debt secured by the deed of trust, it was held that a payment of interest by him on the debt was the payment by a mere volunteer, and did not interrupt the running of the Statute of Limitations against a suit to foreclose the trust deed. The court said: "It is contended now by plaintiff that the payment of interest by Block [a grantee], and his having written a letter to plaintiff in which he mentioned something about paying the debt, were recognition by him of the deed of trust, and that he is, for that reason, now held for its payment, and therefore, if he paid interest upon the note, the running of the Statute of Limitations was suspended, and that his suit is in time. With this contention we do not agree. If Block did not agree at the time he purchased the land to pay the debt secured by the deed of trust, a subsequent agreement made by him with the holder of the note, to be binding, would have to be based upon a new consideration; so that even though he may have promised to pay the debt, and did, as a matter of fact, pay interest upon it, this would not constitute a contract upon his part to pay the principal of the note. . . . As Block was not bound to pay the debt, payments made by him were, in contemplation of law, made by a mere volunteer, and did not stop the running of the Statute of Limitations. Neither can it make any difference that Block paid interest on the debt to prevent a foreclosure of the deed of trust upon the land. A payment to stop the running of the Statute of Limitations must be made by someone legally bound to pay the debt. A payment made by one for his own convenience, merely, is not sufficient." At the time of the foreclosure action, the land was held by a remote grantee, but, as indicated from the above quotation, the court treated the case as though

the land was still held by the original grantee. The opinion in the above case was adopted by the St. Louis court of appeals in (1911) 160 Mo. App. 607, 140 S. W. 1194, when the case was transferred to that court.

There is a suggestion in *Devens v. Van Valkenburg* (1915) 192 Mo. App. 215, 180 S. W. 996, that the *Frase Case*, supra, was distinguishable on the ground that it was an action on the note secured by a deed of trust and to foreclose the deed. But the action in the *Frase Case* is referred to, in the opinion therein, as one merely to foreclose a deed of trust. In the *Devens Case*, the court held that the grantee had reissued the note secured by the trust deed given by his predecessor in interest, and that the statute, under the circumstances, should run from the time of the reissuance.

III. As to liability of mortgagor or grantor.

a. Cases holding that running of statute is not interrupted.

On the question whether acknowledgments or payments by a grantee of mortgaged premises, who has assumed the debt, interrupt the running of the Statute of Limitations in favor of the grantor, there is a conflict among the authorities. The better rule would seem to be that they do not have this effect, and this view is supported by the following cases: *Biddel v. Brizzolara* (1880) 56 Cal. 374; *Old Alms-House Farm v. Smith* (1884) 52 Conn. 434; *Boughton v. Harder* (1899) 46 App. Div. 352, 61 N. Y. Supp. 574; *Regan v. Williams* (1904) 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; *Cottrell v. Shepherd* (1894) 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983.

The reasons for the rule are thus stated in *Old Alms-House Farm v. Smith* (Conn.) supra: "If the defendant himself had paid the interest during the time, the payments would have had such effect, for each payment would be a voluntary admission by him that the debt was then subsisting, which would raise by implication a new promise to pay it.

But the payments of interest by the successive owners of the equity of redemption were on their own account, in order to keep alive the equity of redemption, of which they had become the purchasers; for if they failed to pay interest their equitable estate would become liable to be extinguished by foreclosure. Such payments, therefore, being made on their own account and for their own benefit, had no legal significance as regards the maker of the note, and effected no change whatever in the legal relations between the plaintiff and the defendant. They were not the agents of the defendant in making the payments, neither did they profess to be acting for him. How, then, can the payments be regarded as made by the defendant, when they were neither made by him personally, nor by any authorized agent in his behalf? . . . The defendant was liable on the note. The grantees were liable to have their land taken for its payment. These liabilities are separate and distinct. Neither party could do anything to increase the liability of the other. How could the grantees, by any act of theirs, acknowledge that the mortgage debt was a subsisting indebtedness, so as to subject the defendant to a new liability upon it, when they themselves were not liable on the note? We think the grantees could do nothing by word or deed to remove the bar of the Statute of Limitations, so far as the defendant is concerned."

A grantee who has assumed payment of a mortgage on the premises does not become, as to the debt, a principal, with the grantor as surety, so as to permit the grantee, by making payments on the indebtedness, to interrupt the running of the Statute of Limitations as to the grantor, under the doctrine that payments by a principal will suspend the statute as to a surety. *Regan v. Williams* (1904) 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959, supra. The court said: "The reason why a payment by the principal stops it as to a surety is not because one is principal and the other surety, but be-

cause both are usually joint promisors; that is, the surety is affected by the act of the principal in his capacity as a joint promisor. The idea is that persons who jointly bind themselves are all liable to the promisee by virtue of their original agreement, so that performance or part performance by one is the act of all. . . . The principle only applies where the payment was made by one originally liable. . . . Whether or not the statute ceased to run in favor of the defendant, when the payments were made by the subsequent grantees, depends, then, on whether he can be considered a joint promisor with them. Undoubtedly he was not. They were not parties to the note when it was made, and only became obligated to pay it by subsequent contracts between themselves and the maker, Williams. Their responsibility, far from resting on a promise by them given in conjunction with Williams to the payee, Regan, rests exclusively on the promises they made afterwards to assume the debt. In no sense were they joint obligors with him. Their promises neither coincided with his in point of time, nor were made with the same person, nor based on the same consideration. . . . The precedents are all against this contention of the appellant."

So, where there was an oral agreement that the grantee of the mortgagor, as a part of the consideration, should pay the mortgage, and the grantee subsequently made payments of principal and interest to the mortgagee, it was contended in *Cottrell v. Shepherd* (1894) 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983, *supra*, that the payments by the grantee should be held to have been made by the grantor, and so to remove the bar of the Statute of Limitations as to the latter, on the theory that the grantee occupied the relation of a joint debtor with, or agent of, the grantor. The court rejected this contention, however, on the ground that the grantee was not a joint debtor, or jointly liable, with the grantor, and that he made the payments, not for the benefit of the

grantor, but for his own benefit, to protect his equity of redemption, and that he was not acting in any sense as agent for the grantor.

The statement in *Mack v. Anderson* (1901) 165 N. Y. 529, 59 N. E. 289, that when the grantee, who had assumed and agreed to pay the mortgage, paid interest on the mortgage indebtedness, he did so to protect his own title, and in paying it necessarily acted for himself as principal, and not as an agent, points to the view that by such a payment by the grantee the Statute of Limitations in favor of the grantor is not interrupted, although the question was not directly presented for decision. See this case under IV. *infra*.

The view that payments made by a grantee of mortgaged premises will not interrupt the running of the Statute of Limitations in favor of the mortgagor has been taken, also, in several cases in which, so far as appears, the grantee did not assume payment of the mortgage debt.

Thus, in *Home L. Ins. Co. v. Elwell* (1897) 111 Mich. 689, 70 N. W. 334, where the payments were made by one who had taken a conveyance subject to a mortgage on the premises, the court said there was nothing to show that the payments made by the grantee were other than payments for his own benefit to relieve the premises from the encumbrance; that, where the payment is made by another than the debtor, such other must be authorized to make a new promise on behalf of the debtor, in order to take the case out of the statute; that there was nothing in this case to show that any such authority was given to the grantee; and that presumably the payments were made on his own behalf to save his estate; and the court could not say that on expectation on the part of the grantor that the grantee would make the payments, if such might be inferred, was tantamount to authorizing or directing the grantee to bind the grantor by a new promise.

And in *Dundee Invest. Co. v. Horner* (1897) 30 Or. 558, 48 Pac. 175, an action to foreclose a mortgage, the

court took the view that payments of interest made by a grantee of the mortgagor, after the grantee had parted with his interest, were in effect made by a stranger, the grantee never having assumed the debt, and were, therefore, ineffective to toll the Statute of Limitations as to his grantee or as to the original debtor.

b. Cases holding that running of statute is interrupted.

Although, as indicated above, the better rule, and that supported, perhaps, by the weight of authority, is to the contrary, there are some cases to the effect that acknowledgments or payments made by a grantee of mortgaged premises who has assumed the debt may interrupt the running of the Statute of Limitations in favor of the mortgagor. *Cucullu v. Hernandez* (1881) 103 U. S. 105, 26 L. ed. 322 (applying rule in Louisiana); *Blackburn University v. Weer* (1886) 21 Ill. App. 29; *Collier v. His Creditors* (1846) 12 Rob. (La.) 398 (purchaser at execution sale); *Cockfield v. Farley* (1869) 21 La. Ann. 521; *Levy v. Police Jury* (1872) 24 La. Ann. 292; *Biddle v. Pugh* (1900) 59 N. J. Eq. 480, 45 Atl. 626; *Forsyth v. Bristowe* (1853) 8 Exch. 716, 155 Eng. Reprint, 1540, 17 Jur. 675, 22 L. J. Exch. N. S. 255, 1 Week. Rep. 356; *Alston v. Mineard* (1907) 31 Sol. Jo. (Eng.) 132, 2 *Butterworths' Ten Years' Dig.* (1898-1907) 570; *Ross v. Schmitz* (1913) — Sask. —, 14 D. L.R. 648, 25 West. L. R. 828. See also *Longstreet v. Brown* (1897) — N. J. Eq. —, 37 Atl. 56 (recognizing rule); *Dibb v. Walker* [1893] 2 Ch. (Eng.) 429, 62 L. J. Ch. N. S. 536, 3 Reports, 474, 68 L. T. N. S. 610, 41 Week. Rep. 427 (where payments of interest by a life tenant under a deed of settlement were held to interrupt the running of the Statute of Limitations against an action to recover a deficiency from the estate of the settlor); and *Rogers v. Brann* (1905) 6 Ont. Week. Rep. 993.

And payments of interest by the grantee of the mortgaged premises, who had not personally assumed payment of the debt, were held in *Macfar-*

land v. Utz (1912) 175 Ill. App. 525, to toll the Statute of Limitations in favor of the mortgagor. The court said that these payments by the grantee were made both for his benefit and for the benefit of his grantors, and served to toll the statute and keep alive the debt for the payment of which the mortgaged property was primarily liable. It may be observed, however, that the decree of foreclosure in this case was in rem, and not in personam against the grantors, to whom a reconveyance had been ordered.

In *Blackburn University v. Weer* (1886) 21 Ill. App. 29, supra, where a conveyance of lots reserved a lien to secure a note given for part of the purchase money, and in subsequent conveyances the lien was expressly retained, each grantee assuming payment of the note, the court took the view that payments on the indebtedness made by an immediate grantee were, in effect, made by him as agent of the original grantee, and arrested the running of the Statute of Limitations as to the latter.

In *Levy v. Police Jury* (1872) 24 La. Ann. 292, supra, the court said that each successive purchaser assumed payment of the mortgage for the benefit of the preceding one, and that payments of interest (which were made by each successive purchaser) were in discharge of the former owner, and with his implied consent. And to the same effect are *Collier v. His Creditors* (1846) 12 Rob. (La.) 398, and *Cockfield v. Farley* (1869) 21 La. Ann. 521, supra. In the latter case, a payment on the mortgage debt, made, before prescription had accrued, by a remote grantee from the mortgagor, who had assumed payment of the debt, was held to interrupt prescription both as to himself and the original debtor.

In *Forsyth v. Bristowe* (1853) 8 Exch. 716, 155 Eng. Reprint, 1540, 17 Jur. 675, 22 L. J. Exch. N. S. 255, 1 Week. Rep. 356, supra, where the grantee of the equity of redemption had agreed to pay, and had paid, the interest on the mortgage debt within the statutory period of limitations, the

court said that the statute did not expressly require that the payments should be made by the party liable, or his agent, but that, if it implied such a requirement, the assignee of the equity of redemption, who covenanted to pay the interest, was sufficiently an agent for this purpose.

In *Alston v. Mineard* (Eng.) *supra*, where the defendant conveyed to the trustees of his daughter's marriage settlement, property which he had mortgaged to the plaintiff, and the trustees paid the interest on the indebtedness, it was held that payments made by the trustees were sufficient to take the case out of the Statute of Limitations.

Where there was an implied covenant, by operation of a statute, on the part of an assignee of the equity of redemption, to pay the mortgage debt, the court in *Ross v. Schmitz* (Sask.) *supra*, held that payments of interest by the assignee to the mortgagee were made on behalf of the mortgagor, and interrupted the running of the Statute of Limitations in favor of the latter.

IV. Acknowledgment or payment by purchaser of part of mortgaged premises.

In several cases the question has been as to whether acknowledgment or payment made by a purchaser of a portion of the mortgaged premises would interrupt the running of the Statute of Limitations in favor of the purchaser of another portion. And the cases do not seem to be in accord upon this question.

It was held in *Mack v. Anderson* (1901) 165 N. Y. 529, 59 N. E. 289, that payments on the mortgage indebtedness made by a grantee of one parcel of the premises from the mortgagor, such grantee having assumed and agreed to pay a certain portion of the debt secured by the mortgage, would not operate to suspend the running of limitations in favor of a purchaser of another parcel of the mortgaged premises, since the payment by such grantee was on his own behalf, to protect his

own title, and was not made by him as agent of the mortgagor, or as an agent or privy of the purchaser of the other portion.

To a similar effect is *Boughton v. Harder* (1899) 46 App. Div. 352, 61 N. Y. Supp. 574, where a suit to foreclose a mortgage upon three parcels of land was held barred by the Statute of Limitations as to two of the parcels, notwithstanding the fact that a grantee of the third parcel and his successors in interest, who by the terms of their deeds assumed and agreed to pay the mortgage, had continued to pay interest on the mortgage debt until about five years before the bringing of the suit, since the mortgagor's grantees were not his agents, and their payments were made upon their own covenants, to protect their own title.

But in *Hollister v. York* (1886) 59 Vt. 1, 9 Atl. 2, the court held that a portion of the mortgaged premises which had been deeded to the wife of the purchaser of another part of the premises was equally liable to foreclosure, where payments by him had removed the bar of the Statute of Limitations, quoting the doctrine that, where several persons are interested in the equity of redemption, payment by one of them keeps alive the right of entry not only as against him, but also against all the other owners of the equity. And it was said that the holder of the mortgage could not be deprived of his security by any conveyances; and that, as affecting his security, he was not bound to inquire as to what conveyances had been made, but that when the bar of the statute was removed, he was entitled to all the security given by the mortgage.

Attention is called, also, to *Longstreet v. Brown* (1897) — N. J. Eq. —, 37 Atl. 56, as illustrative of possibly other cases of the same class, where the payment was not made by a grantee of the mortgagor. This case is to the effect that a payment made by an owner of the equity of redemption of a portion of the mortgaged premises inures to the benefit of all the mortgaged premises still

subject to the mortgage, and interrupts the running of the Statute of Limitations in favor of an owner of an equity of redemption in another portion of the mortgaged premises. The court said: "This payment was made by the owner of the equity of redemption of a portion of the mortgaged premises, and inured to the benefit of all the mortgaged premises, still subject to the mortgage. So far as the mortgagee is concerned, the whole mortgage debt is charged in equity on all the mortgaged lands; and, while conveyances by the owner, subsequent to the mortgage, may give rise to equities relating to the order of application of the lands for payment, yet the whole mortgage debt still continues, until payment, a debt chargeable upon all the lands. All the lands being, therefore, chargeable with the debt, in their proper equitable order, the lands of the owners of the equity of redemption in different portions of the premises subject to the debt are to be treated, so far as the mortgagee is concerned, as jointly liable to the equitable charge, and the payment to the mortgagee by any one of such owners should be considered as a payment made on account of this joint equitable liability."

V. Miscellaneous.

As before stated, the annotation does not cover the question as to the sufficiency of the acknowledgment. Of this class of cases, apparently, is *Byrnes v. Payne* (1918) 103 Wash. 260, 173 Pac. 1091, where it is said: "Some courts hold that a grantee who, prior to the bar of the mortgage debt, accepts title subject to the mortgage, thereby makes such acknowledgment as will interrupt or toll the statute and keep the debt on foot for another statutory period. Such, however, is not the rule in this state."

And, as illustrative of the same class of cases, attention is called to *Wallber v. Caldwell* (1907) 79 Neb. 418, 126 Am. St. Rep. 675, 112 N. W. 584, where it was held that a recital in a deed that the conveyance was subject to a certain mortgage did not interrupt the running of the Statute of Limitations against an action to foreclose the mortgage, it not appearing that the grantee assumed the debt or retained any part of the consideration on account of such indebtedness. The court approved the rule that an acknowledgment of a debt, to take the case out of the statute, must be made to the creditor or someone acting for or representing him.

And the question whether acknowledgments of the indebtedness by a purchaser of the mortgaged property may rebut the presumption of payment of the mortgage arising from lapse of time is not within the scope of the present annotation. As holding that it may have this effect, see, among possibly other cases, *Park v. Peck* (1829) 1 Paige (N. Y.) 477.

Although distinct from the other cases cited in the annotation, as the indebtedness which it was sought to enforce was not the mortgage debt, attention is called to *Greenley v. Greenley* (1906) 114 App. Div. 640, 100 N. Y. Supp. 114, where the defendant agreed that, if the mortgagor would deed to him the mortgaged property, he would manage and dispose of it, and, after reimbursing himself for his services and expenses, would pay certain obligations, among which were notes held by the plaintiff; and it was held that, although the Statute of Limitations had run against an action on the notes, the holder might maintain a suit in equity to establish the validity of the agreement, and to compel its performance.

R. E. H.

MINNIE M. PARSONS, Plff. in Err.,

v.

ESTATE OF HENRY R. PARSONS, Deceased.

Colorado Supreme Court (Dept. No. 1) — April 4, 1921.

(— Colo. —, 201 Pac. 559.)

Divorce — survival of liability for alimony.

Death of the husband terminates the liability of his estate for alimony under a decree adopting a contract fixing the amount of alimony, which does not provide for its surviving the husband's death.

[See note on this question beginning on page 1040.]

ERROR to the District Court for Montrose County (Black, J.) to review a judgment disallowing plaintiff's claim for alimony against the estate of her deceased husband. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Catlin & Blake, for plaintiff in error:

The court has power to decree alimony during the natural life of the wife, thus making it a charge upon the husband's estate, should he die first.

14 Cyc. 788; O'Hagan v. O'Hagan, 4 Iowa, 509; Stratton v. Stratton, 77 Me. 373, 52 Am. Rep. 779; Miller v. Miller, 64 Me. 484; Burr v. Burr, 10 Paige, 20; Murphy v. Moyle, 17 Utah, 118, 70 Am. St. Rep. 767, 53 Pac. 1010; Grover v. Clover, 69 Colo. 72, 169 Pac. 578; Storey v. Storey, 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329; Buck v. Buck, 60 Ill. 242; Whitney v. Whitney Elevator & Warehouse Co. 106 C. C. A. 28, 183 Fed. 678; Steinkopf v. Steinkopf, 165 Wis. 224, 1 A.L.R. 1103, 161 N. W. 757; Wilson v. Hinman, 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236; Stone v. Bayley, 75 Wash. 184, 48 L.R.A.(N.S.) 429, 134 Pac. 820; 1 R. C. L. 947; Creyts v. Creyts, 143 Mich. 375, 114 Am. St. Rep. 656, 106 N. W. 1111.

Mr. John L. Stivers, for defendant in error:

Alimony continues only during the joint lives of the parties.

Lennahan v. O'Keefe, 107 Ill. 620; Brenger v. Brenger, 142 Wis. 26, 26 L.R.A.(N.S.) 387, 135 Am. St. Rep. 1050, 125 N. W. 109, 19 Ann. Cas. 1136; 2 Bishop, Marr. & Div. 6th ed. §§ 427, 428; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595; 14 Cyc. 788; Wilson v. Hinman, 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E.

236; Maxwell v. Sawyer, 90 Wis. 352, 63 N. W. 284; Lally v. Lally, 152 Wis. 56, 138 N. W. 651; Faversham v. Faversham, 161 App. Div. 521, 146 N. Y. Supp. 569; Hazard v. Hazard, 197 Ill. App. 612; O'Hagan v. O'Hagan, 4 Iowa, 509; Wilson v. Hinman, 2 L.R.A.(N.S.) 232, note; Yates v. Yates, 165 Wis. 250, 161 N. W. 743; Craig v. Craig, 163 Ill. 176, 45 N. E. 153, 19 C. J. 279; Storey v. Storey, 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329.

Allen, J., delivered the opinion of the court:

This cause is before us upon a writ of error to review a judgment of the district court of Montrose county, disallowing a claim of a divorced wife against the estate of her former husband, now deceased.

In March, 1918, the claimant, Minnie M. Parsons, brought an action for divorce against Henry R. Parsons. On April 17, 1918, prior to the trial of the case, the parties entered into a written stipulation and agreement intended to settle their property rights and fix the amount and manner of payment of permanent alimony for the support of the plaintiff and of a minor child of plaintiff and defendant. That part of the written agreement which is material upon this review reads as follows: "The defendant agrees and binds himself to pay to plaintiff

(— Colo. —, 301 Pac. 559.)

the sum of thirty-five dollars (\$35) per month so long as she shall remain single, for the full maintenance and support of herself and the minor child of plaintiff and defendant, Zelta Louise. . . ."

Thereafter, and on the same day, the cause was tried upon its merits, resulting in findings for plaintiff. No testimony was taken for the purpose of fixing the amount of alimony, but, in exact accord with the stipulation of the parties, the court ordered that "plaintiff shall receive from the defendant the sum of \$35 a month alimony for the support of plaintiff and said child as long as said plaintiff shall remain single and unmarried."

The defendant in the divorce action died October 13, 1918. During his lifetime he paid all alimony due for the period of time ending October 17, 1918. Several months thereafter the plaintiff filed in the county court a claim against the estate of the deceased for alimony as having accrued since October 17, 1918, notwithstanding the death of the divorced husband. The claim was disallowed, and, on appeal to the district court, was again denied.

The question to be decided is whether the divorced wife, Minnie M. Parsons, is still entitled to receive from the estate of Henry R. Parsons, deceased, the monthly allowance awarded to her as alimony for the support of herself and minor child, or whether she ceased to be entitled to the payment of such alimony upon the death of her divorced husband.

The decree as to the allowance of permanent alimony was a consent decree. It embodied fully the agreement made and filed by the parties, giving effect to and ratifying the agreement both as to the amount and as to the manner and time of payment of the alimony. It is generally held that agreements affecting the amount of alimony may be

adopted by the court. 19 C. J. 251, § 586. This was done in the instant case.

We will assume, without deciding, that, under our divorce statute, the courts have the power to make a decree for alimony which will survive the death of the husband. In *Stone v. Bayley*, 75 Wash. 184, 48 L.R.A. (N.S.) 429, 134 Pac. 820, it is said: "Authority is not wanting that the making of a contract by the parties that a decree may be entered providing for the payment of alimony or for the support of minor children, to continue after death of the father, has the effect of giving the court power to make such a decree, even if the court would not ordinarily possess that power under the statute."

In *Stone v. Bayley*, supra, the court was concerned with a contract, and not a decree. In *Storey v. Storey*, 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329, the court construed a consent decree, and not a contract. In each case the decision finally rested on the intention of the parties as to whether payments of alimony should continue after the husband's death.

The contract upon which the claimant relies in the instant case does not disclose any intention that it should survive the death of the husband. There being an absence of any agreement of the parties to that effect, and the decree not showing that the court intended to bind the husband's heirs

Divorce—survival of liability for alimony.

not survive the former husband's death. 19 C. J. 278, §§ 633, 635; 1 R. C. L. 933, §§ 80, 81. It was not error to disallow the claim.

The judgment is affirmed. Former opinion withdrawn.

Teller, J., sitting for Scott, Ch. J., and Denison, J., concur.

Petition for rehearing denied November 7, 1921.

ANNOTATION.

Death of husband as affecting alimony.

- I. Introductory, 1040.
- II. Limited divorce or separation, 1041.
- III. Absolute divorce:
 - a. Restricted view, 1045.
 - b. Broader view, 1050.
 - c. English cases, 1053.
- IV. Arrears at time of husband's death, 1054.
- V. Consent, 1055.
- VI. Miscellaneous, 1057.

I. Introductory.

This annotation does not include the question whether a provision in a decree directing the payment by the father of a certain sum for the support of a child will survive the death of the father; nor does it include cases where the husband dies before judgment, or pending an appeal.

For power to enter judgment in divorce *nunc pro tunc* after death of party, see the annotation to *Re Pillsbury*, 3 A.L.R. 1403.

For what amounts to a "final division and distribution" of estate within statute allowing such in lieu of alimony, see the annotation to *Steinkopf v. Steinkopf*, 1 A.L.R. 1106.

The word "alimony" in English law comes from a time when there was no judicial divorce a vinculo for the husband's fault, if at all; and the word was used to signify an allowance judicially granted to the wife for support during a divorce a mensa et thoro, or during separation. But, at an early day in America, as later in England, the question arose, What is to be done in the way of support, maintenance, or property for the wife divorced a vinculo for the husband's fault?

With the enlarged idea, the word "alimony" took on an enlarged meaning, and in modern American law has come generally in legal parlance to include not only its former meaning, but also the provision or allowance, whether periodical or in gross, judicially made to the wife upon an absolute divorce. See, for example: *Pryor v. Pryor* (1908) 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700; *Parsons v.*

Parsons (1838) 9 N. H. 309, 32 Am. Dec. 362; *Sheafe v. Sheafe* (1852) 24 N. H. 564; *Lynde v. Lynde* (1902) 64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694; *Piatt v. Piatt* (1839) 9 Ohio, 37; *Tuttle v. Tuttle* (1910) 26 S. D. 545, 128 N. W. 695.

In *Burrows v. Purple* (1871) 107 Mass. 428, Gray, J., after stating the Massachusetts usage, said: "In many other states, also, the word 'alimony' is commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce, under similar statutes." Quoted in *Robinson v. Robinson* (1889) 79 Cal. 511, 21 Pac. 1095.

"In this commonwealth, it is provided by Rev. Laws, chap. 152, § 30, that 'upon a divorce, or upon petition at any time after a divorce, the superior court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband.'" *Brown v. Brown* (1916) 222 Mass. 415, 111 N. E. 42.

In *Warne v. Warne* (1916) 36 S. D. 576, 156 N. W. 60, the court said: "'Alimony,' in its strictly legal sense, relates to provisions made pendente lite. Under the statutes of New York, California, and South Dakota, there is no such thing as permanent alimony. It is 'allowance' or 'permanent allowance' for maintenance."

In *Bialy v. Bialy* (1911) 167 Mich. 564, 133 N. W. 496, Ann. Cas. 1913A, 800, in sustaining the award of a large gross sum in an absolute divorce, the court said: "Alimony, by whatever authority it is conferred, is an incident of marriage, and based on the underlying principle that it is the duty of the husband to support his wife not necessarily to endow her. Primarily it signifies, not a certain portion of his estate, but an allowance or allotment adjudged against him for her subsistence, according to his means and their condition in life; during their separation, whether it be for life or for years. In practical application

an award of permanent alimony in a gross sum may result in a division of the husband's estate; but the controlling element, not to be lost sight of, is his compulsory contribution for her support and maintenance under obligations of the marriage contract." Quoted in *Kiplinger v. Kiplinger* (1912) 172 Mich. 552, 188 N. W. 230.

In *Ex parte Spencer* (1890) 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395, a case beyond the scope of this annotation, the court said: "It is true that 'alimony,' in its strict technical sense, proceeds only from husband to wife; and that where the relation of husband and wife does not exist, strictly speaking, there can be no alimony. It is true, also, that the legislature has used the term only in its strict legal sense, and has therefore used the word 'alimony' only when prescribing the provision which the court might make for the support of the wife pendente lite. But the courts have not always been as careful in their use of the word. They have frequently used it as a mere name for another and different allowance, made, and authorized to be made, under § 139 of the Civil Code. It was manifestly so used in this case, and has been so used in many others."

In *Nelson v. Nelson* (1920) 282 Mo. 412, 221 S. W. 1066, the court said: "There is a distinction, however, between the alimony known to the ecclesiastical law and that provided by the statute. The former was incident to and dependent upon an existing and continuing valid marriage, while the latter is given only upon its dissolution. This distinction should be kept in mind, for it differentiates the two in essential attributes. Under the canonical law administered by the ecclesiastical courts, marriage was a religious sacrament, and no English court had jurisdiction to dissolve it for a postnuptial cause. The divorce granted by these courts was from bed and board,—a mere judicial separation. The relation of husband and wife continued, the door of reconciliation was left open, and they could resume their former status of their own accord without any civil or religious

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ceremony of any kind or character. As the marriage relation continued, the husband was in no wise disturbed either in his title to the property brought to the marriage by the wife, or in his possession thereof, but he was still under the duty to afford her support according to his means and station in life. Hence, alimony was allowed and enforced as support due from husband to wife during their legal separation. This was the theory and origin of alimony under the unwritten law. Consequently, alimony decreed the wife continued only during the joint lives of herself and her husband. Upon the death of either it was at end. Even unpaid arrearages upon the decease of the wife could not be collected by her personal representatives, but reverted to the husband, though her creditors could in equity have such arrearages impressed in their favor to the amount of the support furnished the wife by them."

The fact that in many states there are statutes empowering the court, on absolute divorce, to divide the property, or to allot to the wife a gross sum, shows that there is no general rule restricting the wife's provision, on divorce, to the life of the husband. And the variances in the statutes are so great as to limit the making of general rules on the subject.

Some of the statutes expressly permit the court, on divorce for an offense of the husband, to make an allowance to the wife for her support during her life. See, for example, *De Roche v. De Roche* (1908) 12 N. D. 17, 94 N. W. 767, 1 Ann. Cas. 221, and cases there cited.

II. *Limited divorce or separation.*

There are a number of cases which take the view that, on limited divorce or separation, a provision for regular periodical payments to the wife for her maintenance and support should not relate to periods after the death of the husband.

Arkansas.—*Johnson v. Bates* (1907) 82 Ark. 284, 101 S. W. 412.

Kentucky.—*Lockridge v. Lockridge* (1835) 3 Dana, 28, 28 Am. Dec. 52;

Caskey v. Caskey (1883) 4 Ky. L. Rep. 811. See also *Lively v. Lively* (1886) 7 Ky. L. Rep. 838.

Maryland.—*Wallingsford v. Wallingsford* (1823) 6 Harr. & J. 485; *McCaddin v. McCaddin* (1911) 116 Md. 567, 82 Atl. 554; *Hood v. Hood* (1921) 138 Md. 355, 15 A.L.R. 774, 113 Atl. 895 (arguendo).

Massachusetts.—*McIlroy v. McIlroy* (1911) 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934 (arguendo).

Michigan.—See *Wagner v. Wagner* (1903) 132 Mich. 343, 93 N. W. 889.

Mississippi.—*Dewees v. Dewees* (1877) 55 Miss. 315.

New York.—See *Sleeper v. Sleeper* (1892) 65 Hun, 454, 20 N. Y. Supp. 339, affirmed in (1894) 142 N. Y. 625, 37 N. E. 565.

North Carolina.—*Rogers v. Vines* (1846) 28 N. C. (6 Ired. L.) 293 (arguendo). See also *Taylor v. Taylor* (1885) 93 N. C. 418, 53 Am. Rep. 460.

Ohio.—*Lockwood v. Krum* (1877) 34 Ohio St. 7 (arguendo).

Virginia.—*Francis v. Francis* (1879) 31 Gratt. 289. But compare *Isaacs v. Isaacs* (1913) 115 Va. 562, 79 S. E. 1072 (for a later appeal, see (1915) 117 Va. 730, L.R.A.1916B, 648, 86 S. E. 105).

Canada.—*Davidson v. Winteler* (1902) Rap. Jud. Quebec B. R. 97.

In *Lockridge v. Lockridge* (Ky.) supra, where, on a bill for alimony, the decree had granted alimony for the life of the wife, it was held: "Alimony is the maintenance secured by judicial authority, during coverture, or until reconciliation. There being no divorce a vinculo, it cannot be right to decree any allowance for the term of the wife's life."

This case was cited in *Caskey v. Caskey* (1883) 4 Ky. L. Rep. 811, supra, where the court, in holding it error, on a limited divorce, to give the wife the use for life of one third of the husband's land "of any apparent value," said: "The law provides for the wife at the husband's death, 'and being then sui juris, there is no necessity for a decree for maintenance, nor any suitableness or propriety in such decree.'" See also *Lively v. Lively* (Ky.) supra.

Where separate maintenance was granted the wife, the appellate court said and held: "The final decree will be modified by giving and continuing the permanent alimony until the dissolution of the marriage by the death of either party, instead of 'during the natural life of the wife,' and, as thus modified, is affirmed." *Dewees v. Dewees* (Miss.) supra.

In *Sleeper v. Sleeper* (N. Y.) supra, the court, in a separation case, ordered that the monthly payment for maintenance and support should continue no longer than during the joint lives of the parties.

In *Lockwood v. Krum* (Ohio) supra, where a decree for separation made a provision for alimony during the natural life of the wife, which was not complained of, the court said: "Where alimony is decreed to a wife, not in gross, but in instalments, to be paid at stated times, the decree should limit her right to receive the same to the period of coverture, where it is not to terminate before that relation ceases. The estate of the husband cannot, properly, in a proceeding for alimony, be charged or encumbered with the support of the wife, to continue after his decease."

In *Johnson v. Bates* (1907) 82 Ark. 284, 101 S. W. 412, supra, it was held that, in a suit by a wife for separate maintenance, it was error to allot to the plaintiff, as maintenance, the use of certain land owned by defendant, for and during the natural life of plaintiff, as such a provision could not extend beyond the life of the husband. The court said: "It is unnecessary now to discuss the question as to whether, in an action for maintenance alone, the chancellor could allow, as maintenance or alimony, one half of the cleared land owned by the defendant, for, even if he could do so, such a provision could not extend beyond the life of the husband. As she was not divorced, and remained the wife of defendant at his death, the law makes provision for her by allowing her dower in his estate."

The decree in *Wallingsford v. Wallingsford* (1823) 6 Harr. & J. (Md.) 485, supra, directed a sale of part of

the husband's real estate, but did not assign an income for the maintenance of the wife, it being supposed that an agreement had been made for that purpose. Without deciding the question as to the validity of the agreement, the court said: "Alimony is a maintenance afforded to the wife where the husband refuses to give it, or where, from his improper conduct, he compels her to separate from him. It is not a portion of his real estate, to be assigned to her in fee simple, subject to her control, or to be sold at her pleasure, but a provision for her support, to continue during their joint lives, or so long as they live separate. Upon the death of either, or upon their mutual consent to live together, it ceases; and the amount of this allowance must depend upon the value of the husband's estate."

Where alimony without divorce was decreed, it was said: "When, therefore, this decree provided for the payment of so much a week as permanent alimony, it was subject to the limitations fixed by law, and could only continue during the joint lives of the husband and wife, while they live apart." *McCaddin v. McCaddin* (1911) 116 Md. 567, 82 Atl. 554, *supra*.

So, on a bill for limited divorce, the court said, *arguendo*: "In the case of the death of one of the parties . . . alimony ceases." *Hood v. Hood* (1921) 188 Md. 355, 15 A.L.R. 774, 113 Atl. 895, *supra*.

In *Wagner v. Wagner* (1908) 132 Mich. 343, 93 N. W. 889, *supra*, the decree was that alimony be paid in certain monthly instalments so long as the wife should maintain the youngest child of the defendant, and until the child arrived at fourteen years of age, when a smaller amount was to be paid monthly. Other provisions were made, the whole to be in lieu of dower and any interest she had or might have in the real or personal property of the defendant. While declining to pass on the question of the power of the court to determine that allowance should be in lieu of all her other interests in her husband's property, while living and at his death, the court declared: "According to the

absolute terms of this decree, she would have no interest in his estate in the event of his death at any time, except that a fund should be set aside to secure to her the monthly allowance decreed. We think the decree for separate maintenance should end with his death, and that then she should be left to her interests in his estate according to the law."

In *Rogers v. Vines* (1846) 28 N. C. (6 Ired. L.) 293, *supra*, it appeared that, on a limited divorce, the court had awarded alimony and a separate maintenance to the wife under the statute permitting the court to assign to her separate use such part of the real and personal estate of the husband as the court shall think fit, not exceeding one third part thereof, as the justice of the case may require, which shall continue until a reconciliation shall take place between the parties; and the husband, on her death, having sued to recover slaves assigned to the wife under the decree, the court said, *arguendo*, that alimony, in its nature, "is a provision for a wife separated from her husband; and it cannot continue after reconciliation, or the death of either party. There is no occasion for it after the death of the husband; for she then becomes entitled to dower and a distributive share, though divorced a mensa et thoro; unless, indeed, she should lose dower by leaving her husband and living in adultery."

Where a decree for a divorce from bed and board and for alimony in gross had been made, and the alimony paid, in *Taylor v. Taylor* (1885) 93 N. C. 418, 58 Am. Rep. 460, the husband died seized of land which he devised to another than his wife. She sought her dower right, setting up the decree, which recited that, in consideration of the alimony, "he is hereby discharged and acquitted from all liability to maintain, support, and provide for the plaintiff in the future." Upon demurrer to the complaint, it was contended that, by the payment of the alimony, the husband's estate was discharged from all further liability for her support, and his estate was, therefore, not subject to her

dower. But the court declared: "This contention is founded on a mistaken notion of alimony and the relative rights of husband and wife upon a divorce a mensa et thoro. Alimony, in its legal sense, may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to the wife for her subsistence and livelihood during the period of their separation. . . . Instead of the allotment of a certain sum to be paid from year to year, the decree, in the case referred to in the pleadings, gave the plaintiff a sum in gross, which she consented to take in lieu of all future allotments, and the husband was thereby discharged from any liability to be charged with any other sums for her support during their separation. . . . When the alimony is allotted out of the specific property of her husband, . . . the property continues in the husband, and will revert in possession to him upon her death or reconciliation. For it is given to her until a reconciliation, and, notwithstanding the divorce, the husband will be entitled to his curtesy in her lands, and the wife to dower in his, just as if there had been no divorce."

Where the husband died pending his appeal from a decree for the wife's separate maintenance, the court, in affirming the decree, said: "Alimony is a proportion of the husband's estate allowed to the wife for her maintenance and support during the period of their separation, and only continues with their joint lives. It ceases with the death of either of the parties. . . . The death of the appellant, therefore, puts an end to the provision in favor of the appellee. It could not, however, affect her right to those instalments which, under the decree of the court, accrued before the death occurred." *Francis v. Francis* (1879) 31 Gratt. (Va.) 289.

But it is to be noted that in *Isaacs v. Isaacs* (1913) 115 Va. 562, 79 S. E. 1072, on a divorce from bed and board, the husband was ordered to pay to the wife monthly a certain amount "during her lifetime," and the court held that this charge was a lien against

the husband's property, and remanded the case for further proceedings. For a later appeal, see (1915) 117 Va. 730, L.R.A.1916B, 648, 86 S. E. 105.

In *Davidson v. Winteler* (1903) Rap. Jud. Quebec 13 B. R. 97, it was held, where the wife, in an action for separation from bed and board, was granted an alimentary allowance of a certain yearly sum, payable quarterly during her life, that the obligation did not continue after the death of her husband. An appeal was quashed for want of jurisdiction in (1903) 34 Can. S. C. 274.

There are, however, decisions which show a different view.

In *Smythe v. Banks* (1884) 73 Ga. 303, the question arose on the death of the husband, in this way: A decree for alimony had been granted the wife on separation. An agent of the husband held a note for him, secured by mortgage. The agent was appointed receiver to collect this money, and hold it subject to order of the court. After collection, the husband died. In a contest by the widow and a judgment creditor, with judgment prior to the decree, the money was awarded to the widow. On appeal the court said: "It is further provided, by § 1752 of the Code, after permanent alimony granted, upon the death of the husband the wife is not entitled to any further interest in his estate in her right as wife; but such permanent provision shall be continued to her, or a portion of the estate equivalent thereto shall be set apart to her. In this section there is no saving in favor of creditors; and it would seem from this section alone, where permanent alimony has been allowed the wife out of her husband's estate, and he dies, that then the same shall be continued to her, and that a portion of his estate equivalent thereto shall be set apart to her, and this without regard to the condition of the estate as to judgment debts or other claims against the estate. . . . So we hold that, when Charles Banks died, a provision for the support of his family, which is provided by a decree for alimony, took precedence of all claims against his estate. And it must follow from these

positions that the court below did right to order the money in the hands of the receiver to be paid upon the decree in favor of Louisa C. Banks."

In *Burr v. Burr* (1842) 10 Paige (N. Y.) 20, affirmed in (1843) 7 Hill, 207, the decree by the vice chancellor, as modified by the chancellor, gave the wife \$10,000 a year, payable quarterly during her life, and also provided that, if not paid quarterly, as it became due, it should still belong to the wife as her separate property, with power of disposal at her death, by an instrument in the nature of a will, if her husband survived her. The chancellor (10 Paige, 36) said: "And the objection that the vice chancellor was not authorized to decree a provision for the alimony of the wife which should continue beyond the life of the husband is clearly untenable. The statute authorizes the court to make such order and decree for the suitable support and maintenance of the wife out of his property as may be just and proper. 2 Rev. Stat. 147, § 53. And it certainly cannot be unjust or improper to compel a husband, whose wife has been driven from her home by his cruelty, or in consequence of his defilement of the marriage bed, to provide her a suitable support for the remainder of her life, instead of permitting him to dispose of his property to strangers at his death, leaving her entirely destitute."

This case was declared "not controlling" in the absolute divorce case of *Wilson v. Hinman* (1905) 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236 (see *infra*, III. a, under "Lack of power"), where the court pointed out that, in the *Burr* Case, the statute "provided that the court might make decree for the suitable support and maintenance of the wife by the husband, 'or out of his property, as may appear just and proper' (2 R. S. 147, § 54)," and said: "Now the provision is that the court may require the defendant to provide for the support of the plaintiff as justice requires (Code Civ. Proc. § 1759). Thus the court is now empowered only to impose a personal obligation upon the defendant."

III. Absolute divorce.

a. Restricted view.

There are a number of cases which take the view that, in absolute divorce, a provision for regular, periodical payments to the wife for her maintenance and support should not relate to periods after the death of the husband; or, at least, that the presumption is that such a provision will not embrace such periods unless they are specifically included.

Arkansas.—*Kurtz v. Kurtz* (1881) 38 Ark. 119; *Brown v. Brown* (1881) 38 Ark. 324; *Casteel v. Casteel* (1882) 38 Ark. 477.

Colorado.—*PARSONS v. PARSONS* (reported herewith) ante, 1038.

Illinois.—*Lennahan v. O'Keefe* (1883) 107 Ill. 620; *Stahl v. Stahl* (1885) 114 Ill. 375, 2 N. E. 160; *Craig v. Craig* (1896) 163 Ill. 176, 45 N. E. 153 (*arguendo*).

Maryland.—*Emerson v. Emerson* (1913) 120 Md. 584, 87 Atl. 1033.

Massachusetts.—*Knapp v. Knapp* (1883) 134 Mass. 353 (*arguendo*); *Stone v. Duffy* (1914) 219 Mass. 178, 106 N. E. 595 (*obiter*).

New York.—*Field v. Field* (1883) 66 How. Pr. 345, affirmed in (1885) 15 Abb. N. C. 434; *Johns v. Johns* (1899) 44 App. Div. 523, 60 N. Y. Supp. 865, affirmed in (1901) 166 N. Y. 613, 59 N. E. 1124; *Wilson v. Hinman* (1905) 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236; *Barnes v. Klug* (1908) 129 App. Div. 192, 113 N. Y. Supp. 325 (*arguendo*); *Whitney v. Whitney Elevator & Warehouse Co.* (1910) 106 C. C. A. 38, 183 Fed. 678 (*obiter*); *Faversham v. Faversham* (1914) 161 App. Div. 521, 146 N. Y. Supp. 569 (*arguendo*); *Gibson v. Gibson* (1913) 81 Misc. 508, 143 N. Y. Supp. 37 (*obiter*).

West Virginia.—*Martin v. Martin* (1890) 33 W. Va. 695, 11 S. E. 12 (not necessary to result).

Wisconsin.—*Maxwell v. Sawyer* (1895) 90 Wis. 352, 63 N. W. 283. See also *Lally v. Lally* (1912) 152 Wis. 56, 138 N. W. 651.

While the court, in *Kurtz v. Kurtz* (Ark.) *supra*, considered it within its discretion to fix the rules as to alimony, it refused to allow a decree

granting it for the life of the wife to stand without modification, and made it payable only for the joint lives of the parties. And in *Brown v. Brown* (1881) 38 Ark. 324, supra, in striking out of a decree of divorce a provision for a gross sum as alimony, to be paid in instalments, the court said that alimony "continues only during the joint lives of the parties, or, when there is a divorce from the bonds of matrimony, until the wife marries again." So, in *Casteel v. Casteel* (1882) 38 Ark. 477, supra, where a husband appealed from the decree granting alimony, the court said: "By the decree, as it now stands, although no definite time is fixed during which it is to continue, it will, from its nature, cease with the death of either party."

In the reported case (*PARSONS v. PARSONS*, ante, 1088) it was held that a divorced woman had no claim against the estate of her deceased divorced husband for sums not accruing during his life, under the decree of divorce providing that she should receive from him a certain sum "a month alimony for the support of plaintiff and her child as long as said plaintiff shall remain single and unmarried," such decree being based upon a written stipulation of the parties that the defendant in the divorce suit should pay the plaintiff said sum "per month so long as she shall remain single, for the full maintenance and support of herself and the minor child" of the parties. The court considers that, in the absence of disclosed intention, alimony does not survive the former husband's death. The court does not refer to *Van Gorder v. Van Gorder* (1912) 54 Colo. 57, 44 L.R.A.(N.S.) 998, 129 Pac. 226, where the appellate court, in affirming a decree of divorce giving the wife a gross sum, states that plaintiff was "given a judgment for \$8,000, as permanent alimony," and it refers to the judgment as "awarding alimony;" nor does it refer to *Cowan v. Cowan* (1891) 16 Colo. 335, 26 Pac. 934, where, on divorce, the same court spoke of a gross sum allowed the wife "as permanent alimony."

In *Lennahan v. O'Keefe* (1883) 107

Ill. 620, supra, the decree awarding the alimony stated that it should be payable in instalments "until further order of this court." The defendant died intestate, and the widow filed a bill for dower and for partition. One of the heirs filed a cross bill asking that dower might be assigned, and that her alimony might be modified or canceled. The court held that the widow was entitled to dower, and that the alimony decreed to the wife ceased at the death of her husband, and that the lands were discharged from that lien, except as there might be unpaid alimony which had accrued in his lifetime. The court, on appeal, said: "We have held that the court may, under proper circumstances, make an allowance for alimony once for all, and, also, that real estate may be decreed absolutely to the complainant; but that neither of these is justifiable only under exceptional circumstances, which have been pointed out. But that is not the question here. Here the payment of alimony is ordered to be made in instalments, and the right of revision of the question is expressly reserved, and the only question is, What effect has the death of the defendant upon such a decree? In the absence of language showing unequivocally that the intention was to bind the heir by such a decree, we are of the opinion that it does not do so, but that its life terminates with the life of the defendant. . . . Granted that, under our statute, the power of the court to allow alimony is broader than it was in England, still, until the power is exercised by the court, its mere existence is, to the present question, unimportant; and, when it is exercised, it must, and can, only be through its decree, and the decree must, upon its face, show the extent to which the court has exercised, or assumed to exercise, such power. The question in such case is, simply, Does the decree, by its terms, charge the payment of the alimony upon the heir? We cannot presume that it does so. The fact, if such it is, must affirmatively, and, as we have before observed, unequivocally, appear."

The foregoing case was cited in

Stahl v. Stahl (1885) 114 Ill. 375, 2 N. E. 160, *supra*, as authority for the statement that alimony in a divorce decree, of a certain sum per month, abates on the husband's death.

In *Craig v. Craig* (1896) 163 Ill. 176, 45 N. E. 153, reversing in part (1895) 64 Ill. App. 48, it was held that it was error to refuse payment of alimony already due, and to enter an order canceling such alimony. The husband was not dead in this case, but the court remarked: "The accruing of each and every of them was contingent upon the continued life of both the parties, for the general rule is that alimony will not accrue after the death of either party. Alimony decreed upon the dissolution of a marriage, if payable in instalments, is, unless otherwise specially provided, an allowance for the support of the beneficiary during the joint lives of herself and her divorced husband. The duty of support ends with the death of the beneficiary."

Where a decree of absolute divorce ordered \$400 to be paid to the wife each and every six months, without limit, the defendant died leaving a will by which he left the residue of his estate to a trustee, to pay therefrom \$800 annually to his former wife, during her natural life, the same to be paid semiannually. The petitioner sought both the \$800 per year under the will and the \$800 per year decreed by the judgment of divorce. But the court declared: "It is very clear that the allowance made to the wife by the decree of divorce was alimony pure and simple. It is so denominated in the judgment. It consists of an allotment of sums payable at regular intervals from year to year, and it is not declared to be a division of the estate; hence it must be construed as alimony. *Blake v. Blake* (1887) 68 Wis. 303, 32 N. W. 48. The general principle is well established, also, that alimony continues only during the joint lives of the parties. It ends when the husband dies." *Maxwell v. Sawyer* (1895) 90 Wis. 352, 63 N. W. 283.

In *Lally v. Lally* (1912) 152 Wis. 56, 138 N. W. 651, *supra*, in holding that the decree in a divorce case was a decree for alimony, and not a decree

of final division of the estate of the husband, the court said: "It is true the provision for payment by his heirs, executors, and administrators does not harmonize with the idea of alimony, for that ceases upon the death of the husband." (Probably nothing to the contrary was intended in *Kempster v. Evans* (1892) 81 Wis. 247, 15 L.R.A. 391, 51 N. W. 327, where quarterly payments to the plaintiff, on divorce, were to be made each year "during her natural life," in case she remained unmarried, and it was held that this was alimony, and not a final division; nor by the similar holding in *Norris v. Norris* (1916) 162 Wis. 356, 156 N. W. 778. See, in this connection, the annotation in 1 A.L.R. 1106.)

Lack of power.

In *Emerson v. Emerson* (1913) 120 Md. 584, 87 Atl. 1033, *supra*, where an agreement as to alimony, etc., had been embodied in a decree of absolute divorce, the court, in refusing to modify it as to alimony, etc., on the remarriage of the wife, said, *arguendo*: "It was not alimony as understood and followed under the Maryland law. It was not alimony, as the court, in the absence of the agreement, would have decreed. A mere recital of the provisions shows that, under our statutes and decisions, no such decree could have been passed if this appellant had not been in agreement upon it. It was a plain attempt upon his part to have allowed to his wife something more than, under the law, could have been allowed as alimony; and, as the learned judge below said, we 'should bind ourselves to the fact if we should treat that arrangement as one of alimony.' If for alimony, why did he bind himself to pay these annual sums up and until the death of the wife, irrespective of whether or not she survived him? Was not that providing more than he could have been compelled to provide under the terms of alimony? It is settled in this state that alimony ceases upon the death of either of the parties. *Wallingsford v. Wallingsford* (1823) 6 Harr. & J. (Md.) 485."

In *Martin v. Martin* (1890) 33 W. Va. 695, 11 S. E. 12, it was held to

be error, in granting a divorce to a wife, to decree an annual sum as alimony during her lifetime, as it could only have been granted during the joint lives; but the judgment was entirely reversed and a divorce granted to the husband.

—New York.

It is held in New York that the court has no power, in absolute divorce, to grant to the (plaintiff) wife a certain sum annually beyond the life of the husband, under a statute empowering the court, in the final judgment dissolving the marriage, to require the defendant to provide "for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties," on the ground that the court is empowered only to impose a personal obligation upon the defendant. *Wilson v. Hinman* (1905) 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236; *Field v. Field* (1883) 66 How. Pr. 346, affirmed in (1885) 15 Abb. N. C. 434; *Barnes v. Klug* (1908) 129 App. Div. 192, 113 N. Y. Supp. 325 (arguendo); *Whitney v. Whitney Elevator & Warehouse Co.* (1910) 106 C. C. A. 28, 183 Fed. 678 (arguendo).

In *Wilson v. Hinman*, supra, it was held that the obligation to comply with a provision of a decree of absolute divorce imposing upon the husband the duty of paying to the wife a certain sum annually as alimony, "so long as she may live," ceases with his death, although, in compliance with the decree, such payment has been secured by a mortgage of real estate. The court does not refer to *Miller v. Miller* (1822) 6 Johns. Ch. 91, where a decree of absolute divorce ordered "that the defendant pay to the plaintiff, or to her order, during her natural life, or until the future order of this court to the contrary, the annual sum of \$100," where the statute authorized the court, in dissolving a marriage where the wife is complainant, to make a further order compelling the defendant "to provide a suitable allowance to the complainant for her support as to the said court shall seem reasonable and just, having regard to the circumstances of

the parties respectively," etc. Rev. Laws 1813, chap. 102, § 5. Nor does the court refer to *Peckford v. Peckford* (1828) 1 Paige, 274, where, in deciding that there must be a divorce, the chancellor said that the husband must pay to the wife an annuity of a sum named "during her natural life." The court, however, in the *Wilson Case*, declared that the case of *Burr v. Burr* (1842) 10 Paige, 20, affirmed in (1843) 7 Hill, 207, was "not controlling," and pointed out that in the *Burr Case* (which was a case of limited divorce, see supra, II.), the statute "provided that the court might make a decree for the suitable support and maintenance of the wife by the husband, 'or out of his property, as may appear just and proper' (2 R. S. 147, § 54)" whereas, in the statute in question in the *Wilson Case*, the words "or out of his property" did not appear.

It was held in *Field v. Field* (1883) 66 How. Pr. 346, supra, that where a judgment dissolving the marriage provided that the defendant husband should pay the plaintiff the sum of \$50 per month, during her life, the obligation did not extend to periods after the husband's death. In affirming this case the court, in (1885) 15 Abb. N. C. 434, supra, declared *Burr v. Burr* (1842) 10 Paige, 20, affirmed in (1843) 7 Hill, 238, not to be in conflict; but the remarks of the court plainly indicate that the opinion of the chancellor in 10 Paige had not been read carefully.

In *Beach v. Beach* (1883) 29 Hun, 181, a decree dissolving the marriage at the suit of the wife having been made, providing that the defendant pay, during the lifetime of the plaintiff, and while she remained unmarried, the sum of \$365 in each year, in quarterly payments; and the husband having been thereafter discharged in bankruptcy from all debts existing on a day subsequent to the decree, and having died after paying, during his lifetime, all payments accruing during his lifetime, it was held that his estate was not liable for instalments falling due after his death. The court said: "It is not necessary to dispute the doctrine that, on a

divorce, alimony may be decreed to the wife, payable during her life. *Burr v. Burr* (1842) 10 Paige, 20. For the question is not as to the power of the court to make such a decree, but as to the effect of the subsequent discharge in bankruptcy. Inasmuch as there is a continuing duty, resting on the husband, during his life, to support his wife, from which no discharge in bankruptcy would relieve him, it is very possible that the obligation to pay alimony, which, after a divorce, takes the place of the ordinary duty of support, may, in like manner, be a continuing obligation from which he is not relieved by his discharge. But that question is not directly involved. For the husband, during his lifetime and after his discharge, did pay the alimony decreed. Now the obligation upon his estate, if there be one, must be a mere debt. The ordinary duty of a husband to support his wife has been ended by his death. Whatever now remains is nothing but the debt created by the judgment, and that was discharged by the bankruptcy proceedings."

In *Johns v. Johns* (1899) 44 App. Div. 533, 60 N. Y. Supp. 865, affirmed in (1901) 166 N. Y. 613, 59 N. E. 1124, the decree of divorce provided that the defendant should pay a certain sum monthly, during the wife's natural life, and should also pay premiums on policies on his life, payable to the plaintiff on his decease. Upon the death of the defendant, his former wife collected over \$21,000 on the policies, and entered a claim against his estate for six instalments of alimony. The appellate division, in referring to the judgment below, said: "The court, in dismissing the complaint, proceeded upon the ground that the provision in the decree of divorce, which directed the payment of alimony during the life of the plaintiff, was subject, in legal construction, to mean during the lives of both parties, and that, upon the death of the defendant, the binding force of the judgment in this respect came to an end. We think the court below was correct in such construction, and that the obligation to continue to pay alimony

ceased with the death of the defendant in the judgment. . . . We think, however, that it was not the intention of the court to decree any liability beyond the lifetime of the defendant, and that such intention is clearly gathered from the provisions of the present judgment. It first awards alimony during the lifetime of the plaintiff; it then makes provision for the protection of the plaintiff upon the death of the defendant; he was required to pay the premiums upon the insurance policies issued upon his life, which were payable to the plaintiff, and which only became due and payable upon his death. Thus, by the very terms of the judgment, the court contemplated and made a provision which should inure to the benefit of the plaintiff upon the decease of the defendant, and of this provision the plaintiff has received the benefits, and is now in the enjoyment of an estate nearly three times as large as that which she seeks to impound for her future protection."

When, after the death of the husband, the wife sued on an agreement, the court said: "When a decree of divorce is granted to an innocent wife against a guilty husband, the allowance of alimony to her is a continuance of his marital duty of support which the courts have power to compel him to furnish notwithstanding the dissolution of the marriage. This duty being upon him only during his lifetime, the courts cannot compel him to make provision for its continuance after his death. But he can voluntarily make such provision for support to continue after his death, by contract or otherwise, if he sees fit so to do. By the contract annexed to the complaint, appellants' testator agreed 'to make such payments for the term of her (plaintiff's) natural life,' and the modified agreement provided for the increased payments to be made according to the original contract. The appellants' testator could make such a contract if he desired." *Barnes v. Klug* (1908) 129 App. Div. 192, 113 N. Y. Supp. 325.

In *Whitney v. Whitney Elevator & Warehouse Co.* (1910) 106 C. C. A. 28,

183 Fed. 678 (*infra*, V.), the court said, *arguendo*: "Except for possible subsequent statutory changes, to none of which has our attention been called, the law of this state relevant to the subject-matter of this appeal is fully and definitely set forth in two decisions: *Johns v. Johns*, *supra*, and *Wilson v. Hinman* (1905) 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236. With the conflict of law in other states we have no concern. Briefly stated, the law of New York is this: When a suit by a wife for absolute divorce comes before a court for determination, and it grants the relief prayed for, it is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of support which the divorce cuts off, and is also authorized to require security for the payment of the allowance. But since the right of support, if the marital relation were not disturbed, terminates with the death of the husband, the court has no power to enlarge it, and impose a charge upon the deceased husband's estate for support of the wife, who secures a divorce, after his death. The reasons for this will be found in the exhaustive opinions cited *supra*."

In *Faversham v. Faversham* (1914) 161 App. Div. 521, 146 N. Y. Supp. 569, the court said, *arguendo*: "Although the decree allows alimony to the wife 'so long as she shall live,' the obligation to pay ceases on the death of the husband, and any lien given by him to secure the payment of the alimony terminates at the same time. *Wilson v. Hinman* (1905) 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236; *Johns v. Johns* (1899) 44 App. Div. 533, 60 N. Y. Supp. 889, affirmed on opinion below in (1901) 166 N. Y. 613, 59 N. E. 1124." (The *Faversham* Case held that the wife's executor could not recover arrears of alimony, and was overruled in *Van Ness v. Ransom* (1915) 215 N. Y. 557, L.R.A.1916B, 852, 109 N. E. 593, Ann. Cas. 1917A, 580.)

b. Broader view.

Other cases take the view that whether a provision for periodical

payments to the wife in absolute divorce, for support and maintenance, abates on the husband's death or not, depends upon circumstances.

California.—*Ex parte Hart* (1892) 94 Cal. 254, 29 Pac. 774.

Illinois.—*Storey v. Storey* (1888) 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329 (*arguendo*).

Iowa.—*O'Hagan v. O'Hagan* (1857) 4 Iowa, 509 (*arguendo*).

Kentucky.—*Fishli v. Fishli* (1822) 2 Litt. 338.

Maine.—*Stratton v. Stratton* (1885) 77 Me. 373, 52 Am. Rep. 779.

Michigan.—*Seibly v. Person* (1895) 105 Mich. 584, 63 N. W. 528 (*arguendo*); *Creyts v. Creyts* (1906) 143 Mich. 375, 114 Am. St. Rep. 656, 106 N. W. 1111 (*arguendo*).

Minnesota.—*Fitzpatrick v. Fitzpatrick* (1914) 127 Minn. 96, 148 N. W. 1074.

Utah.—*Murphy v. Moyle* (1898) 17 Utah, 113, 70 Am. St. Rep. 767, 53 Pac. 1010 (*arguendo*).

In *Ex parte Hart* (Cal.) *supra*, the petitioner was imprisoned for refusal to pay alimony, as he claimed that the decree was void because it did not specify the period during which the alimony was to be paid. The court held it sufficiently certain, since "it intends the payment of alimony during the life of the wife, or until modified by the court. Such a decree the court had power to make in granting a divorce for the offense of the husband. Civil Code, § 139." The statute (§ 139) provided: "When a divorce is granted for an offense of the husband, the court may compel him . . . to make such suitable allowance to the wife for her support, during her life or for a shorter period, as the court may deem just. . . ."

In case of a "consent decree" for alimony, in *Storey v. Storey* (Ill.) *supra*, the court declared: "The right of the divorced wife to have the payment of alimony continued to her out of the estate of her deceased husband will depend upon the nature and terms of the decree allowing alimony." The alimony was payable in instalments "for so long as she may be and remain sole and unmarried." As to the claim

made that those words were merely to designate the time, during the life of the husband, when he should cease to pay the alimony, the court said: "We think that the words in question are to be interpreted according to their natural sense and meaning. Their natural meaning is that alimony shall be paid for so long a time as Mrs. Storey shall remain unmarried, whether before or after her husband's death. This construction receives support from the language subsequently employed, wherein it is ordered that 'the same sum' shall be paid 'every three months thereafter during the time aforesaid.' The words, 'during the time aforesaid,' designate a continuous period, during which payment is to be made, and not a mere limit at which payment is to cease." (In *Adams v. Storey* (1890) 135 Ill. 448, 11 L.R.A. 790, 25 Am. St. Rep. 392, 26 N. E. 582, the widow claimed dower in addition to the alimony granted in *Storey v. Storey* (Ill.) supra, but the court held that the consent decree was intended to be in lieu of dower, and refused it.)

In *O'Hagan v. O'Hagan* (Iowa) supra, in holding that the husband's death abated a proceeding by the wife supplemental to a decree of divorce, for modification of such decree as to alimony, so as to give her a monthly allowance, the court said, *inter alia*: "In this country, however, the statutes of the different states generally authorize that where a divorce of either kind is granted, there may also be a decree for alimony, or some equitable and fair division of the property. In making such decree, our courts are not, in many of the states, confined to giving to the wife sums of money, payable at regular periods; nor to giving her money merely; but may give her absolutely a specific portion of her estate or property, whether real or personal. And in decreeing her sums of money, in the first instance, or in making the proper and equitable order in relation to their property and her maintenance, the decree may provide for the payment thereof from year to year, for a specified period, or may

provide even that it shall continue during her life."

Where the statute provided that "the court pronouncing the decree of divorce shall regulate and order the division of the estate, real and personal, in such way as to them shall seem just and right, having due regard to each party and the children, if any: Provided, however, that nothing herein contained shall be construed to authorize the court to compel either of the parties to divest himself or herself of the title to the real estate," the court decreed the wife, on dissolving the marriage, a moiety of the husband's personal estate, and the use for life of one third of his real estate. *Fishli v. Fishli* (Ky.) supra.

(It may be noted that in *Tyler v. Tyler* (1896) 99 Ky. 31, 34 S. W. 898, it was held, that in granting an absolute divorce, the court may allow the wife a lump sum of money, and she may issue an execution against her husband's real estate therefor, notwithstanding the statute provides that "no such order for maintenance of children or allotment in favor of the wife shall divest either party of the fee-simple title to real estate.")

In *Stratton v. Stratton* (Me.) supra, during the pendency of cross libels for divorce, the parties entered into an agreement that, in case of divorce entered upon the husband's libel, two referees should determine what alimony the wife should receive, and how she should receive it; and that the report of the referees should be made a part of the decree, and binding on the parties. Their award and this agreement were extended on the record. The award was to the wife "during her natural life, an annuity . . . to be paid quarterly." Upon a decree of divorce, the court ordered "that alimony according to the award . . . be received and paid as therein provided." The defendant paid for a time, then ceased paying, and finally died. An action of debt was brought against the administrator to recover the instalments past due, both before and after the death. It was declared, on appeal, that "the court, in adopting the award of the referees as a part of

its decree, gave alimony to the wife 'during her natural life.' That the court has the power so to do, where it may be granted at all, seems to be very strongly implied by the terms of the statute, which provide that the court may order so much of the husband's real estate, or the rents and profits thereof, as is necessary, to be assigned and set out to the wife for life. Moreover, where the language of the decree expressly states that it is to continue after the death of the husband, the authorities hold that it will so continue."

In *Seibly v. Person* (1895) 105 Mich. 584, 63 N. W. 528, an absolute divorce had been granted the wife, and the consideration of alimony reserved. But, before further steps were taken, the husband died testate, and the former wife sought alimony out of the estate. The court, while considering it to be the general rule that a proceeding to enforce alimony, at the common law, abates on the death of either party, stated: "But, under our statute (How. Anno. Stat. §§ 6245, 6247), the court may decree suitable alimony, and it may award a sum in gross, which becomes presently payable; or the court may sequester the real and personal estate, and appoint a receiver thereof, and cause the personal estate and the rents and profits of the real estate to be applied to the payment of the alimony. It is proper practice for the court to determine, in the first instance, the right to decree, and to reserve the question of alimony for subsequent adjudication. See *Rea v. Rea* (1884) 53 Mich. 40, 18 N. W. 551. That was attempted to be done in this case, and, if it results that the death of the husband ousts the court of jurisdiction to award permanent alimony, it follows that in every case where a decree is entered in the form here employed there must be a period of greater or less duration, during which the wife is at the risk of losing the interest in her husband's estate which she would have under the Statute of Distributions but for the divorce, and without opportunity afforded her by the court to have awarded her a proper allowance of alimony."

In *Creyts v. Creyts* (1906) 143 Mich. 375, 114 Am. St. Rep. 656, 106 N. W. 1111, where the court, in dissolving a marriage, awarded to the wife a lump sum "alimony, in lieu of dower," which had been paid, on holding that a provision for a monthly sum for the support of a child did not abate by the death of the husband, the court said: "The original decree was not discharged by the death of the complainant. No one would contend that the provision for the wife would have been discharged by his death, or before payment, or before it became due."

In *Fitzpatrick v. Fitzpatrick* (1914) 127 Minn. 96, 148 N. W. 1074, where a divorce was granted to the husband, the plaintiff, for cruel and inhuman treatment, the trial court awarded to defendant, under authority of the statutes, first, a life estate in the family homestead, valued at \$4,500, together with the household furniture and effects; and, second, the sum of \$50,000 as alimony, payable, two payments of \$1,000 each, within a certain time, and the balance, or \$48,000, in quarterly payments of \$750 each, with interest on the deferred payments after they became due and payable, and the judgment was made a lien upon certain specified real property. The appellate court stated that "the statutes provide (Gen. Stat. 1913, § 7128) that such award shall be made in cases of this kind as the situation of the parties, the circumstances of the case, and the ability and financial worth of the husband, the court shall deem fair and just, 'not exceeding in value the one third thereof;'" and later on said: "The general rule, supported by the weight of authority, in respect to an award of alimony in a definite sum of money, payable in instalments at future dates, in the absence of some statute or provision in the decree to the contrary, is that the allowance terminates at the death of either party. 1 R. C. L. 933; *Wilson v. Hinman* (1905) 182 N. Y. 408, 75 N. E. 236, and notes to the report of that case in 108 Am. St. Rep. 820, and 2 L.R.A.(N.S.) 232. We have no statute in this state covering this subject, and if the rule stated applies here,—a

question we do not stop to determine,—then the period during which the alimony must be paid under this decree depends for its continuance upon the life of plaintiff, and not upon the life of defendant,—the reverse of what was intended by the court below. We fully concur with the trial judge, and for reasons stated by him, that defendant is entitled, under the facts of this case, to liberal support from plaintiff during the remainder of her life, and, to effect this end, conclude that the judgment appealed from should be so modified that the matter will be put beyond future controversy." And it was held that, instead of \$50,000, the amount should be \$3,000 per year, payable quarterly (besides \$3,000 in thirty days), and "that the judgment and the right of defendant to have and receive the payments shall continue after the death of plaintiff, should defendant survive him, and be a charge upon and against his estate." (It should be noted that if the court, by the above expression, "an award of alimony in a definite sum of money, payable in instalments at future dates," meant to refer to the award of a sum in gross, payable in instalments, then it had mistaken the decision in *Wilson v. Hinman* (1905) 182 N. Y. 408, 2 L.R.A.(N.S.) 232, 108 Am. St. Rep. 820, 75 N. E. 236, *supra*, III. a, as that case related to a *yearly* sum, and not to a sum in gross, and it appears that the court in that case considered that, under the New York statute, there could be no award of a sum in gross as alimony, except by consent.)

In *Murphy v. Moyle* (1898) 17 Utah, 113, 70 Am. St. Rep. 767, 53 Pac. 1010, a case relating to allowance for the support of a child, the court said that in absolute divorce, "whether or not the divorced wife and minor children, or any of them, are entitled to have the payment of alimony or money for their support continue after the death of the deceased, depends on the nature and terms of the decree allowing the same; the statute providing: "When a divorce is decreed, the court shall make such order in relation to the children and property of the parties,

and the maintenance of the wife, and such portion of the children as may be awarded to her, as may be just and equitable."

It may be noted that in *Lawton's Petition* (1878) 12 R. I. 210, the court said that, under R. I. Rev. Stat. chap. 137, § 8, allowing the wife, "out of the real or personal estate of the husband, or out of both, such alimony as the court shall think reasonable, not exceeding the use of one moiety of his real estate, during the life of the wife, and the property of one half of his personal estate," the wife might have had the use of one half of the husband's real estate for life and one half of his personal estate outright; but, the decree being for an annual allowance of \$100 for life, and not making it a lien upon real estate, the only claim the woman had, if any, would be that of a judgment creditor in the man's estate upon his decease; not deciding that she had any.

c. English cases.

The Matrimonial Causes Act (1907) 7 Edw. VII. chap. 12, § 1 (1) (repeals § 32 of the Act of 1857 and § 1 of the Act of 1866, and) enables the court, on any decree for dissolution or nullity of marriage, to "order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable;" and § 1 (2) provides that "in any such case the court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding subsection." That order may be modified from time to time. The order for securing the property to the wife can only be modified if there is inserted therein an express clause reserving that power of modification. See *Naish v. Naish*

(1916) 32 Times L. R. 487; *Dunbar v. Dunbar* L. R. [1909] Prob. 90, 78 L. J. Prob. N. S. 35, 100 L. T. N. S. 380, 25 L. T. N. S. 230.

The Statute 20 & 21 Vict. 1857, chap. 85, § 32, was substantially the same as the present subsec. (1) of § 1 of the present statute. The Act of 1866 (29 Vict. chap. 32), which was worded with obscurity, evidently intended to provide in its § 1 that in cases where the husband had no property on which to secure the sums ordered, the court might order him to pay to the wife during their joint lives such monthly or weekly sums for her maintenance and support as the court might think reasonable.

In *Naish v. Naish*, supra, the court ordered £75 per annum secured to the divorced wife for her life, whether she survived her husband or not, with liberty to her to apply for an increase, and also that an additional £75 per year be paid to her during their joint lives, with liberty to either to apply for a modification.

It has been held that there is no power under the foregoing subsec. 2, to order payment to the wife "during her life," except by consent. *Maidlow v. Maidlow*, L. R. [1914] Prob. 245.

In *Kirk v. Kirk*, L. R. (1902) Prob. 145, 71 L. J. Prob. N. S. 78, 87 L. T. N. S. 148, the court ordered that a gross sum of £6,000 for permanent maintenance be paid to the wife, who had obtained a decree dissolving the marriage, following *Morris v. Morris* (1861) 31 L. J. Prob. & Div. N. S. 33. See also *Stanley v. Stanley*, L. R. [1898] Prob. 227, 79 L. T. N. S. 104, 68 L. J. Prob. N. S. 227, 47 Week. Rep. 272. These cases were overruled in *Twentyman v. Twentyman* L. R. [1903] Prob. 82, 72 L. J. Prob. N. S. 36, 51 Week. Rep. 575, 88 L. T. N. S. 571, holding that there was no power under the statute to order a gross sum paid over to the wife, and the court ordered the gross sum to be secured for the divorced wife during her life.

IV. Arrears at time of husband's death.

Arrears of instalments accruing during the life of the husband may be recovered from his estate after his death.

Massachusetts.—*Knapp v. Knapp* (1883) 134 Mass. 353; *McIlroy v. McIlroy* (1911) 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934 (separation); *Stone v. Duffy* (1914) 219 Mass. 178, 106 N. E. 595 (obiter).

Michigan.—*Martin v. Thison* (1908) 153 Mich. 516, 18 L.R.A.(N.S.) 257, 126 Am. St. Rep. 587, 116 N. W. 1013.

New York.—See *Van Ness v. Ransom* (1915) 215 N. Y. 557, L.R.A.1916B, 852, 109 N. E. 593, Ann. Cas. 1917A, 580. See also *Faversham v. Faversham* (1914) 161 App. Div. 521, 146 N. Y. Supp. 569 (obiter).

Ohio.—*McCown v. Weiskittle* (1879) 4 Ohio L. J. 803.

Rhode Island.—*Gilbert v. Hayward* (1914) 37 R. I. 303, 92 Atl. 625 (separation).

Tennessee.—See *Sloan v. Cox* (1817) 4 Hayw. 75 (limited divorce).

Virginia.—*Francis v. Francis* (1879) 31 Gratt. 289 (supra, II.).

Wisconsin.—See *Guenther's Appeal* (1876) 40 Wis. 115 (possibly implied.)

England.—*Re Stillwell* [1916] 1 Ch. 365, 85 L. J. Ch. N. S. 314, 114 L. T. N. S. 604, 32 Times L. R. 285, 60 Sol. Jo. 322.

Smith v. Smith (1792) 1 Root (Conn.) 349, sometimes referred to in this connection, seems to suggest in its brief report the death of the wife rather than that of the husband.

In *Knapp v. Knapp* (1883) 134 Mass. 353, supra, the court declared: "As alimony out of the husband's property is a provision for the support of the wife by him, the obligation to pay it in the future necessarily ceases with the death of the husband, but amounts already due at the time of his death are in the nature of a debt then existing, and are payable out of his estate. . . . Such arrears, however, are not absolute debts." The court said further: "From the peculiar nature of a decree for alimony, and the right and power in the court to revise or alter it at any time, execution is not necessarily to issue for the full amount of arrears of alimony found to have been due and unpaid at the time of the death of the defendant's testator; but it is in the discretion of the court, on the facts that may be proved,

to determine for what sum, if for anything, the decree for alimony shall be enforced by an execution against his estate."

Under a statute permitting a court of probate to appoint commissioners to examine and adjust all claims and demands against deceased, the court may allow against the estate of a decedent claims for alimony which accrued between a divorce decree and the remarriage of decedent's wife in his lifetime, and is not precluded from so doing by the fact that jurisdiction over decrees for alimony is, by statute, vested in the chancery court. *Martin v. Thison* (1908) 153 Mich. 516, 18 L.R.A.(N.S.) 257, 126 Am. St. Rep. 537, 116 N. W. 1013, *supra*.

"The estate of a deceased husband may be held, at the suit of his wife, for alimony which had accrued prior to his death." *Faversham v. Faversham* (1914) 161 App. Div. 521, 146 N. Y. Supp. 569, *supra* (obiter), overruled on other grounds in *Van Ness v. Ransom* (1915) 215 N. Y. 557, L.R.A. 1916B, 852, 109 N. E. 593, Ann. Cas. 1917A, 580.

In *Van Ness v. Ransom* (1914) 164 App. Div. 483, 150 N. Y. Supp. 251, where the wife, after the husband's death, claimed many years' arrears of alimony under a decree of divorce, the court held for the defendants upon defenses of a release, payments under it, and the Statute of Limitations. After this determination the wife died, and the court of appeals granted a motion by her executor to substitute him as plaintiff in (1915) 215 N. Y. 557, L.R.A. 1916B, 852, 109 N. E. 593, Ann. Cas. 1917A, 580, stating in their opinion: "We are not concerned on this motion with any defense which the defendants may have to the judgment of 1867, other than the one that the liability thereby created for alimony in arrears does not survive the wife's death." The above judgment of the appellate division was affirmed without opinion by the court of appeals in *Parsons v. Macfarlane* (1917) 220 N. Y. 605, 115 N. E. 1046.

In Ohio it was held, in *McCown v. Weiskittle* (Ohio) *supra*, that a decree granting alimony might be revived

against the husband's administrator, to recover the instalments due at the time of his death.

In *Sloan v. Cox* (1817) 4 Hayw. (Tenn.) 75, *supra*, the only defense made by the executor to the attempt to have the arrears of alimony decreed on a divorce from bed and board paid from the estate was that the complainant was a person of lewd habits; which point the court decided against him solely on the statute governing the question of suspension of the decree.

It was held in *Re Stillwell* (Eng.) *supra*, where, on judicial separation, permanent alimony had been ordered the wife, that she, on the husband's death, might collect the arrears from his solvent estate.

Limitation of the rule.

(It seems that, even in the husband's lifetime, the ecclesiastical courts were not disposed to allow collection of arrears of long standing. See *Wilson v. Wilson* (1830) 3 Hagg. Eccl. Rep. 329, note, 162 Eng. Reprint, 1175.)

By the quotation in the preceding subdivision from *Knapp v. Knapp* (1883) 134 Mass. 353, it appears that the court, in its discretion, may limit the amount of arrears to be collected from the husband's estate. In that case the wife had allowed the arrears to accumulate for more than twenty years, and the decision aforesaid reversed an order dismissing her writ of scire facias against the husband's executrix, and stated that the statutory presumption of payment "would affect only those payments which, by the decree, were to be made more than twenty years before the date of this writ."

V. Consent.

When an agreement between the parties as to an allowance to the wife, although she survives the husband, is embodied in the decree, the courts will enforce it. *Whitney v. Whitney Elevator & Warehouse Co.* (1910) 106 C. C. A. 28, 183 Fed. 678 (New York); *Pryor v. Pryor* (1908) 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700; *Stratton v.*

Stratton (1885) 77 Me. 373, 52 Am. Rep. 779 (supra, III. b); Emerson v. Emerson (1913) 120 Md. 584, 87 Atl. 1033 (supra, III. a, under "Lack of power"). See also Storey v. Storey (1888) 125 Ill. 608, 1 L.R.A. 320, 8 Am. St. Rep. 417, 18 N. E. 329 (supra, III. b).

In *Whitney v. Whitney Elevator & Warehouse Co.* (1910) 106 C. C. A. 28, 183 Fed. 678, supra, the court affirmed the judgment of the United States circuit court for the western district of New York in (1910) 180 Fed. 187, where it appeared that some years after husband and wife, together with a trustee, had entered into an agreement of separation, by which the wife agreed at any time to release her inchoate right of dower, when requested, in any of her husband's property, and the husband agreed, among other things, to pay to the wife \$3,000 per year, in equal monthly payments, during the time she should remain his wife or widow, or during her life, if she should not marry until after his death, he to give security therefor, the wife was granted an absolute divorce from the husband for his fault. Counsel for the parties agreed on the form of the decree, which provided that the defendant pay to the plaintiff \$3,000 per year, "for and during her natural life, as a suitable allowance to . . . the plaintiff, for her maintenance and support," and that the said sum of \$250 monthly be paid to the trustee as trustee for the plaintiff, and be paid by him to her for her support and maintenance. The decree provided for a new security for the annuity, and differed in certain matters from the old agreement, but provided that the old agreement should "remain unimpaired and in full force, except," etc. It was held, in an action to foreclose the new security, that, by the agreement embodied in the decree, the liability for the annuity continued after the husband's death. The court refers to the provision in the decree that the allowance of \$3,000 per annum should continue during the wife's natural life, irrespective of whether the husband lived or died, as one that, in New York, "the court had no power to make except by consent." An appli-

cation for a writ of certiorari to review this decision was denied in (1911) 219 U. S. 588, 55 L. ed. 348, 31 Sup. Ct. Rep. 472.

It may be noted that in *Fleming v. Peterson* (1897) 167 Ill. 465, 47 N. E. 755, the bill in equity alleged a decree of divorce and alimony from defendant, and a subsequent contract in writing, whereby he agreed to pay her alimony quarterly, "until her decease or remarriage." The payment having ceased, the complainant asked for an accounting, the ascertainment of the amount due her, and for a payment of the annuity "according to the terms of the contract." It was declared that it was within the equity jurisdiction of the court to enforce the contract.

In *Carson v. Murray* (1832) 3 Paige (N. Y.) 483, there seems to have been no divorce, but there was an agreement for immediate separation, the amount of the alimony and the method of carrying it out to be settled by arbitrators. The precise terms were not in evidence, but the court seems to have presumed that there was a covenant, on the part of the husband, with the trustees, to pay an annuity to the wife for life in lieu of dower and of all other claims upon the estate of the husband, either before or after his death. The husband died intestate. The court said: "I cannot see that there is anything in the contract, as proved, to render it invalid. It appears to have been an agreement for an immediate separation; the amount of alimony to the wife, and the particular mode of carrying it into effect, to be settled by the arbitrators selected by the parties. . . . But, as it appears a lawyer was employed to put it into form, in the absence of all proof to the contrary, I think that it may fairly be presumed there was a covenant on the part of the husband, with the trustee, to pay the annuity to the wife for life, in lieu of dower and of all other claims upon the estate of the husband, either before or after his death, according to the terms of the award." See also *Barnes v. Klug* (1908) 129 App. Div. 192, 113 N. Y. Supp. 325 (supra, III. a, under "Lack of power").

VI. *Miscellaneous.*

Where the value of the husband's property, real and personal, did not exceed \$1,000, and the trial court, in a decree of divorce, had awarded the wife \$500 alimony and the further sum of \$10 per month continuing alimony, payable monthly, the appellate court struck out the monthly sum and said: "We are fully persuaded that the allowance of \$10 per month indefinitely for the support of the plaintiff, in addition to the sum of \$500 awarded her, is excessive. We do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time." *McGechie v. McGechie* (1895) 43 Neb. 523, 61 N. W. 692, following *Cochran v. Cochran* (1894) 42 Neb. 612, 60 N. W. 942.

It may be observed that in *Bauman v. Bauman* (1857) 18 Ark. 320, 68 Am. Dec. 171, it appears that, on an absolute divorce, the husband was ordered to pay to the wife \$250 every year "during her natural life."

So, in *Richmond v. Richmond* (1838) 2 N. J. Eq. 90, on an absolute divorce, an annual sum was to be paid to the wife or to her order "during her natural life, or until the future order of this court to the contrary."

In 3 Salk. 138, 91 Eng. Reprint, 738, there is the following note: "A divorce for adultery was anciently a vinculo matrimonii; and therefore, in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery the parties might marry again; but in *Foliamb's Case*, anno. 44 Eliz., in the Star Chamber, that opinion was changed; and Archbishop Bancroft, upon the advice of divines, held that adultery was only a cause of divorce a mensa & thoro." Chancellor Kent (2 Com. 104) follows this view of the old law, citing Bracton, fol. 92, the passage in Salk, and the report of *Foliamb's Case* in F. Moore, 683, pl. 942, 72 Eng. Reprint, 838, where it appears that the adultery was that of the wife. (For a discussion of *Foliamb's Case*, see 2 Scribner on Dower, 2d ed. p. 544.) B. B. B.

W. F. MYERS, Plff. in Err.,

v.

STATE OF OKLAHOMA.

Oklahoma Criminal Court of Appeals — June 6, 1921.

(— Okla. Crim. Rep. —, 197 Pac. 884.)

Rape — liability of husband.

1. Part of subdivision 8 of the statute defining rape provides "that in all cases of collusion between the accused and the husband of the female to accomplish such act, both the husband and the accused shall be deemed guilty of rape." Held that, where it appears that there is no collusion and no common felonious purpose between the husband and the actual perpetrator to commit the act, the husband alone cannot be guilty of raping his wife.

[See note on this question beginning on page 1063.]

Trial — instruction — rape by husband.

2. Where a husband is charged with rape committed on his wife, an instruction to the jury defining rape, given in the language of the statute

(Rev. Laws 1910, § 2414), except that it omits the phrase "not the wife of the perpetrator," is erroneous in that it omits one of the elements of the offense named in the statute.

Rape — coercion by husband — liability of perpetrator.

3. Where the perpetrator of the offense believed that he was having sexual intercourse with a common prostitute, the fact that the female was coerced by her husband to submit to such act will not of itself, without a common felonious intent, constitute collusion between the accused husband and the actual perpetrator.

Evidence — sufficiency.

4. The evidence as a whole, as recited in the opinion, was insufficient to support the verdict.

Statute — construction — penal offense — scope.

5. Where an offense is defined by statute and its application to enumerated conditions prescribed, it is implied that it shall not apply to other conditions not enumerated.

[See 25 R. C. L. 981.]

ERROR to the District Court for Bryan County (Crook, J.) to review a judgment convicting defendant of rape. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Robert Crockett and W. B. Stone, for plaintiff in error:

Defendant was not guilty of rape, and the court erred in refusing to give in charge to the jury his special instruction No. 5.

Mulligan v. Com. 84 Ky. 229, 1 S. W. 417; State v. Haines, 51 La. Ann. 731, 44 L.R.A. 837, 25 So. 372; State v. Dowell, 106 N. C. 722, 8 L.R.A. 297, 119 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681.

To constitute rape by means of threats of physical violence, such threats must be accompanied by an apparent power of execution preventing resistance, and existing at the time of the commission of the act.

Sowers v. Territory, 6 Okla. 436, 50 Pac. 257.

Where the testimony of prosecutrix bears upon its face inherent evidence of improbability, to sustain a conviction, there should be corroboration by other evidence as to the principal facts relied on to constitute the crime.

Allen v. State, 10 Okla. Crim. Rep. 64, 134 Pac. 91; Morris v. State, 9 Okla. Crim. Rep. 252, 131 Pac. 731; Palmer v. State, 7 Okla. Crim. Rep. 557, 124 Pac. 928; Wines v. State, 7 Okla. Crim. Rep. 450, 124 Pac. 466.

Messrs. S. P. Freeling, Attorney General, and W. C. Hall, Assistant Attorney General, for the State.

Bessey, J., delivered the opinion of the court:

On the 15th day of March, 1919, in the district court of Bryan county, W. F. Myers was convicted of rape upon the person of Goldie Myers, committed on May 15, 1918, and his punishment was fixed at imprisonment in the state penitentiary for

a term of fifteen years. From this judgment and sentence he appeals.

The evidence disclosed that W. F. Myers, plaintiff in error, herein called the defendant, was a moral degenerate, who, by force or persuasion, induced his wife, Goldie Myers, to lead the life of a prostitute. The information charges that the defendant, by means of a certain dangerous and deadly weapon, a knife which he held in his hand, forcibly compelled Goldie Myers, his wife, against her will, to submit to sexual intercourse with one Arn Adcock, and that she was prevented from offering resistance to the act of sexual intercourse by reason of the defendant's threats to kill her, and threats of immediate great bodily harm, which the defendant then had the apparent power to execute.

The testimony of Goldie Myers discloses that she was married to the defendant in December, 1917, when she was just past seventeen years of age; that she then resided in the country, 4 miles west of Durant; that the defendant was a man of uncertain habits and occupation; that in May, 1918, there was a show at the town of Mead, in Bryan county, giving nightly performances, and that defendant and his wife went to Mead and took lodgings in a hotel there, where they remained all night; the following night, at their room at the hotel, the defendant told witness that he was going to arrange with men to have sexual intercourse with her, and told

her to charge and collect for it; she objected, and that he told her that if she did not have sexual intercourse with men he would cut her damned head off, and that while this threat was being made he held an open knife at her throat; that later, after dark, they went walking up the railroad track, and after they had gone some distance defendant told her there would be some men come, and instructed witness to have intercourse with them; that she protested, and he told her she had to do it, while he held the open knife in his hand. Presently three men or boys came, and defendant told witness to go ahead and get the money. He told witness to stay where she was, and he retired a short distance away, leaving this man, Arn Adcock, with whom she had sexual intercourse, collecting the money and turning it over to the defendant; then the other two boys came in turn to where witness was, and had sexual intercourse with her; after that they walked back to the show, where the defendant made arrangements with three more men, and they all got into a car and went into the country, and witness there had sexual intercourse with two of them, and attempted intercourse with the third; that when alone with the defendant she protested, and he repeated his threats to do her great bodily harm if she failed to carry out his instructions; that no protests were made in the presence of these men, and from all that appears from her testimony these men did not know that she was acting against her will; that the defendant was not in the immediate presence of the parties when these sexual acts were performed, but remained in speaking distance, some 50 or 60 feet away.

On cross-examination the witness Goldie Myers said she first had sexual intercourse with other men at Leigh, about three months after her marriage to defendant. Later she had intercourse with men at her room in a hotel at Mead, at Coalgate, at Medill, Poteau, Bonham, Texas,

and Dennison, Texas. In each case she claimed that the intercourse was arranged for by her husband, the defendant, and was done under fear and duress. She did not disclose these threats and duress to any of the men with whom she had intercourse, and did not communicate them to her parents or to any friend or any other person, because she feared that if she did the defendant would put his threats into execution. She visited Durant on two or more occasions in the absence of her husband, after the last visit at Mead, but made no effort to communicate to her father the threats or conduct of her husband.

Arn Adcock testified for the state to the effect that before the time of this offense he was not acquainted with Goldie Myers or her husband. He saw both of them at Mead while the show was going on there, but had not spoken to either one. After receiving information from others as to where Goldie and the defendant were, along the railroad track, witness and Joe Jackman went to where they were. The defendant was sitting on a dump, about 50 or 60 feet from where Goldie sat. Witness came to him first, and defendant said she was right up the track. If defendant had anything in his hand there witness did not see it. Witness had a lighted cigar in his mouth, and defendant told him to get rid of it; that the law might see it and come down and get them. Witness went to where the woman was, and she asked him what he wanted, and on being told they proceeded to have intercourse without further conversation. She asked for the money and was paid, and witness was warned to hurry away or the defendant would "raise the devil." The woman did not appear to be excited. "She acted like she didn't care whether she done it or not." Witness then went back to where defendant was standing with Joe Jackman and waited until the latter went to the woman and had intercourse. In the meantime there was no further conversation with

the defendant. When Jackman returned the two went back to town, leaving the defendant and the woman in the position they were when first seen there.

The testimony of Adcock is typical of the testimony of four other state witnesses, who testified that they had intercourse with this woman that night. None of them knew that she was laboring under fear, duress, or threats; all supposed that she was a common prostitute, willingly selling her person for gain.

We feel, as doubtless the jury felt, that this degenerate husband deserved severe punishment, but that alone is not the question before us. It is for us to determine, as a matter of law, whether the facts proven constitute rape, or some other crime. Section 2414, Rev. Laws 1910, provides:

"Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances:

"First. Where the female is under the age of sixteen years.

"Second. Where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character.

"Third. Where she is incapable through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.

"Fourth. Where she resists but her resistance is overcome by force and violence.

"Fifth. Where she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution.

"Sixth. Where she is prevented from resisting by any intoxicating narcotic, or anesthetic agent, administered by or with the privity of the accused.

"Seventh. Where she is at the time unconscious of the nature of the act and this is known to the accused.

"Eighth. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by artifice, pretense or concealment practised by the accused, or by the accused in collusion with her husband with intent to induce such belief. And in all cases of collusion between the accused and the husband of the female, to accomplish such act, both the husband and the accused shall be deemed guilty of rape."

Unlike the statutes of many other states that adhere to the common-law definition of rape, our statute provides that in eight different conditions or situations sexual intercourse with a female shall constitute rape, and all other situations must be excluded. It would seem, then, under our statute, under circumstances shown by the testimony in this case, that the crime of rape can be committed only on some female "not the wife of the perpetrator," except, as provided in subdivision 8, above quoted, the husband may be guilty of the offense perpetrated on the wife in any of the ways pointed out in the statute by collusion with the party actually committing the act, or by aiding or abetting the principal perpetrator to commit the act, and not otherwise.

The word "perpetrator," as defined in Webster's International Dictionary, is: "One who commits an offense or crime; one who is guilty of an act, usually in a bad sense."

In this case it is conceded that there was no collusion or conspiracy between the husband and any of the young men who had intercourse with the wife, to have such intercourse forcibly or against her will. These men were not guilty of the charge of rape, and, that being so, in the absence of collusion, the husband must have been the sole "perpetrator," without collusion of any other person; and our statutory definition of rape takes out of its operation the offense committed by the husband alone against his wife, although done

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through the instrumentality of an innocent third person. By the exception to the above rule, as embodied in subdivision 8, where the act is done by the husband in collusion with some other person who commits rape upon the wife, both the husband and his co-conspirator are guilty, but the husband alone, in this case the sole "perpetrator," cannot commit rape on his own wife.

The reports abound with decisions holding that, where the husband conspires with a third person to commit a rape on the wife, both are guilty of the offense, but after diligent search we have been able to find but two cases where the third person, the one who actually committed the act of sexual intercourse, was not a co-conspirator with the husband to ravish the woman. In the case of *State v. Dowell*, 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681, the husband, a white man, at the point of a gun, compelled an unwilling negro to attempt to have sexual intercourse with his wife. We assume that the want of precedents covering situations of this character is due to the fact that men's depravity rarely drags them to such depths as to cause them to attempt an offense so difficult, repulsive, and abhorrent. In the *Dowell Case*, *supra*, there was no statute defining rape, as in this state. The court held in that case that there was a sufficient criminal intent on the part of the negro to sustain a conviction of the husband of an assault to commit rape upon his wife, where by threats of death he coerced this third person to attempt to ravish her; that, notwithstanding such threats, it was the duty of the third person to refuse and resist. But there was a dissenting opinion, embodying, as we think, the better reasoning, in which it was said: "In the nature of the marriage relation, the husband himself cannot ravish his wife; nor, for like reasons, can he in a legal sense assault her with the intent to commit a rape upon her. He can only commit the offense

of rape, or that of assault with intent to commit a rape, against his wife, by procuring, aiding, abetting, or encouraging another to commit these offenses. His offense, in such case, depends, necessarily, upon the perpetration of the principal offense by another party. In this case the negro named did not commit a rape upon the wife of the defendant, nor did he assault her with such intent. There was a total absence of such intent on his part. . . . Then, in the nature of the matter, how can the defendant be chargeable with the particular offense charged against him in the indictment? As the negro committed no assault with the intent to commit a rape, so the defendant did not. It is said: Shall the defendant go quit? Has he committed no offense? Most unquestionably he shall not go quit. He has committed an offense—a very serious one. He is chargeable with an assault upon his wife with a deadly weapon, and with the intent to kill, and a like assault upon the negro."

The reasoning of this dissenting opinion is in some measure amplified in the case of *State v. Haines*, 51 La. Ann. 731, 44 L.R.A. 837, 25 So. 372: "While the husband is indicted as a principal, he could be guilty of the crime of rape, in so far as his wife is concerned, only on the supposition and proof that he procured the offense to be committed upon her by another, or aided or abetted that other in so doing; for, if he were the one who forcibly and against her consent performed the sexual act upon her, there was, and could be, no rape. . . .

"One cannot be guilty of aiding and abetting the perpetrator of a crime without its first being shown that the crime has been actually committed by another."

A case having some points of analogy to the case here at issue is the case of *State v. Jackson*, 65 N. J. L. 105, 46 Atl. 764, where it appeared that a Mrs. Jackson had acted as a procuress for one Kinsinger in persuading a girl to go to a room pro-

vided by this woman, where Kinsinger expected to meet and debauch the girl; that after meeting Kinsinger in the room appointed the girl resisted, and refused to yield to his wishes. Kinsinger and the Jackson woman were jointly indicted for a felonious assault on the girl. Held, that the accusation would not hold as against the Jackson woman. She was not present, aiding and abetting the assault, and did not know that Kinsinger would attempt to gratify his passion against the will of the girl, or make an assault upon her person. This Jackson woman simply arranged for a meeting place for these two by mutual consent, and, while she might have been indicted as a panderer or for keeping a place for assignation, she was not, under the circumstances, guilty of an assault to rape. Like Arn Adcock in this case, she was not entirely guiltless, but certainly neither was guilty of the offense of rape. Applying the rule announced and followed in the Dowell Case, *supra*, the unlawful purpose of this Jackson woman, in the one case, and of Arn Adcock, in the instant case, to commit a misdemeanor, would be sufficient to predicate a felony charge against the chief perpetrator of the respective offenses. With this conclusion we cannot agree; we think that, if the woman and Arn Adcock were innocent of the crime of rape, it was immaterial that they were guilty of misdemeanors, and being guilty of a misdemeanor would not make either of them responsible for the overt act of rape committed by another, without their knowledge and consent, and that such participation, without a felonious intent, would not make the actual perpetrator a co-conspirator, because there was no common purpose to commit a felony.

The statutes of neither North Carolina nor Louisiana classify and define rape, as in this state. The statutes of New Jersey, without mentioning the husband, make ev-

ery person who aids, abets, counsels, or procures the commission of the offense equally guilty with the principal offender. In this state every condition not included in the statutory classification is by implication excluded, and we hold that the general declaration in our statute that rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, excludes every such act not within the purview of the eight subdivisions of that statute.

It is a general rule of statutory construction that the mention of one thing implies the exclusion of another thing; that, where an offense is defined and its application to enumerated conditions prescribed, it is implied that it shall not apply to other conditions not enumerated. Sutherland, Stat. Const. §§ 326 and 327; 25 R. C. L. 981, § 229; 36 Cyc. 1112.

Penal statutes cannot be enlarged by implication or extended by inference. This court is without power to amend or repeal a plain general statutory provision, although the court may disapprove of some of its provisions or omissions. *White v. State*, 4 Okla. Crim. Rep. 163, 111 Pac. 1018; *Shawnee v. Landon*, 3 Okla. Crim. Rep. 440, 106 Pac. 652.

Moreover, we think the evidence in this case, considered as a whole, was insufficient to support the verdict. During the time the defendant was coercing and abusing his wife and on this particular occasion she could have informed others or made some outcry. The evidence shows that she must have known when she went to Mead that the purpose of going there was to make money by prostituting her body to strange men. The jury probably concluded that Mrs. Myers had become a prostitute through the influence or coercion of her husband, and that his despicable, depraved conduct merited severe punishment, and that it was a matter of no conse-

Statute—
construction—
penal offense—
scope.

Evidence—
sufficiency.

—coercion by
husband—
liability of
perpetrator.

quence whether his crimes against her and society were rape or some other penal offense. But this court cannot so view it. We are here to construe and apply the law as it is written, and to do so in such a way as will operate to guide courts and executive officers in definitely applying the law to similar conditions that may arise in the future.

In paragraph 1 of the court's instructions the court instructed the jury that:

"Rape, as applicable to this case, is the act of sexual intercourse accomplished with a female under either of the following circumstances:

"First. Where she is prevented from resisting by threats of immediate and great bodily harm, accom-

panied by apparent power of execution upon the part of him who makes the threats."

This part of the court's instructions is incomplete and erroneous, in that it omits one of the elements named in the statute, viz., "not the wife of the perpetrator," except in cases coming within the purview of subdivision 8, where it is provided that the husband may, by collusion with another be guilty of rape in any instance where there was a common felonious intent to commit the act.

For the reasons stated in this opinion, the judgment of the trial court is reversed.

Doyle, P. J., and Matson, J., concur.

ANNOTATION.

Criminal responsibility of husband as for rape, or assault to commit rape, on wife.

- I. Introductory, 1063.
- II. Act of husband alone, 1063.
- III. Act of husband in conjunction with others:
 - a. General rule, 1064.
 - b. Exception to rule, 1065.

I. Introductory.

It is intended in this note to consider only those cases which discuss the criminal responsibility of a husband for the crime of rape or assault to commit rape on his wife.

For a discussion of intercourse under marriage with a girl below the age of consent as constituting statutory rape, see 10 A.L.R. 409.

II. Act of husband alone.

But one case has been found wherein the charge against a husband of rape, or assault to commit rape, was based on his act or attempted act of sexual intercourse with his wife, that case holding that no criminal responsibility rested on him therefor. One of the reasons underlying the decision was that a wife by assuming the marital relation gives a consent which she will not be permitted to retract in order to charge her husband with

the crime of rape. In the case mentioned (*Frazier v. State* (1905) 48 Tex. Crim. Rep. 142, 122 Am. St. Rep. 738, 86 S. W. 754, 13 Ann. Cas. 497) it appeared that the defendant had been married for a number of years; that his wife, although continuing to live with him and performing the household duties for the family, had later refused to cohabit with him, and that finally he demanded his marital rights, pursuing her when she resisted and fled from him, and renewing his efforts, from which, however, she escaped. The court held that a man cannot himself commit an actual rape on his wife.

There are, however, numerous cases in which it has been stated more or less incidentally that a husband cannot be guilty of an actual rape on his wife.

Thus, in *State v. Haines* (1899) 51 La. Ann. 731, 44 L.R.A. 837, 25 So. 372, set out at length, *infra*, III. b, the court said: "Sexual intercourse by him with his wife, even effected by violence and against her consent, would not, in law, be rape."

So, the court in *Com. v. Fogerty*

(1857) 8 Gray (Mass.) 489, 69 Am. Dec. 264, concluded its opinion with the following dictum: "Of course, it would always be competent for a party indicted to show, in defense of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife."

Likewise, in *Gonzales v. State* (1901) — Tex. Crim. Rep. —, 62 S. W. 1060, it was said: "Nor did the court err in instructing the jury they must believe beyond a reasonable doubt that defendant was at that time not the wife of appellant, and was under the age of consent, to wit, fifteen years."

The offense of rape has been said to be "correctly defined" as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under certain conditions." *People v. Jailles* (1905) 146 Cal. 301, 79 Pac. 965.

In *State v. Williamson* (1900) 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022, there is a statement to the effect that one indicted for rape may defend on the ground that the act was committed with his wife.

In *Plunkett v. State* (1904) 72 Ark. 409, 82 S. W. 845, a case not strictly in point, the statute under which the defendant was indicted provided as follows: "Every person convicted of carnally knowing or abusing unlawfully any female person under the age of sixteen years shall be imprisoned in the penitentiary for a period of not less than five years nor more than twenty-one years." The court, in discussion thereof, stated that "the legislature intended by this enactment to make it a felony for any person to carnally know or abuse any female under the age of sixteen years, except in cases of marriage, either with or without her consent. Our statute makes it lawful for females to marry at the age of fourteen years."

The court in *Garner v. State* (1905) 73 Ark. 487, 84 S. W. 623, declared that an allegation in an indictment that the defendant "feloniously did carnally know and abuse" a certain female "could not be true if they were husband and wife."

For statements to much the same effect, see the following cases: *Hust v. State* (1905) 77 Ark. 146, 91 S. W. 8; *People v. Gonzalez* (1907) 6 Cal. App. 255, 91 Pac. 1013; *State v. Dowell* (1890) 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681; *Com. v. Landis* (1908) 129 Ky. 445, 112 S. W. 581, 16 Ann. Cas. 901; *State v. Comstock* (1877) 46 Iowa, 265; *Young v. Territory* (1899) 8 Okla. 525, 58 Pac. 724.

III. Act of husband in conjunction with others.

a. General rule.

A husband may, however, be guilty of rape or assault to commit rape on his wife, where he procures another to commit or attempt to commit such crime on her person, or where he assists in the execution thereof, the husband's responsibility in these cases being based on the rule that one who aids, assists, or abets in the commission of a crime, may be held as a principal. *Re Kantrowitz* (1914) 24 Cal. App. 203, 140 Pac. 1078; *People v. Chapman* (1886) 62 Mich. 280, 4 Am. St. Rep. 857, 28 N. W. 896, 7 Am. Crim. Rep. 568; *State v. Dowell* (1890) 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681; *Audley's Case* (1631) 3 How. St. Tr. (Eng.) 401, 1 Hale, P. C. 630.

Re Kantrowitz (Cal.) supra, was an application for a writ of habeas corpus, wherein it appeared that the petitioner was charged with rape, the contention being made by him that since the act charged appeared to have been committed on his wife he could not be held guilty thereof under any circumstances. The court held to the contrary, however, citing authority to the effect that one aiding, assisting, and abetting in the commission of a crime may be charged and punished as a principal.

In *People v. Chapman* (1886) 62 Mich. 280, 4 Am. St. Rep. 857, 28 N. W. 896, 7 Am. Crim. Rep. 568, the defendant had been convicted of rape on the person of his wife, under statutes making liable to punishment as a principal anyone who aided, assisted, or abetted in the commission of a crime. There was testimony to the effect that

the defendant had agreed with one Reagan that he would pay Reagan \$25 if he, Chapman, should catch Reagan in the act of sexual intercourse with Chapman's wife, the purpose being to obtain evidence for the securing of a divorce from her. To this end the defendant and his brother stationed themselves in a certain room next to that occupied by Mrs. Chapman, bored a hole through the wall separating the rooms, and witnessed the rape committed on her by Reagan without offering the slightest assistance in her struggles, rushing into the room after the crime had been committed, and the defendant exclaiming, "Now I have caught you." The court, in discussing the defendant's responsibility, said: "By his presence and his silence, under the fact of his previous agreement with Reagan, he must be considered as having countenanced and encouraged the latter in the commission of the outrage upon his wife. He did this as effectually as if he had stood in the room, and said to Reagan; 'Go ahead; you shall have the money the same whether it be by force or consent.' If he had done this, there would have been no possible doubt of his guilt as a principal of the same crime as Reagan." And it was held that the jury were properly charged that if they were convinced of the truth of the testimony, substantially as recited above, the defendant was guilty of rape.

In *State v. Dowell* (1890) 106 N. C. 722, 8 L.R.A. 297, 19 Am. St. Rep. 568, 11 S. E. 525, 8 Am. Crim. Rep. 681, which involved an indictment for assault with intent to commit rape, it was shown that the defendant, a white man, armed with a gun, attempted to force his white wife and a negro to have sexual intercourse, threatening them both with death in case of their refusal. It appeared that the colored man actually made the attempt under the coercion of the defendant, but that he escaped before the perpetration of the outrage. The defendant based a claim to immunity from guilt on the ground that he was the husband of the prosecutrix. The court, however, citing *Audley's Case* (Eng.) *supra*,

held that the privilege was a personal one, and that in a case such as the one before it the husband might be convicted as if he were a stranger. The further contention that, the negro having acted under coercion, there was no intent to commit rape, and that consequently the defendant could not be convicted, was denied by the court, which, after pointing out that the attempt actually took place, said: "We are clearly of the opinion that the unlawful act committed in pursuance of the combined intents of the defendant and his enforced instrument are amply sufficient to sustain the conviction."

In *Audley's Case* (1631) 3 How. St. Tr. (Eng.) 401, 1 Hale, P. C. 630, the defendant, having by force compelled his wife to submit to intercourse with his servant, was convicted of rape.

It was said in *Com. v. Fogarty* (1857) 8 Gray (Mass.) 489, 69 Am. Dec. 264: "A husband may be guilty at common law as principal in the second degree of a rape on his wife, by assisting another man to commit a rape upon her."

And it was remarked in *Com. v. Murphy* (1861) 2 Allen (Mass.) 163, that a man may be a principal in the second degree in the commission of the crime of rape on his wife.

For statements to the same effect, see the following cases: *State v. Comstock* (1877) 46 Iowa, 265; *State v. Boyland* (1880) 24 Kan. 186; *Com. v. Landis* (1908) 129 Ky. 445, 112 S. W. 581, 16 Ann. Cas. 901; *Strang v. People* (1871) 24 Mich. 1.

b. Exception to rule.

There is apparently an exception to the rule heretofore stated, namely, where the one procured by the husband to accomplish sexual intercourse with his wife, or assisted by him in the act, cannot be convicted of the crime with which the husband is charged. So, in the two following cases the courts, while recognizing the rule in question, held it to be inapplicable to the facts before them:

In *State v. Haines* (1899) 51 La. Ann. 731, 44 L.R.A. 837, 25 So. 372, it appeared that the defendant had been indicted for rape, the woman being

his wife. She testified that the act had been accomplished by one Thibodeaux while the defendant held her down. Thibodeaux, however, on a separate trial, was found not guilty, so that the question to be decided was, "After the acquittal of the man who actually violated the person of the woman, the husband being present aiding and abetting, is there any longer a basis, a predicate, a foundation, upon which to rest the prosecution of the husband?" The court, stating that a husband can, by procuring the commission of the crime of rape on his wife, or by aiding and abetting in its commission, incur liability as a principal together with the perpetrator, pointed out that the husband, while

chargeable as a principal, could be considered only as a principal in the second degree, and that since there was no principal in the first degree in the case, Thibodeaux having been acquitted, the conviction of the defendant could not stand.

The reported case (*MYERS v. STATE*, ante, 1057) differs slightly from the other cases discussed, in that the actual perpetrator or perpetrators of the crime were not acting in collusion with the defendant husband, and the court therein, while acknowledging the rule as stated, points out that, by reason of this fact and the statutory provisions applicable thereto, the case presents itself as an exception.

R. S.

WILLIAM OUTLAW, Plff. in Err.,

v.

STATE OF FLORIDA.

Florida Supreme Court — June 29, 1921.

(— Fla. —, 89 So. 342.)

Assault — aggression — riding with wife of assailant.

1. The mere fact that defendant was riding in a car alone with the wife of another will not make the defendant the aggressor in bringing on a difficulty, unless there was some act or attempted act of violence toward the assailant or his wife.

[See note on this question beginning on page 1068.]

— justification — attentions to spouse.

2. The mere walking or driving of a married woman with another man, or a married man with another woman, is not sufficient provocation to justify an assault by either spouse.

[See 2 R. C. L. 555.]

New trial — verdict against evidence.

3. Where the evidence so greatly preponderates against a verdict that it may well be assumed that the jury were influenced by considerations outside the evidence, the verdict will be set aside and a new trial granted.

[See 20 R. C. L. 275, 276.]

Headnotes by BROWNE, Ch. J.

ERROR to the Circuit Court for Walton County (Campbell, J.) to review a judgment convicting defendant of assault with intent to commit murder in the second degree. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Walter Kehoe and Forsyth Caro for plaintiff in error.

Messrs. Rivers H. Buford, Attorney General, and J. B. Gaines, Assistant Attorney General, for the State.

Browne, Ch. J., delivered the opinion of the court:

William Outlaw was convicted of assault with intent to commit murder in the second degree.

The evidence discloses that Mrs. Ingram, the wife of the man assaulted, sent two telegrams to Outlaw, one on the 3d and one on the 4th. The first read: "Come to-day if you cannot wire me care Jennie Skipper." The second read: "Come to-day by 1 or 2." Both were signed "Addie." On the afternoon of the 4th Mrs. Ingram walked out on what is known as the Glendale road, where she met Mr. Outlaw, who was traveling in a car. She got in the car with him, and they rode together some distance, and turned and came back towards De Funiak springs; when they reached the second bridge they saw another car containing the driver and Mrs. Ingram's husband. Outlaw stopped to let the other car pass, and when he did Ingram jumped from his car, and, with his right hand in his bosom, ran or walked rapidly to the car in which Outlaw and Mrs. Ingram were, and said: "Well, you are going to ruin me, are you; you have tried to. Crawl out, and I am going to whip you."

Ingram further testified: "After I got the curtain up I reached in under the curtain; it was not fastened, and I reached in through there and started to pull him out,—tried to make him get out, and I couldn't. He didn't offer any resistance, and I wondered why he didn't raise his hands up. I looked down and one hand was on the gun. He put the gun out over the facing of the door, and I starts back and he shoots me in the left hip."

On cross-examination he testified: "When I seen who it was I didn't like it the best in the world." "I wasn't so powerful angry," but "I might have been" mad. As he got out of his car and went towards Outlaw, he used violent language toward Outlaw, saying, "Well, God damn you, you want to ruin me, do you?"

As to the assault, he says: "I don't think I exactly hit him in the face." "I reached my hand from the under side of the curtain up, and I got hold of him right along there

(indicating), and told him to get out. I kind of jerked back my hand, and I didn't exactly handle him like he was a doll—didn't put my hand up there like he was a china doll."

Mrs. Ingram says she did not know whether her husband hit or slapped Outlaw,—“he done something to him;” there was blood “on his sleeve and his nose” after he was struck. This is corroborated by several witnesses.

Outlaw's version of the affray is that, when he stopped his car, Ingram, with his right hand in his bosom, rapidly approached him and said: "O, yes, God damn you, you are here, are you; I will get you." He came up to the car, shoved his hand in, hit him on the nose with something, and when he did he shot him once, and made no attempt to shoot again, but got out of the car and assisted Mrs. Ingram to get her husband to the other car.

Just what version of the affray is correct is not material, because Ingram admits the assault, and the evidence is conclusive that he drew blood from the defendant's face. The testimony also discloses that threats to do bodily harm to Outlaw were made by Ingram and communicated to Outlaw prior to the difficulty. Ingram admits that he used violent language towards Outlaw as he went towards him, and that he had his hand in his shirt bosom, but denies that he had any weapon. Outlaw testifies to seeing a tire wrench. Clarence Aycock, the chauffeur who drove Ingram to the scene of the difficulty, said Ingram took a Maxwell tire wrench that was in the car and stuck it in his bosom, and after he had done so said, "I will kill the s—— of a b—— that is with her;" and that when he got out of the car he had his hand in his bosom.

There was testimony about attentions that Outlaw had paid to Mrs. Ingram before she was married, and an attempt was made by the state to introduce a letter alleged to have been written by Outlaw to Mrs. Ingram. When this was excluded by

the court, the state attorney, in the presence of the jury, stated: "I want to make it plain before the jury that this man was not altogether justified in making love to another man's wife." There was further testimony not pertinent to the issue, from which the jury, if not fully instructed by the court, might have improperly found that Outlaw was the aggressor, and brought on the difficulty.

In order that the jury might not be misled on this point, the defendant requested this charge to be given, but it was refused by the court, and is the basis of the fourth assignment of error: "The fact that the defendant was riding in a car alone with the wife of Ingram, if the evidence proves that fact, would not alone make the defendant the aggressor in bringing on a difficulty, if there was a difficulty, unless there was some act of violence toward the said Ingram or his said wife."

This instruction was peculiarly applicable to the facts in the case, and should have been given. It was intended to offset the likelihood of the jury adopting a false rule in determining who was the aggressor, and when the court refused it he permitted the jury to adopt a standard not known to the law, in determining whether Outlaw or Ingram was the

aggressor. The testimony is so positive and uncontradicted on the point of Ingram being the actual aggressor that the verdict can only be explained by the conclusion that the jury considered Outlaw the aggressor because he was riding with Ingram's wife.

*New trial—
verdict against
evidence.*

There may have been a time when a wife was regarded as her husband's chattel, and being out alone on a public road with another man regarded as sufficient provocation to justify the husband in making an assault upon her companion, but this is no longer true when women enjoy equal freedom with men. The mere walking or driving of a married woman with another man, or a married man with another woman, is not sufficient provocation to justify an assault by either spouse, and the greater freedom of intercourse between men and women in this day protects them from unwarranted attacks by a jealous husband or wife, who sees in innocent acts of social intercourse "confirmation strong as proofs of Holy Writ" that they are flagrantly immoral.

*Assault—
justification—
attentions to
spouse.*

The judgment is reversed, and a new trial granted.

Taylor, Whitefield, Ellis, and West, JJ., concur.

ANNOTATION.

Right of self-defense as affected by the fact that the defendant was in company with the assailant's spouse.

As to right of self-defense as affected by defendant's violation of law only casually related to the encounter, see annotation in 10 A.L.R. 861.

The reported case (OUTLAW v. STATE, ante, 1066) is authority for the proposition that the mere act of a man in walking or driving with the wife of another is not sufficient provocation to justify an assault by the latter, or make the former the aggressor in bringing on a difficulty with

the husband, so as to deny him the right of self-defense. The court, in reaching this conclusion, pointed out that although there may have been a time when a wife was regarded as her husband's chattel, and being out alone on a public road with another man as sufficient provocation to justify the husband in making an assault upon her companion, this is no longer true when women enjoy equal freedom with men, such

*Assault—
aggression—
riding with wife
of assailant.*

greater freedom of intercourse between men and women protecting them from unwarranted attacks by a jealous spouse.

And where a wife has sought a relative's home as a refuge from her husband, it has been held that such relative has a right to protect his habitation and its inmates from the husband, who, by the use of force, is entering the same with threats against the lives of the inmates, under a statute defining justifiable homicide as the killing of a human being in necessary self-defense of habitation or person, against one who manifestly intends or endeavors by violence to enter the habitation of another for the purpose of offering personal violence to any person dwelling or being therein. It was so held in *Bailey v. People* (1913) 54 Colo. 337, 45 L.R.A.(N.S.) 145, 130 Pac. 832, Ann. Cas. 1914C, 1142.

In *State v. Burns* (1919) 278 Mo. 441, 213 S. W. 114, where the deceased, apparently because of the alleged attentions of the defendant to his wife, drove the defendant out of the house with a drawn weapon and such threatening demeanor as to cause, in defendant's mind, a reasonable belief that his life was in danger, and, so believing, he fired to protect his own life, it was held that he was acting in self-defense and entitled to an acquittal. The report of this case does not indicate the nature of the defendant's attentions, or what the defendant and the wife of deceased were doing at the time the husband drove defendant out. It does appear, however, that the defendant was lawfully upon the deceased's premises, the wife having charge of the postoffice which was located in the house, and the defendant being a mail carrier and waiting for mail to be made up.

And it has been held that one is not deprived of the right of self-defense when attacked by another, by the fact that he has enticed the latter's wife temporarily to accompany him from her home for illicit purposes. *State v. Larkin* (1913) 250 Mo. 218, 46 L.R.A.(N.S.) 13, 157 S. W.

600. In reaching this conclusion the court said: "The pertinent inquiry here is whether there was in the record sufficient facts to show that defendant Larkin did voluntarily engage in the difficulty which resulted in the death of the deceased. The testimony for the state shows that Larkin, on the night in question, had been at the home of deceased for no good purpose. The whole trend of the testimony indicates that he sustained, and had been for some weeks sustaining, illicit intercourse with the wife of deceased, Larkin's codefendant here. The testimony indicates that as a rule this illicit intercourse was not had in the home of the deceased, but that the defendants adjourned to some suitable spot in the vicinity. Such an adjournment was apparently had on this occasion. . . . They had both left the house of deceased. The facts show that they were seeking the darkness, and not light; that they were evading a probable difficulty, and not seeking to bring it on. The fact that Larkin and his codefendant had left the premises of deceased and gone out to uninclosed and unimproved property, presumably, and so far as the record shows, belonging to others, shows that so far as the physical encounter was concerned, defendant Larkin was avoiding the same and not bringing it on or seeking to bring it on. Had he remained in the home of deceased, where he had no right to be, and where he unlawfully was, there might be some sort of a peg upon which to hang such a theory. But he left the home of deceased, and went with or met (it matters not which) his codefendant and guilty paramour at a place distant therefrom, and where he might well be supposed to have believed the deceased would not come, and of which he might well have believed the deceased would have no knowledge. . . . Since the defendant Larkin, at the point where the difficulty occurred, was not on the premises of deceased, but on the premises of others, distant from the home of deceased, wherein does this

case differ from a case which would have been presented if deceased, hearing that defendant Larkin was in company with the wife of deceased upon a public street, or any other public place, or even private place, should have armed himself as he did, and gone threatening defendant Larkin as he did, to seek him and kill him? It is true that under the well-settled law in this state murder in the second degree is to be presumed from the simple fact of the wilful intentional killing of one man by another, nothing further appearing. . . . Yet such presumption, while it attaches to the acts of the defendant here, does not prohibit him from showing, if he may, and can, that in such killing he acted in self-defense. It is not the duty of this court to enforce what is very commonly called the 'unwritten law.' The legislature of this state has not seen fit to enact into a statute this 'unwritten law.' It is our duty to enforce the law as we find it, and as written by the legislature, and not as we might otherwise write it, or as we might desire it to be. If the uncontradicted facts as shown by the state in this case are true, the inferences arising therefrom corroborate the statement of defendant Larkin. The written law is, and the law which we must enforce says, that even if the deceased had discovered his wife and her codefendant, Larkin, in flagrante delicto, and being overcome by his passion had shot and killed defendant Larkin, yet under the strict letter of the law he would not go acquit. He would have been guilty even then, however human his passion and failing in that behalf would have been, and however much it might be said that the sympathies of man for man might go out to him; he would yet have been guilty of manslaughter in the second degree. . . . The theory of the state in this case that no right of self-defense existed under the facts here in favor of defendant Larkin is not tenable. Such a theory would be tenable only if the law were that if deceased had killed Larkin, instead of

Larkin having killed deceased, deceased would be guilty of no crime, or, at least, of no felony. But since, as we have seen, even had the facts been thus reversed, instead of as they are, deceased would not have been guiltless, but, on the contrary, would have been guilty of manslaughter in the second degree. So, the right of self-defense still inured to Larkin, however outrageous and morally reprehensible and indefensible his conduct and actions might have been, and in fact were. The court properly instructed, therefore, under the facts and circumstances shown in evidence, that Larkin was entitled to his right of self-defense."

On the other hand, there is considerable authority to the effect that if a paramour is discovered having illicit intercourse with the discoverer's wife, he commits such a wrong as takes away the right of self-defense in case the husband attacks him. *Dabney v. State* (1896) 113 Ala. 38, 59 Am. St. Rep. 92, 21 So. 211; *Drysdale v. State* (1889) 83 Ga. 744, 6 L.R.A. 424, 20 Am. St. Rep. 340, 10 S. E. 358; *Redding v. State* (1920) 25 Ga. App. 233, 102 S. E. 845. And in *Rigell v. State* (1913) 8 Ala. App. 46, 62 So. 977, it was again said that a paramour, upon being discovered in the act of having sexual intercourse with a married woman, has no right to defend himself by inflicting injury on the husband, even though he has been assailed by the latter with deadly intent. The court argued that in such a case, though the husband be the aggressor and there be no way to escape death at his hands except by taking his life, still, if the paramour do so, he is guilty of murder, for he was the wrongdoer in the first instance in that he furnished the very provocation which brought the difficulty on. And see *Duncan v. State* (1908) 171 Ind. 444, 86 N. E. 641, wherein it was said in answer to a plea of self-defense that, if a paramour armed with a deadly weapon was lurking in a public alley for the sole purpose of seeking an opportunity to have illicit sexual relations with the wife of the de-

ceased, when attacked, he was not in a place where he had a right to be, and without fault, within the meaning of those terms as employed in the law of self-defense, and that it would be "absurd to hold a libertine, confessedly guilty of defiling the wife of another, without fault when assaulted by the outraged husband while upon or about his premises, under cover of darkness, seeking an opportunity to repeat the offense." Also *Wheeler v. State* (1921) — Ind. —, 132 N. E. 259, wherein it was held that a man who came, after midnight, armed with a pistol, to call at the home of a woman whose husband was believed to be and had been away from home, and, after fleeing from the husband, returned near where the woman and her husband lived, and to avoid repetition of a blow from a stick 1 inch thick in the hands of the husband, shot him in the leg, was not in a place where he had a right to be, and without fault, at the time of the shooting, although he was there at the invitation of the wife, such an invitation not justifying the shooting.

In *Dabney v. State* (Ala.) supra, where the husband found the defendant in his wife's home and about to have or having illicit intercourse with her, the court, after laying down the rule that "one who provokes a difficulty—who by his own wrong contributes to a situation out of which arises a necessity to take the life of another to preserve his own—cannot invoke the doctrine of self-defense to justify the homicide he commits in such difficulty—cannot plead a necessity to kill which arose from his own wrong," said that sexual intercourse with the wife of another is such a wrong, and that "if, as in the case at bar, the paramour, in order to save his own life from the consequences of the deadly passion of the husband, excited by the wrong of the former, slays the husband, he can in no sense be said to have been free from fault in bringing about the mortal encounter; the fatal result, to the contrary, is traceable directly to his own wrong, and

he cannot justify his act by an invocation of the doctrine under which one free from fault and unable to retreat is authorized to save his own life by destroying that of another." And in *Drysdale v. State* (1889) 83 Ga. 744, 6 L.R.A. 424, 20 Am. St. Rep. 340, 10 S. E. 358, supra, where the element of justification was in issue, the court, in holding that a husband may attack for intimacy with his wife in his presence, raising a well-founded belief from the improper or unjustifiable conduct of the defendant that an adulterous act is just over or about to begin, and that the adulterer, though in imminent danger, cannot defend himself by using a deadly weapon, said that "a man surprised by the husband immediately after an actual, or immediately before an intended, adulterous connection, can lawfully defend himself against the husband's violence by flight only, or at least by means short of deadly. He cannot stand his ground and shoot or cut to repel the husband's attack upon him, though it may be a dangerous attack. Whatsoever the law would justify the husband in doing under such circumstances, it would not justify the adulterer in preventing by homicide or attempting homicide; perhaps not otherwise than by making his escape." Again, in *Redding v. State* (1920) 25 Ga. App. 233, 102 S. E. 845, supra, the court held the case squarely within the ruling in the *Drysdale Case*.

So, in *State v. Martin* (1900) 9 Ohio S. & C. P. Dec. 778, it was held that if the jury should find that the defendant's debauchery of the deceased's wife was the direct cause of the deceased's attack upon the defendant, he had so far put himself in the wrong by provoking the attack that he would not be justified in killing in repelling the attack, unless he retreated as far as he could, and avoided the conflict by every available means that did not increase his danger.

And, for a better reason, self-defense cannot be set up by a paramour who kills the husband, if he has armed himself with a deadly weapon

in contemplation that the husband would interfere with his having illicit intercourse with the wife, and for the purpose of taking life should it become necessary to save his own in the course of such interference. *Dabney v. State* (1896) 113 Ala. 38, 59 Am. St. Rep. 92, 21 So. 211. In so holding the court said: "It is also a too elementary and familiar principle of law to need discussion or reference to authorities, that if one entering upon the commission of a wrongful act has in contemplation that another will or may interfere with his enterprise, arms himself with a deadly weapon with the intent to take the life of that other should it become necessary to save his own in the course of such interference, and who in fact does take the life of the person so interfering in pursuance of such intent, is guilty of murder in the first degree; the intent to kill under the conditions contemplated constituting the 'formed design' sufficient and necessary in murder, when the circumstances of the act do not justify the design, and the wrongfulness of the act in which the slayer was engaged at the time the necessity to strike arose precluding all justification of the design." And to the effect that, if the defendant produced the occasion for the purpose or in order to have a pretext for killing, the killing will be murder, no matter to what extremity the defendant was reduced, see statement in *Franklin v. State* (1892) 30 Tex. App. 628, 18 S. W. 468.

But circumstances which would lead a husband to believe that a man has just been engaged in, or is about to engage in, an act of illicit intercourse with the wife, does not deprive such person of the right of self-defense on the spot unless he himself was chargeable with giving rise to such circumstances by his own improper or unjustifiable conduct. *Drysdale v. State* (1889) 83 Ga. 744, 6 L.R.A. 424, 20 Am. St. Rep. 340, 10 S. E. 358.

And it has been held that if a husband, knowing of his wife's criminal infidelity, deliberately lays a trap

for her paramour, the latter when caught in the guilty act may defend himself against the deadly assault of the husband. Thus, in *Wilkerson v. State* (1893) 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990, where the husband, knowing of his wife's infidelity, pretended to her and her paramour that he, the husband, was going on a journey, when it was his purpose not to go, but to conceal himself and lie in wait at or near his home for the purpose of killing the paramour in case he should be caught in the guilty act, at the same time expecting and designing so to catch him, it was held that the paramour had a right to defend himself against a deadly assault made by the husband under such circumstances, although the assault was made while the guilty act was in progress; and that where the husband was killed as matter of necessity to prevent his assault from resulting in death, the homicide was justifiable. This decision was based upon the fact that the act of the husband was in no sense justifiable, since it was not to prevent the adultery, he being consonant of previous similar acts, but to obtain revenge; and the court distinguished the *Drysdale Case* (Ga.) *supra*, upon the ground that in that case it did not appear that there was any previous adultery, or circumstances other than that the husband, upon discovering the intimacy, immediately assaulted the paramour under such circumstances as to render his act justifiable.

In Texas, where by statute a husband is justified in slaying a person when taken in the act of adultery with the wife and before they have separated, and by adjudication a distinction is made between the so-called perfect and imperfect right of self-defense, it is held that the wrong does not entirely remove the right of self-defense. This distinction and its application are well illustrated by the case of *Reed v. State* (1882) 11 Tex. App. 509, 40 Am. Rep. 795, wherein, in holding erroneous an instruction to the effect that an adulterer is not justified in resisting an

attack by the husband of the adulteress, it is said: "Evidently the court must have based this charge upon the converse of the proposition stated in art. 567 of the Penal Code, which declares that 'homicide is justifiable when committed by the husband upon the person of anyone taken in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated.' In other words, the controlling idea intended to be conveyed by the court, according to our construction of the language used, seems to have been that, because the law would justify the husband in taking the life of the adulterer under the circumstances named in the statute, it would follow that the adulterer must submit to the infliction of death thus attempted to be executed upon him, and that he was not even authorized to resist an attack upon his life by the injured husband, much less plead such deadly attack by way of justification or self-defense, if, in resisting such attack, he was compelled to take the life of the injured husband to save his own. Thus, it appears that the court has attempted to make the legal status of the defendant depend upon what might or would have been the law with reference to the act of deceased had the situation of the parties been reversed and the latter had taken the life of the former. In no possible state or case would such a rule of deduction be a fair or conclusive criterion in the administration of criminal law. The accused is always guilty or innocent from his own standpoint; that is, his personal, individual acts with relation to the matter charged. . . . But the right of self-defense, though inalienable, is and should to some extent be subordinated to rules of law, regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes; to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in

occasioning or producing the necessity which requires his action. If, however, he was in the wrong,—if he was himself violating or in the act of violating the law,—and on account of his wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party, by his own wrongful act, produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which, but for such acts, would never have been occasioned. . . . How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it, or about to be injured thereby, makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide, and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law. . . . If defendant was taken by deceased in the act of

adultery with his wife, and to avenge the wrong deceased made a dangerous or murderous assault upon him, in resisting which he took the life of deceased, under such state of facts defendant would be guilty of manslaughter, because he was committing a misdemeanor which was the cause of and brought the necessity for the homicide." And in *Franklin v. State* (1892) 30 Tex. App. 638, 18 S. W. 463, the rule of perfect and imperfect self-defense was again adhered to, it being held that conduct of the defendant, such as being found in the deceased's home at 2 A. M., under circumstances indicating that the purpose was carnal knowledge of the deceased's wife, was such as was calculated to provoke an attack from the husband, and that therefore the right of self-defense was imperfect, and a killing in resisting an attack so provoked, manslaughter. So, in *Nicks v. State* (1904) 46 Tex. Crim. Rep.

241, 79 S. W. 35, where, from one view of the evidence it appeared that the defendant went to deceased's house for the purpose of having carnal intercourse with the latter's wife, which provoked an assault upon him by the deceased, it was held that the issue of imperfect self-defense was raised, and that it was the duty of the court to charge on manslaughter. And see also *Barber v. State* (1920) 87 Tex. Crim. Rep. 585, 223 S. W. 457. For a case of perfect right of self-defense under the Texas rule, see *Pannell v. State* (1908) 54 Tex. Crim. Rep. 498, 113 S. W. 536, which, however, is not strictly in point in the present annotation, since it appeared that defendant's carnal intercourse with deceased's wife was prior to the time of the homicide, and that she was not present when the attack was made. And of the same class is *Sheely v. State* (1918) 83 Tex. Crim. Rep. 127, 201 S. W. 1012. G. J. C.

MILAN SHEPPARD, Plff. in Err.,

v.

STATE OF NEBRASKA.

Nebraska Supreme Court—June 19, 1920.

(104 Neb. 709, 178 N. W. 616.)

Indictment — charging different offenses in separate counts — election.

1. Whether or not the state shall be required to elect between counts in an indictment charging the receiving of different stolen automobiles rests largely in the discretion of the trial court.

[See note on this question beginning on page 1077.]

Appeal — refusal to require election — error.

2. Failure to require the state to elect between counts charging the receiving of three separate automobiles until the evidence was all in is not such prejudice to accused as to require reversal, where the evidence under either count would have been admissible under the one on which the conviction was based, to show scienter.

Evidence — motion of strike — portion competent.

3. A motion to strike all the evi-

dence of a witness as incompetent is properly overruled if a portion of it was competent.

[See 26 R. C. L. 1056.]

Appeal — indorsement of witness's name after beginning of trial.

4. Permitting the indorsement of the name of a witness upon the information after trial is commenced is not reversible error if no prejudice is shown or continuance asked.

[See 14 R. C. L. 169, 170.]

ERROR to the District Court for Hamilton County (Corcoran, J.) to review a judgment convicting defendant of receiving a stolen automobile. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Prince & Prince and Patterson & Patterson, for plaintiff in error:

It was prejudicial error in not requiring the state to elect at the commencement of the trial upon which count of the information it would ask for a conviction.

Guyle v. State, 102 Neb. 668, 168 N. W. 567.

The evidence to the witness, Guard, was all incompetent, and highly prejudicial to defendant, as it cast suspicion upon him of the commission of another separate and distinct offense, and introduced into the case a new, separate, and distinct offense, without any showing whatever that defendant was connected therewith.

People v. Loper, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193; State v. Walker, 124 Iowa, 414, 100 N. W. 354; People v. Maine, 166 N. Y. 50, 59 N. E. 696; People v. Cuin, 27 Cal. App. 316, 149 Pac. 795; Alsobrook v. State, 126 Ga. 100, 54 S. E. 805; State v. Robinson, — Mo. —, 183 S. W. 304; Harrison v. State, 69 Tex. Crim. Rep. 152, 151 S. W. 552; St. Clair v. State, 103 Neb. 125, 169 N. W. 554.

It was error to admit evidence of distinct and separate offenses.

Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; St. Clair v. State, 103 Neb. 125, 169 N. W. 554; Clark v. State, 102 Neb. 728, 169 N. W. 271.

Messrs. Clarence A. Davis, Attorney General, and J. B. Barnes, for the State:

Not requiring the state to elect at the commencement of the trial upon which count of the information it would ask for a conviction was not prejudicial error.

Guyle v. State, 102 Neb. 668, 168 N. W. 567.

There was no error in the reception of evidence of witness Guard.

Knights v. State, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; Goldsberry v. State, 66 Neb. 312, 92 N. W. 906; Clark v. State, 79 Neb. 473, 113 N. W. 211; Palin v. State, 38 Neb. 862, 57 N. W. 743; Becker v. State, 91 Neb. 352, 136 N. W. 17.

It was not an abuse of discretion for the trial court to permit the state

to indorse the name of the witness Mrs. Percy Lamphere on the information.

Johnson v. State, 34 Neb. 257, 51 N. W. 835; Rauschkolb v. State, 46 Neb. 658, 65 N. W. 776; Fager v. State, 49 Neb. 439, 68 N. W. 611; Trimble v. State, 61 Neb. 604, 85 N. W. 844; Barney v. State, 49 Neb. 515, 68 N. W. 636.

Morrissey, Ch. J., delivered the opinion of the court:

Defendant prosecutes error from a conviction in the district court for Hamilton county for receiving a stolen automobile.

The information was in three counts, the first of which charged defendant with receiving, on or about November 1, 1918, a stolen automobile belonging to George W. Jewel. The second count charged the receiving of a stolen automobile on or about May 1, 1919, the property of J. E. Schaeffer, and the third count charged the receiving of a stolen automobile on or about April 15, 1919, the property of Lloyd Magney. Defendant was convicted on the third count.

The principal assignment of error is the refusal of the trial court to require the state to elect, at the beginning of the trial, upon which count of the information it would rely for a conviction. Each count of the information was complete in itself, and there was no allegation of any connection between the various offenses charged. The state introduced evidence on each of the three counts. Defendant did not renew his motion to elect until all the testimony had been adduced, and the court then required the state to elect upon which count it would go to the jury.

The question of election is one resting largely in the sound discretion of the trial court. As was said by Justice Harlan in Pointer v.

United States, 151 U. S. 396, 403, 38 L. ed. 208, 212, 14

**Indictment—
charging
different offenses
in separate
counts—
election.**

Sup. Ct. Rep. 410,
412: "While recog-
nizing as funda-
mental the prin-

ciple that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused."

The same rule has been announced by this court in *Korth v. State*, 46 Neb. 631, 65 N. W. 792, and in *Bartley v. State*, 53 Neb. 310, 73 N. W. 744, although in these cases there was a closer relationship between the offenses charged than in the instant case.

But the determining question in each case is whether defendant has been embarrassed or confounded in his defense. Practically all of the evidence introduced relating to the crimes charged in the first and second counts was admissible for the purpose of showing scienter under the count on which defendant was convicted. When the state closed its case in chief, defendant proceeded to make his defense without again asking that the state be required to elect until after he had introduced all his evidence. Under these circumstances we fail to

**Appeal—refusal
to require
election—error.**

see that defendant has been so confounded or prejudiced in his defense as to call for a reversal of the judgment.

Complaint is made of the testimony of a witness named Guard, who stated that shortly prior to the commission of the crime in question defendant asked him to obtain a Ford coupé for him, and agreed to pay him \$200 for one which he subsequently "spotted out." This witness further testified that some time later he delivered a stolen Buick automobile at Friend, supposedly for defendant, but it was not shown to whom the delivery was made. Defendant moved to "strike all the evidence given by this witness for the reason that it is incompetent, irrelevant, and immaterial, and also that the introduction of this evidence constitutes misconduct on the part of the state." The ruling of the court was as follows: "Part of it is competent. The motion as made will be overruled." The first part of this testimony was clearly competent, as showing that defendant was in the business

**Evidence—
motion to strike
—portion
competent.**

of receiving stolen automobiles. *St.*

Clair v. State, 103

Neb. 125, 169 N. W. 554. The motion, in the form in which it was made, was properly overruled.

Error is predicated upon permission granted the state to indorse the name of a witness upon the information after the trial had commenced. Defendant made no showing of prejudice, nor did

he ask for a continuance. Prejudice will not be assumed.

The action of the trial court does not constitute reversible error. *Kemplin v. State*, 90

Neb. 655, 134 N. W. 275; *Laws* 1915, chap. 164.

Defendant's other assignments of error are disposed of by the views just expressed. There is nothing in the record to call for a reversal, and the judgment is affirmed.

Flansburg, J., not sitting.

Petition for rehearing denied.

**Appeal—indorse-
ment of wit-
ness's name
after beginning
of trial.**

ANNOTATION.

Joinder of counts for theft of property, or receiving stolen property, belonging to different persons.

Counts based on single transaction.

Where all the counts of an indictment for larceny are based on the same transaction, it is proper to charge the defendant in different counts with the theft of property belonging to several persons, and the prosecution is not required in such a case to elect on which count it will rely for a conviction, unless it appears to the trial court, in the exercise of a sound discretion, that an election is required to enable the defendant to make his defense without embarrassment or prejudice.

California. — *People v. Connor* (1861) 17 Cal. 354.

Florida. — *Kennedy v. State* (1893) 31 Fla. 428, 12 So. 858.

Indiana. — *Bell v. State* (1873) 42 Ind. 335; *Cooper v. State* (1881) 79 Ind. 206.

Maryland. — *State v. McNally* (1881) 55 Md. 559.

Massachusetts. — *Com. v. Sullivan* (1870) 104 Mass. 552; *Bushman v. Com.* (1885) 138 Mass. 507.

North Carolina. — See *State v. Simons* (1874) 70 N. C. 336.

Tennessee. — *Owen v. State* (1845) 6 Humph. 330.

Texas. — *Irving v. State* (1880) 8 Tex. App. 46; *Shuman v. State* (1895) 34 Tex. Crim. Rep. 69, 29 S. W. 160; *McLaughlin v. State* (1896) — Tex. Crim. Rep. —, 34 S. W. 280; *Robinson v. State* (1909) 56 Tex. Crim. Rep. 62, 118 S. W. 1037. See also *Pisano v. State* (1895) 34 Tex. Crim. Rep. 63, 29 S. W. 42.

Thus, in *State v. McNally* (Md.) supra, it was held to be error to quash an indictment for the larceny of wheat because it charged in three separate counts that the wheat was the property of three different persons, the court saying that it was proper to state the transaction in different ways in order to meet the evidence which might be adduced. See to the same effect *Pisano v. State* (Tex.) supra.

Similarly, in *People v. Connor* (Cal.) supra, it was held that an indictment for larceny was not defective because some of the counts alleged the ownership of the stolen property to be in one person, and other counts alleged it to be in other persons, it appearing that the same transaction was charged in all of the counts. There is a dictum to the same effect in *State v. Simons* (N. C.) supra.

So, in *Shuman v. State* (1895) 34 Tex. Crim. Rep. 69, 29 S. W. 160, an indictment in one count charged the theft of a bale of cotton as the property of one person and in another count alleged it to be the property of another. In holding that though different dates were alleged for the theft in the two counts, there was no error in overruling a motion in arrest of judgment, the court said: "It is not only allowable, but considered the better practice, to set up the same transaction by as many counts as the pleader may deem necessary to meet the various phases which the proof may possibly develop, and only in a case where it may appear that the rights of a defendant may be jeopardized or prejudiced will the state be required to elect on which count it will proceed to trial. In this case there was no motion requiring the state to elect, and the question was first presented after verdict by a motion in arrest of judgment."

In *Owen v. State* (Tenn.) supra, it was held to be proper to allege in one count of an indictment for larceny of a stray horse that the horse was the property of the person who had taken possession of it, and in another count to allege it to be the property of its legal owner; and a general finding of guilty on both counts was sustained.

In *Robinson v. State* (1909) 56 Tex. Crim. Rep. 62, 118 S. W. 1037, the first count of an indictment charged the defendant with stealing property

belonging to one Aderholt, and the second count charged the stealing of the same property from the possession of Aderholt, but alleged that it belonged to some person to the grand jury unknown. After the evidence was given, the defendant asked for an election by the state as to the count on which it would rely for a conviction. In holding that a denial of the defendant's request was not error, the court said: "It is well settled in this court that the state will not be required to elect between counts where the same transaction is embraced in any number of distinct counts, and where the same offense is charged and each count alleges a different mode or means of doing the same act constituting the same offense, or where the distinct ways of doing the same thing are not antagonistic to each other. In such case they may be alleged conjunctively in the same count, and the prosecution has the right to proceed upon all the means alleged. Again, where the different counts in an indictment are in substance but different ways of charging the same offense, and are pleaded for the purpose of meeting the evidence as it may transpire, the state cannot be required to elect and confine itself to one count upon which it shall rely for conviction."

Likewise, in *Irving v. State* (1880) 8 Tex. App. 46, it was held to be proper to charge the defendant in one count of an indictment with the theft of money belonging to a certain person named therein and in another count with the theft of the same money belonging to some person to the grand jurors unknown. See to the same effect, *McLaughlin v. State* (1896) — Tex. Crim. Rep. —, 34 S. W. 280.

In *Kennedy v. State* (1893) 31 Fla. 428, 12 So. 858, it was held not to be error to refuse to quash an indictment for larceny on the ground that the first count thereof alleged the money stolen to be the property of certain persons and a second count alleged the same money to be the property of another person. The decision was based on a statute pro-

viding that no indictment should be quashed or judgment arrested or new trial granted on account of any defect in the form of an indictment, or of misjoinder of offenses, or for any cause whatsoever, unless the court should be of the opinion that the indictment was so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him, after conviction or acquittal, to substantial danger of a new prosecution for the same offense.

In *Com. v. Sullivan* (1870) 104 Mass. 552, the defendant was charged in one count of an indictment with larceny of the goods of one person and in another count with the larceny of the goods of another person. It appeared that all of the goods were taken from the same wagon at the same time, but from different parts of the wagon. The court, in holding that it was not error to refuse to require the prosecuting attorney to make an election between the counts, said: "Distinct larcenies may be presented in different counts of one indictment; and whether the district attorney shall be ordered to elect between them is within the discretion of the presiding judge, and not a subject of exception. . . . The stealing at the same time and by one taking of several articles belonging to different persons is larceny of the whole and of each article; and may be indicted either in one aspect or the other,—as one entire crime, or as several distinct offenses. If indictments or counts for one taking of several articles are unreasonably multiplied, the court, in superintending the course of trial and in passing sentence, will see that justice is done and oppression prevented." See to the same effect, *Bushman v. Com.* (1885) 138 Mass. 507.

Likewise, in *Bell v. State* (1873) 42 Ind. 335, the overruling of a motion to quash an indictment was held not to be error where the different counts alleged the theft of different property owned by different persons, but it did not appear that the property was taken at different times or places.

If the transaction is the same, counts may be joined which charge the defendant with receiving stolen property belonging to different persons. *Castner v. People* (1919) 67 Colo. 327, 184 Pac. 387; *State v. Teideman* (1850) 35 S. C. L. (4 Strobb.) 300; *Reg. v. Beeton* (1849) 2 Car. & K. (Eng.) 960, 1 Den. C. C. 414, Temple & M. 87, 4 New Sess. Cas. 60, 18 L. J. Mag. Cas. N. S. 117, 13 Jur. 394, 3 Cox, C. C. 451.

In *State v. Teideman* (1850) 35 S. C. L. (4 Strobb.) 300, supra, the defendant was charged in one count of an indictment with receiving stolen property belonging to a person named therein, and in another count with receiving the same stolen property belonging to a person unknown. The court held, without discussing explicitly the joinder of the counts, that there was sufficient evidence for the jury to find that the property belonged to the person named as owner in one of the counts of the indictment, but that the question was immaterial, since, if the evidence was insufficient to prove ownership, the property belonged to a person unknown, as alleged in the other count.

Likewise, in *Reg. v. Beeton* (Eng.) supra, the defendant was charged in five different counts of an indictment with receiving stolen goods belonging respectively to five different persons. The counts apparently referred to a single transaction. After a plea of not guilty, and before the prosecution opened its case, the defendant asked for an election by the prosecution on which count it would proceed. The refusal of the request was held by the exchequer chamber not to be error.

Moreover, in a prosecution for receiving stolen goods it has been held that there was no error in denying a motion made after the evidence for the state was completed, to require the prosecuting attorney to elect on which count he would proceed, where different counts of an information alleged a different ownership of the same goods. *Castner v. People* (Colo.) supra, wherein the court said: "Counsel for defendants admit . . .

that this motion was addressed to the sound discretion of the court. In view of the fact that the goods mentioned in each count of the information were the same, and the further fact that neither defendants nor their counsel could have been misled thereby, we see no reason to conclude that the trial court's discretion was improperly exercised."

Counts based on separate transactions.

Even where the counts of an indictment or information relate to distinct transaction, it is generally held that the defendant may be charged in separate counts with the theft of property, or the receiving of stolen property, belonging to different persons; and that the state is not required in such a case to elect on which count it will rely for a conviction unless it appears to the trial court, in the exercise of a sound discretion, that an election is necessary to avoid embarrassment or prejudice to the defendant in making his defense. *State v. Nelson* (1849) 29 Me. 329. See also *Hoiles v. United States*, 3 MacArth. (D. C.) 370, 36 Am. Rep. 106; *Branch v. State* (1918) 76 Fla. 558, 80 So. 482. And see the reported case (*SHEPPARD v. STATE*, ante, 1074). Compare *United States v. Beerman* (1838) 5 Cranch, C. C. 412, Fed. Cas. No. 14,560, and, as to necessity for election, *Pisano v. State* (1895) 34 Tex. Crim. Rep. 63, 29 S. W. 42.

Thus, it was held in *State v. Nelson* (Me.) supra, that three distinct larcenies committed at different times, of the goods of different persons, were properly charged in one indictment, where each larceny was alleged in a separate count. The court said: "Each one of these larcenies is charged in separate counts. And such course is admissible where the offenses are of the same nature. . . . If the counts are so numerous as to embarrass the defense, the court, in the exercise of its discretion, may compel the prosecutor to elect on which charge he will proceed."

In the reported case (*SHEPPARD v. STATE*, ante, 1074) it is held that a refusal to require an election between different counts based on different

transactions, and respectively charging a defendant with receiving stolen property belonging to different persons, is not error where it appears that the defendant has not been embarrassed or prejudiced in making his defense. It is also held that the question whether an election is necessary to prevent such embarrassment or prejudice is largely within the discretion of the trial court. The defendant requested an election at the beginning of the trial, and the refusal of the request is upheld on the ground that practically all of the evidence relating to the crimes charged in the other counts was admissible to show a scienter under the count on which the defendant was convicted.

In *Branch v. State* (1918) 76 Fla. 558, 80 So. 482, it was held not to be error to refuse to require a prosecuting attorney to elect on what count he would proceed, where a tax collector was charged in certain counts of the indictment with embezzling money belonging to the state, and in other counts with embezzling on other dates money belonging to a county. The court said: "By § 3962, General Statutes of 1906, it is provided that 'no indictment shall be quashed or judgment arrested or new trial be granted on account of any defect in the form of the indictment, or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment is so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.' If there was no misjoinder of offenses in the information, it was not error to refuse to require the state to elect upon which count it would stand for a conviction, and, furthermore, it is well settled here that whether the prosecutor will be required to elect upon which of several counts he will try the accused is within the sound discretion of the trial court."

In *Pisano v. State* (1895) 34 Tex. Crim. Rep. 63, 29 S. W. 42, the de-

fendant was charged in one count of an indictment with the theft of four horses belonging to one person and in another count with the theft of four horses belonging to another person. On an appeal from a conviction it was held that there was no error in refusing to quash the indictment for duplicity or repugnancy. The court said: "In order to constitute duplicity, two or more distinct felonies must be averred in the same count. In this indictment, distinct offenses are apparently set out in different counts. This is the proper practice. If the evidence develops distinct transactions, the state should be required to elect upon which count the conviction would be asked. As to repugnancy, it may be stated, in a general way, to consist in pleading two inconsistent allegations in the same count. It does not apply to repugnancy which of necessity exists between different counts in the same indictment."

In *United States v. Beerman* (1838) 5 Cranch, C. C. 412, Fed. Cas. No. 14,560, the defendant was convicted on five separate indictments of stealing, on the same day, the property of five different persons. In upholding the conviction it was said that if the offense had been charged in different counts of a single indictment, the indictment, under the practice of the English courts at least, could be quashed if the objection was discovered before the defendant put in his plea, and if it was not discovered until the trial the prosecutor could be put to his election on which count he would proceed. In *Hoiles v. United States*, 3 MacArth. (D. C.) 370, 36 Am. Rep. 106, the court, after criticizing *United States v. Beerman* (Fed.) supra, said: "Where the indictment contains several counts, each stating a different owner for distinct portions of the goods taken at the same time, or where, as in this case, there are different informations, each containing an averment of ownership for distinct parcels of the goods, there can be but one judgment and one term of imprisonment." W. S. R.

CHICAGO BONDING & INSURANCE COMPANY, Appt.,
v.
ABRAHAM OLINER.

Maryland Court of Appeals—November 16, 1921.

(— Md. —, 115 Atl. 592.)

Damages — insurance — theft of whisky.

1. The damages to be allowed for loss by theft of whisky insured against theft after prohibition went into effect are the fair value of the whisky, in determining which the cost of the liquor may be considered.

[See note on this question beginning on page 1084.]

Insurance — nature of contract.

2. An insurance contract is one whereby for a stipulated consideration

one party undertakes to compensate the other for loss on a specified subject by specified perils.

APPEAL by defendant from a judgment of the Superior Court of Baltimore City (Duffy, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a burglary insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edwin W. Wells and Edward L. Ward for appellant.

Mr. Myer Rosenbush, for appellee:

The limitation in the policy is that the amount for which defendant shall be liable shall not be in excess of the actual cash value, but the jury may fix any sum, in their judgment, they believe the plaintiff to be entitled to, below the limitation fixed in the policy. The term "actual cash value" and other similar expressions are practically synonymous.

16 Am. & Eng. Enc. Law, 840; Martinez v. State, 16 Tex. App. 128; Jonas v. Noel, 98 Tenn. 440, 36 L.R.A. 862, 39 S. W. 724; Cummings v. Merchants' Nat. Bank, 101 U. S. 162, 25 L. ed. 906; Murray v. Stanton, 99 Mass. 348; Cliquot's Champagne, 3 Wall. 114, 18 L. ed. 116; Sanford v. Peck, 63 Conn. 493, 27 Atl. 1057.

The damages which a plaintiff is entitled to recover for a breach of contract should be such as may fairly and reasonably be considered as either arising, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of a breach of it.

Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358,

2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Swain v. Schieffelin, 134 N. Y. 471, 18 L.R.A. 385, 31 N. E. 1025; Shafer v. Wilson, 44 Md. 268; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 400; Furstenburg v. Fawsett, 61 Md. 187; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 207, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; Creamery Package Mfg. Co. v. Benton County Creamery Co. 120 Iowa, 588, 95 N. W. 188; Connersville Wagon Co. v. McFarland Carriage Co. 166 Ind. 123, 3 L.R.A. (N.S.) 709, 76 N. E. 294.

The mere fact that the value of a thing is difficult of ascertainment does not prevent a recovery, and the courts have never hesitated to establish new standards whereby a fair value may be arrived at, when the usual and ordinary means of determining the same cannot be used.

Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co. 65 Md. 73, 3 Atl. 108; Planters' Mut. Ins. Co. v. Rowland, 66 Md. 244, 7 Atl. 257; Green v. Boston & L. R. R. Co. 128 Mass. 226, 35 Am. Rep. 370; Stickney v. Allen, 10 Gray, 352; Niagara F. Ins. Co. v. De Graff, 12 Mich. 135; Robinson v. Harman, 1 Exch. 855, 154 Eng. Reprint, 365, 18 L. J. Exch. N. S. 202; Simpson v. L. & N. W. R. L. R. 1 Q. B. Div. 274, 45 L. J. Q. B. N. S. 182, 33 L. T. N. S. 805, 24 Week. Rep. 294; Wakeman v. Wheeler & W. Mfg. Co.

101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; *Jonas v. Noel*, 98 Tenn. 444, 36 L.R.A. 862, 39 S. W. 724; *Murray v. Stanton*, 99 Mass. 348; *People v. Wilson*, 298 Ill. 257, 131 N. E. 609; *State v. May*, 20 Iowa, 305; *Erb v. German-American Ins. Co.* 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; *Bales v. State*, 3 W. Va. 685; *Com. v. Smith*, 129 Mass. 111; *Osborne v. State*, 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797; *Wolfe v. Howard Ins. Co.* 7 N. Y. 583; *Western Assur. Co. v. Chesapeake Lighterage & Towing Co.* 105 Md. 253, 65 Atl. 637, 11 Ann. Cas. 956.

Stockbridge, J., delivered the opinion of the court:

The appellee, Abraham Oliner, resided at the time of the occurrence hereinafter mentioned in the Lake Court Apartments, on Linden avenue, and had been engaged in the liquor business at Howard and Camden streets. When what is known as the "War-time Prohibition Act" (40 Stat. 1045) went into effect, he closed out his business at Howard and Camden streets and moved up certain unsold liquors to the apartment house building where his apartments were located. In the cellar of that building was a locker room, and in that he placed some of the whisky moved, and, by way of protecting himself against possible loss, took out an insurance policy of the species known as burglary, larceny, or theft insurance. This policy was issued to Mr. Oliner on the 18th of September, 1919. Thereafter, and sometime between the issuance of the policy and the 25th of September, his locker was broken into and there were taken from it fifteen cases of whisky of the brands known as Three Feathers, Canadian Club, Green River, original Roxbury Rye, and Hayner.

The policy issued by the appellant to Mr. Oliner expressly covered property of this description by providing that it should cover money, sterling silverware, precious stones, watches and jewelry, plated ware, wearing apparel, furs, laces, rugs, tapestries, paintings, clocks, bronzes, bric-a-brac, library books,

musical and professional instruments, sporting outfits, bicycles, and household goods and personal effects common in residences generally, including cigars, wines, liquors, and family stores, also gas and electric light fixtures, and plumbing, excluding articles listed in statement No. 10 of the schedule, §§ (b), (c), (d) and (e)."

This liquor, which was so taken, had been purchased by Mr. Oliner at some time previous to the closing of his store at Howard and Camden streets, at various prices, and upon the discovery of his loss Mr. Oliner made the demand on the company for loss in accordance with the terms of the policy.

Eight exceptions were reserved during the trial, but for the purposes of this appeal they may all be considered together, as they form part of a connected whole.

No question is raised by the insurance company as to the loss by Mr. Oliner of the property in question, and the defense upon which the insurance company relies to exonerate it from liability is that, the prohibition order having gone into effect at the time the liquors were taken, they were of no value, and therefore Mr. Oliner suffered no loss. This is raised by objections to evidence which constitute the first seven bills of exception and the ruling of the court on the defendant's second prayer, which ruling is made the defendant's eighth bill of exceptions.

In discussing the case in its entirety, it will be sufficient, therefore, to see whether or not the trial court committed any error of such a character as to work a serious injury to the insurance company. To answer this satisfactorily there are one or two facts to be borne in mind, the first of which is a correct conception of the nature of a contract like the one here presented. Thus an insurance contract is one whereby for a stipulated consideration one party undertakes to compensate the other for loss on a

Insurance—
nature of
contract.

specified subject by specified perils. Black's Law Dict. 2d ed. p. 641. This is sometimes spoken of as a contract of indemnity. 16 Am. & Eng. Enc. Law, 840; 14 R. C. L. 839.

A large number of cases were cited, and others might have been, descriptive of the contract wherein the contract is defined in the same or equivalent terms. Nor does this court understand that there was any serious contention made upon this matter by counsel for the appellant. The real question comes in fixing the rule of damages in such a case.

When we turn to an examination of the various cases, we encounter the expressions "value," "market value," and "fair market value;" but for the present purpose these may all be regarded as synonymous. The larger part of the exceptions was taken to the admission as evidence of the prices paid by Mr. Oliner for the whiskies.

In the strict use of language the terms "market value," "value," and "fair market value," may all be dealt with together. It is perfectly true that at the time of the loss in this case whiskies of any of the brands mentioned were not in any regular market reports, and therefore the ordinary methods by which value was proven were not available in this instance. But simply because a particular article is not quoted in the daily paper affords no sufficient ground for saying that it has no value at all. Thus it may have a distinct value as an heirloom or growing out of association which the then owner of it cherishes for reasons of his own. In the present case, Mr. Oliner testified without contradiction that he had reserved these various kinds of whisky for his own individual use and that of his friends. It is perfectly true that it was no longer an article of merchandise permitted to be dealt in by government, but that is a very different thing from saying that it had no value. This inhibition on the part of the government against the sale of it would have made traffic in it illegal, that is all; and following

the accepted rule of damages in such cases, the damage was its fair value at the time when the burglary or stealing was committed. The general rule of damages was clearly stated by Judge Robinson in Webster v. Woolford, 81 Md. 329, 32 Atl. 319. See also 5 Words & Phrases, 1st series, pp. 4384 et seq., and cases therein collected, and especially Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 380, 15 Am. Rep. 362, where it was held that "if there is no market at the place for the particular goods destroyed, some other criterion of value must be adopted."

See also 3 Words & Phrases, 2d series, pp. 301 et seq.

This forms, therefore, an exception to the general rule as to the method by which the value of property is to be estimated, and when coupled with the well-known fact that the effect of the order of prohibition tended to increase rather than decrease the price at which these liquors could be obtained, while ^{Damages—}~~insurance—~~ ^{theft of whisky.} not giving us exact

data as to its value at the time of the burglary or larceny, the cost price paid by Mr. Oliner was as close an approximation to it as it was possible to give. Conditions regulating the traffic in liquors were comparatively a new thing at that time, but the courts must take cognizance of the conditions as they then prevailed; and as exact evidence of the value at the time of the burglary or theft was not available, the cost of the same would afford some ground, sufficient to base a verdict on, in estimating the loss to Mr. Oliner, plaintiff in the case. This, therefore, makes, as already noted, an exception to the rule with regard to proving value or market value at the actual time of the loss.

The attitude of the insurance company was that the plaintiff had not offered any adequate proof of the market value of the property stolen, and that therefore the verdict should be in favor of the defendant company. The company

had collected from Mr. Oliner the premium for the insurance amounting to \$60.50. It had not given Mr. Oliner any notice of the termination of that policy or of its desire to terminate it. It had thus manifested its willingness to carry the risk so long as no claim was made against it, and it was not until after the loss had occurred that they fell back upon the theory that the property stolen had no value whatever. It fol-

lows from these conditions that the court below committed no error in its rulings upon the questions of evidence submitted to it, and that the defendant's second prayer, as modified by the court, by which the amount of recovery was limited to the time of the theft, worked no prejudicial injury to the defendant, and the judgment appealed from will accordingly be affirmed.

Judgment affirmed, with costs.

ANNOTATION.

Insurance covering intoxicating liquor.

Validity.

A property right which is insurable is generally recognized in intoxicating liquor, although it is capable of unlawful uses. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* (1910) 31 L.R.A.(N.S.) 873, 105 C. C. A. 128, 182 Fed. 590; *Feibelman v. Manchester F. Assur. Co.* (1895) 108 Ala. 180, 19 So. 540; *Erb v. German-American Ins. Co.* (1896) 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; *Insurance Co. of N. A. v. Evans* (1902) 64 Kan. 770, 68 Pac. 623; *Niagara F. Ins. Co. v. De Graff* (1863) 12 Mich. 124; *Kellogg v. German-American Ins. Co.* (1908) 133 Mo. App. 391, 113 S. W. 663; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687.

But in some cases the contract of insurance covering such liquors has been held so closely related to the unlawful act as to be a part of that transaction and therefore invalid. *Wood v. First Nat. F. Ins. Co.* (1917) 21 Ga. App. 333, 94 S. E. 622; *Kelly v. Home Ins. Co.* (1867) 97 Mass. 288; *Lawrence v. National F. Ins. Co.* (1879) 127 Mass. 557; *Johnson v. Union M. & F. Ins. Co.* (1879) 127 Mass. 555.

It has been held that spirituous liquors, though kept for sale in violation of law, may be lawfully insured against destruction by fire, as such liquors are capable of lawful uses, and the insurance attaches to the property only, and the risks insured against are not the consequences of

illegal acts, but of accidents. *Niagara F. Ins. Co. v. De Graff* (1863) 12 Mich. 124. The court said: "It was claimed on behalf of the plaintiffs in error, that if these liquors can be allowed to be included in a policy, the policy will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact that in each instance it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to an illegal act. So, insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were, in express terms, a policy insuring the party selling liquors against loss by fine or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties.

Hibbard v. People (1856) 4 Mich. 125; Bagg v. Jerome (1859) 7 Mich. 145. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property the insurance company has no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected."

And the rule was adopted in *Erb v. German-American Ins. Co.* (1896) 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583, that a contract of insurance upon intoxicating liquors, susceptible of legitimate use, is collateral to, and too remotely connected with, the illegal use to which such goods are put, to be affected by it, where no illegal design entered into the making of the contract at its inception. And it was held that insurance on merchandise kept for an illegal business, such as a stock of drugs and liquors maintained by a dealer who did not have the permit required by law to sell them, was not void as against public policy.

And in *Feibelman v. Manchester F. Assur. Co.* (1895) 108 Ala. 180, 19 So. 540, subsequent appeal in (1897) 118 Ala. 308, 23 So. 759, it was held that the fact that the insured had not obtained a license to sell liquor had nothing to do with insurance on the liquors and fixtures, and constituted no defense to an action on the policy.

And in *People's Ins. Co. v. Spencer* (1866) 53 Pa. 353, 91 Am. Dec. 217, evidence in an action on an insurance policy on the stock of a brewery, that at and before the fire the insured had no license from the government as distiller, was not admissible for the purpose of showing that he was acting in violation of law.

And in *Insurance Co. of N. A. v. Evans* (1902) 64 Kan. 770, 68 Pac. 623, a recovery was allowed on a

policy covering a stock of drugs and other merchandise, including intoxicating liquor, and, in answer to the defendant's contention that the policy was avoided by illegal sales by the insured of intoxicating liquors from the property insured, the court said: "It appears that the court permitted evidence to be given and a defense to be made that Frank Evans and Louis Evans, sons of the plaintiff below, who had charge of the drug store, had made illegal sales of intoxicating liquors. The contention is that the insurance of the stock encourages and promotes a violation of the law and is against public policy, and that the contract is therefore unenforceable. The property insured, as stated in the policy, was a 'general stock of merchandise, consisting principally of drugs, chemicals, patent medicines, oils, paints, glass, wines, drug-store sundries, liquors, and notions.' The indemnity contracted for was on this stock, against loss by fire, and was not an indemnity relating to the conduct of the business or against the consequences of the way the property was used or the business conducted. Nothing in the terms of the contract indicates a purpose to violate the law or in any way encourage its violation. If the contract appeared to have been made with a view to protecting illegal sales, or of indemnifying the parties against fines or forfeitures because of illegal sales, there would be force in the contention; but there is an entire absence of any such provisions in the policy itself, and there is nothing to show that the insured entered into a contract of insurance to protect herself in illegal acts. The present case cannot be likened to the insuring of an illegal traffic or of a business that directly and necessarily violates the law, such as policies on lotteries or marine insurance on unlawful voyages. The distinction is pointed out in *Armstrong v. Toler* (1826) 11 Wheat. (U. S.) 271, 6 L. ed. 468, which is to the effect that if the consideration is illegal, or if the direct purpose of the contract is to advance or encourage acts in violation of law,

it is void, but if the contract to be enforced is collateral and independent, though to some extent connected with acts done in violation of law, the contract is not void;" and in conclusion the court said: "Under our Constitution and statutes, liquor may be lawfully kept, and for some purposes it may be legally sold, and, being recognized as property, it constitutes a legitimate subject of insurance. Where the sale of liquors thus insured is merely incidental, and the policy does not provide against the use or sale of liquors, and the insurance is not effected with a purpose to advance and encourage acts in violation of law, as in this case, the validity of the policy is not affected by the fact that some illegal sales were subsequently made."

And in *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* (1910) 31 L.R.A.(N.S.) 873, 105 C. C. A. 128, 182 Fed. 590, it was held that a contract of insurance of whisky stored in a bonded warehouse in Iowa was not void on the ground that it tended to assist the insured to violate the public policy and laws of Iowa against the possession and sale of intoxicating liquors therein. The court said: "Conceding, however, that the general policy of the state is to forbid its manufacture or sale, and conceding that its possession, in the absence of proof of a lawful intent—and there was no such proof in this case—was evidence of an illegal purpose and rendered its possession unlawful, it does not follow that its insurance against fire was either illegal or violative of the prohibition policy of the state. This whisky was stored in a bonded warehouse, and the insurance of it against fire neither violated nor had any direct tendency to violate the policy of the state which forbade its manufacture and sale. While the whisky remained stored, it could be neither made nor sold. If the whisky burned it could not be thereafter sold, and neither the payment nor the contract to pay its value in the event that it was burned could make its manufacture, storage, or sale after the burning,

possible. Even if these contracts of insurance had the effect to make the business of the manufacture and sale of the liquor less hazardous, and in that way to encourage the conduct of that business, nevertheless that encouragement was not the chief purpose or direct effect, but was a mere incident of the indemnity against loss by fire which the policies were made to secure. The laws of Iowa contain no express prohibition of the insurance of intoxicating liquors against fire, its supreme court had sustained a contract for such insurance (*Erb v. Fidelity Ins. Co.* (1896) 99 Iowa, 733, 69 N. W. 261), there was no moral turpitude in the making or the performing of this contract, and the mere fact that an agreement, the consideration and performance of which are lawful, incidentally assists one in evading a law or a public policy, is no bar to its enforcement. . . . And it is no defense to a contract that has been performed by the promisee, that the promisor knew that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation."

And in *Carrigan v. Lyching F. Ins. Co.* (1881) 53 Vt. 418, 38 Am. Rep. 687, it was held that a contract of insurance on a stock of one who carried on a business as a druggist, using alcoholic liquors legitimately in his drug trade, and occasionally selling them in violation of law, where no illegal design entered into its inception, would be so far collateral to the illegal acts as not to render it invalid. But it was held that a contract directly insuring liquors intended for illegal sale is invalid as one made to afford protection for illegal acts, and that if an illegal traffic in intoxicating liquors is the principal business of a druggist insuring his stock of goods, and his other business is a mere cover for the purpose of enabling him to secrete and disguise his real business, the insurance

is a contract to protect him in his illegal venture, and is therefore void.

And the question whether or not the sale of intoxicating liquor by such druggist was the principal part of his business, and his dealing in drugs a mere cover to enable him to secrete and disguise his illegal traffic, so as to invalidate a fire insurance policy on his stock, was held one of fact for the jury.

And in *Kellogg v. German-American Ins. Co.* (1908) 183 Mo. App. 391, 113 S. W. 663, it was held that intoxicating liquors were property, and were insurable, but that if the insured at the time he took the policy intended to conduct an unlawful liquor business, the contract would be void, as such a contract tended to protect him in his purpose, and the question of his unlawful intent was held for the jury. The court said: "Intoxicating liquors, being recognized as property in this state, are insurable, and their presence in a drug store is not necessarily indicative of a purpose on the part of their owner to violate the liquor laws by making illegal sales of them. If, at the making of the contract of insurance, plaintiff intended to conduct an unlawful business, the contract of insurance should be held void on the ground that its direct effect was to protect plaintiff in his purpose to violate the law. If, on the other hand, plaintiff at the time the insurance was procured was actuated by the intent to conduct a legitimate drug store, and to use intoxicating liquors in connection with that business only, in the usual and lawful manner, we perceive no reason for declaring the contract void. There is nothing on its face to bespeak such improper purpose. As before stated, it deals with a legitimate subject of insurance, and the indemnity provided is for the accidental loss or injury of the property by fire, and not against loss sustained in consequence of a violation of law. We cannot say, as a matter of law, that the presence in the stock at the time the insurance was contracted, of ten barrels of beer and seventy gallons of whisky, indubitably stamped the business and

practices of plaintiff as unlawful, nor should we indulge in such inference from the additional facts that, after the insurance was procured, plaintiff occasionally made unlawful sales and had a very thriving trade in whisky and beer. Such facts tend to prove the existence of unlawful intent, but they are not conclusive, and, in effect, go no further than to raise an issue of fact for the solution of the jury."

In *Wood v. First Nat. F. Ins. Co.* (1917) 21 Ga. App. 333, 94 S. E. 622, where the policy insured a stock of liquors and other merchandise while contained in a certain building occupied for "mercantile purposes," and it appeared that the liquors were kept for the purpose of illegal sale, it was held that the contract covering the liquors was so closely related to the unlawful act as to be part of that transaction, and void. The court, in distinguishing some of the cases, said: "Here, by the terms of the policy sued on, it was expressly agreed that the property insured was to be kept and maintained in violation of law, and thus it is clear that the compliance with such unlawful agreement and the aid of such illegal transaction is necessary to the establishment of plaintiff's case. Even in those jurisdictions where the validity of somewhat similar insurance policies has been sustained as not contravening public policy, the courts have laid down legal principles which we think are in entire harmony with the doctrine we now set forth. In *Niagara F. Ins. Co. v. De Graff* (1863) 12 Mich. 124, the policy included, among other things, groceries, among which were liquors, and it was contended that the policy was void, because to sustain the policy with liquors included would be insuring an illegal traffic. In sustaining the validity of this policy, the court said: 'By insuring his property the insurance company has no concern with the use he may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no

illegal design enters, are not affected by an illegal transaction with which they may be remotely connected.' In *Carrigan v. Lycoming F. Ins. Co.* (1881) 53 Vt. 418, 38 Am. Rep. 387, the court, said: 'If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors, it would have been null; but the greater part of the property insured consisted of goods, insurance upon which was subject to no objection. The contract was legal upon its face, nothing appearing to show that the wines and liquors were intended for illegal sale. . . . There was evidence tending to show that he illegally sold them, including those not used in compounding medicines; and the fact may have been that the latter trade was the larger and his main one. If such illegal traffic was the business of the assured, and his legal traffic and transactions with other property a mere cover, ostensibly carried on for the purpose of enabling him to secrete and disguise his iniquity, the purpose of the contract would be to protect him in his illegal ventures, and it would therefore be void; but if he carried on business, using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, we think that, if no illegal design entered into the making of the contract in its inception, that it would be so far collateral to the illegal acts that it would be inconsistent, and in accordance with no well-adjudged case, to hold it null.' In the case now before us it cannot be said that the contract was legal upon its face, since not only would it seem to have been manifest that the stock of merchandise was kept for illegal sale, but furthermore, the illegal design as entered into by each of the contracting parties was clearly expressed in that the intoxicants, under the terms of the policy, were to be kept in the place of business of the insured, used for mercantile purposes, and since this provision is not susceptible of an interpretation that the keeping of the intoxicants was lawful, it follows that the contract itself is, on its face,

made in direct furtherance of an illegal purpose."

In *Kelly v. Home Ins. Co.* (1867) 97 Mass. 288, it was held that a policy against loss by fire of intoxicating liquors kept by the insured for sale in violation of law was for the direct purpose of enabling him to continue his offense with the greatest safety, and was therefore in contravention of law, and void. The court said: "The same principle upon which it is held that goods which are carried for an illegal purpose, or in an illegal manner, cannot be the subject of a valid insurance against the perils of the sea, applies, with at least equal force, to an insurance against fire upon goods which are so unlawfully kept in a store that the owner is liable to fine and imprisonment, the store made a nuisance, and the goods subject to seizure and forfeiture. In the present case, the insured was the guilty party; and his direct purpose in taking the policies was that he might continue his offense with the greater safety. His contract was in contravention of law, and void as to him, because he entered into it in order to protect himself in his illegal acts."

And it has been held that a fire insurance policy on saloon furniture and stock consisting principally of wines, and liquors is invalid, and never attaches, where the insured was engaged in the unlawful business of selling intoxicating liquor without a license at the time it was issued and for a month afterwards. *Lawrence v. National F. Ins. Co.* (1879) 127 Mass. 557.

And in *Johnson v. Union M. & F. Ins. Co.* (1879) 127 Mass. 555, a policy on intoxicating liquors, owned and kept for sale by both persons to whom the policy was issued, while only one of them had a license, and also upon fixtures, billiard tables, etc., kept without a license for a hire, was held illegal and void where the whole was carried on as one business.

Amount of recovery.

It will be observed that in the reported case (*CHICAGO BONDING & INS. Co. v. OLNER*, ante, 1081), where the

insurer had collected and retained the premium on a burglary, larceny, and theft policy covering intoxicating liquor, and had manifested no desire prior to a loss to cancel the policy, it was held that it could not escape liability on the policy on the theory that because of the "War-time Prohibition Act" the liquors had no value, the court holding that although the liquor had no market value it was not valueless, and that the cost price paid for it was as close an approximation to its value as it was possible to give, and that evidence of this was proper.

Under a policy providing that the insurer should not be liable beyond the actual cash value of the property covered by the policy at the time any loss or damage occurred, and that the liability should in no event exceed what it would cost the insured to repair or replace the property lost or damaged with material of like kind and quality, it was held that the measure of a manufacturer's cost of replacing whisky and like products whose manufacture occupies considerable time and whose value increases with age is not the cost of the raw material, of which a like product may be made, and of the labor required to make it, but that it is the cost of immediately replacing the article by a like product in the most inexpensive way by purchase or otherwise, and that he is entitled to the actual cost value at the time of the fire, although a profit or loss results

to him. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* (1910) 31 L.R.A. (N.S.) 873, 105 C. C. A. 128, 182 Fed. 590.

And in another case involving a like provision to that in the preceding case, it was held that in case of loss of whisky of different inspections, the insured was not restricted to the simple cost of reproducing the whisky, it appearing that aging was an important element entering into the value of whisky, but that he was entitled to have it replaced as of the date of the loss with material of like kind and quality, the court holding that the cost value of the particular brand of whisky in the wholesale market on the date it was destroyed was the measure of damages. *Frick v. United Firemen's Ins. Co.* (1907) 218 Pa. 409, 67 Atl. 743.

And under a policy insuring whisky, and providing that the cost value of property destroyed or damaged should in no case exceed what would be the cost to the insured, at the time of the fire, of replacing the same, it was held that the insured was entitled to recover the market value of the whisky at the time of the fire, but that this was not to be fixed at the high local value caused by the scarcity of corn in the section where the insured lived, it appearing that he was near a railroad and that the other markets of the country were open to him. *Fisher v. Crescent Ins. Co.* (1887) 33 Fed. 544. J. T. W.

HERMAN C. NEWMAN, Plff. in Err.,

v.

THEO ELIZABETH NEWMAN et al.

THEO ELIZABETH NEWMAN et al., Plffs. in Err.,

v.

HERMAN C. NEWMAN.

Ohio Supreme Court—July 12, 1921.

(— Ohio St. —, 133 N. E. 70.)

Fraudulent conveyance — fraud on purchaser — remedy.

1. Where the party to whom the consideration has been paid under an

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oral agreement to convey real estate is insolvent and has given or granted the property concerned to another without consideration, the remedy is by an action to subject the property to the payment of the debts of the insolvent person.

[See note on this question beginning on page 1098.]

Specific performance — payment of price — effect.

2. Where there is a verbal agreement for the conveyance of real estate or an interest therein, payment of the consideration will not take the case out of the operation of the Statute of Frauds, in the absence of deceit or fraud used to induce the payment.

[See 25 R. C. L. 267, 268, 544.]

— fraud — effect.

3. A court of equity will grant

relief in such case where the oral promise was made as a means of imposition and deceit to secure the consideration. The ground upon which the court will interfere in such cases is that of fraud; and the exercise of the jurisdiction is based not on the oral agreement, but on the fraud. A mere refusal to perform a parol agreement void under the statute is not of itself a fraud either in law or in equity.

ERROR to the Court of Appeals for Lorain County to review a decree in favor of defendants in an action brought to subject certain land held by them to a lien in favor of plaintiff. *Affirmed.*

ERROR to the Court of Appeals for Lorain County to review a decree fixing a lien on certain property for the amounts claimed by plaintiff. *Reversed.*

Statement by Johnson, J.:

The original action, cause No. 16,734, was begun by Herman C. Newman in the common pleas of Lorain county to subject certain land held by the defendants in error to a lien in his favor.

The petition alleges that the property was conveyed to Theo Elizabeth Newman on or about the 30th of April, 1918, and was thereafter conveyed by her to McKeehan, as trustee, to hold for her benefit.

The petition alleges that within thirty days prior to the date of the deed to Theo Elizabeth Newman, her husband, Edward E. Newman, since deceased, requested the plaintiff to advance to him the sum of \$5,000 for the express purpose of buying the real estate, and that the said Edward E. Newman did thereupon covenant and agree with the plaintiff that if the real estate was so purchased by the use of the plaintiff's money he would cause a mortgage to be duly executed in favor of and delivered to the plaintiff, covering said real estate as security for the money; that, relying on the promise of said Edward E. Newman, the plaintiff did advance the

\$5,000 as requested, and as a preliminary step to the giving of the security agreed upon before the real estate was purchased said Edward E. Newman executed and delivered to the plaintiff his promissory note for the sum of \$5,000, dated April 1, 1918, payable one year after date; that said Edward E. Newman purchased said real estate, using the \$5,000 so advanced by the plaintiff for that purpose, and caused the title to the same to be taken in the name of Theo Elizabeth Newman, his wife; that the latter paid no consideration whatever for such real estate, and took the title of the same at the request of and for the benefit of said Edward E. Newman, well knowing that the plaintiff had advanced the money with which it was paid, and knowing the obligation of Edward E. Newman to the plaintiff in regard to it; that Edward E. Newman did in fact partially prepare the mortgage in plaintiff's favor, covering the real estate, and other real estate the purchase price of which was likewise advanced by the plaintiff to Edward E. Newman, and was about to carry out his agreement with the plaintiff when

his death occurred on the 25th of December, 1918; that defendant Theo Elizabeth Newman now refuses to recognize the right and interest which plaintiff has in the premises, and is about to dispose of the same; and that the assets of said Edward E. Newman are wholly insufficient to satisfy plaintiff's claim against the estate, or any considerable part thereof, and plaintiff has no adequate remedy at law.

The petition prays that the real estate be decreed to be subject to a lien in plaintiff's favor in the sum of \$5,000, with interest, and for such other equitable relief as is proper.

The answer of the defendant Theo Elizabeth Newman admits that McKeehan holds the legal title, as trustee, for her, subject to a lien in his favor of \$1,000, and that said real estate was conveyed to her on or about the date alleged, and that she conveyed the same to McKeehan, trustee; it admits that Edward E. Newman was her husband, and that he died on December 25, 1918, and that the estate left by him was insufficient to pay the plaintiff's claims in full. Not intending to deny that plaintiff holds a promissory note of the said Edward E. Newman for the amount and of the date alleged, defendant denies all the other allegations not expressly admitted.

The answer of the defendant McKeehan sets forth that the transfer of the real estate to him as trustee was made for the purpose of preserving the status quo while the controversy concerning the matter now in dispute was being investigated. He sets up a lien for \$1,000, and denies the other allegations of the petition. In cause No. 16,734 the court of appeals found in favor of the defendant, and rendered judgment accordingly.

In cause No. 16,770 the same parties were plaintiff and defendants, and the petition in that case alleged that some months after the transaction set up in the petition in No. 16,734, the said Edward E. Newman,

desiring to buy an adjoining piece of property to the one referred to in 16,734, made an arrangement with his father by which his father loaned him \$4,900 for that purpose, and that Edward E. Newman agreed at the same time that if the plaintiff would advance the said \$4,900, he would cause a mortgage to be executed and delivered to plaintiff for the full sum of both loans, to wit, \$9,900, covering both pieces of real estate; and the petition contained the same allegations touching the transaction as were contained in the other petition, and the answers were to the same effect.

In cause No. 16,770 the court of appeals found on the issues in favor of the plaintiff, and entered its decree, fixing the lien on the property for the amounts claimed.

Messrs. Garfield, MacGregor, & Baldwin and Philip R. White, for Herman C. Newman:

A parol agreement to give a mortgage, coupled with part or complete performance on the part of the person advancing the money, will be upheld in equity, to the extent that equitable relief is necessary in order to prevent a fraud either actual or constructive.

Beach, Contr. § 360; Allender v. Evans-Smith Drug Co. 3 Ind. Terr. 628, 64 S. W. 558; 1 Jones, Mortg. § 164; Murphree v. Countiss, 58 Miss. 713; Poole v. Tannis, 137 Wis. 363, 118 N. W. 188, 864; Cole v. Cole, 41 Md. 301; Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000; King v. Williams, 66 Ark. 333, 50 S. W. 695; Smith v. Smith, 125 N. Y. 224, 26 N. E. 259; Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 Ann. Cas. 44; Fitzgerald v. Fitzgerald, 97 Kan. 408, 155 Pac. 791; Perry v. Board of Missions, 102 N. Y. 105, 6 N. E. 116; Baker v. Baker, 2 S. D. 261, 39 Am. St. Rep. 776, 49 N. W. 1064; Dean v. Anderson, 34 N. J. Eq. 496; Gunter v. Halsey, 2 Ambl. 586, 27 Eng. Reprint, 381; Walker v. Walker (1740) 2 Atk. 100, 26 Eng. Reprint, 462; Clinan v. Cooke, 1 Sch. & Lef. 41; Buckmaster v. Harrop, 7 Ves. Jr. 346, 32 Eng. Reprint, 139; Frame v. Dawson, 14 Ves. Jr. 386, 33 Eng. Reprint, 569, 9 Revised Rep. 304; Phillips v. Thompson, 1 Johns. Ch. 149; McCarty v. Brackenridge, 1 Tex. Civ.

App. 170, 20 S. W. 997; *Ulrich v. Ulrich*, 17 N. Y. S. R. 414, 1 N. Y. Supp. 777; *Irvine v. Armstrong*, 31 Minn. 216, 17 N. W. 343; *Heran v. Elmore*, 37 S. D. 223, 157 N. W. 820; *Hollister v. Sweet*, 32 S. D. 141, 142 N. W. 255; *Williams v. Rice*, 60 Mich. 102, 26 N. W. 846; *Mathews v. Leaman*, 24 Ohio St. 615; *Watson v. Erb*, 33 Ohio St. 35; *Gramann v. Borgmann*, 14 Ohio N. P. N. S. 449.

Messrs. **Dustin, McKeehan, Merrick, Arter, & Stewart, H. H. McKeehan, and Warren M. Briggs**, for **Theo Elizabeth Newman et al.**:

The transaction created in no sense a trust.

Whaley v. Whaley, 71 Ala. 159; *Martin v. New York & St. L. Min. & Mfg. Co.* 91 C. C. A. 348, 165 Fed. 398; *Pom. Eq. Jur.* 4th ed. § 1038; 1 *Perry, Trust*, § 133; 1 *Tiffany, Real Prop.* 2d ed. § 107, p. 399; 39 *Cyc.* 135; 15 *Am. & Eng. Enc. Law*, 1149; *Surasky v. Weintraub*, 90 S. C. 522, 73 S. E. 1029; *Durant v. Davis*, 10 Heisk. 522; *Stansell v. Roberts*, 13 Ohio, 148, 42 *Am. Dec.* 193.

A parol agreement to give a mortgage on realty is unenforceable, both under our statute as to conveyances and our statute against frauds and perjuries.

Page, Contr. § 1260; 27 *Cyc.* 984; *Ogden v. Ogden*, 4 Ohio St. 182; *Edwards v. Scruggs*, 155 Ala. 568, 46 So. 850; *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; *Boehl v. Wadgy-mar*, 54 Tex. 589; *Ex parte Broderick*, L. R. 18 Q. B. Div. 766, 56 L. J. Q. B. N. S. 635, 35 *Week. Rep.* 613; *Clabaugh v. Byerly*, 7 Gill, 354, 48 *Am. Dec.* 575; *Six v. Shaner*, 26 Md. 425; *Marquat v. Marquat*, 7 How. Pr. 417; *Washington Brewery Co. v. Carry*, — Md. —, 24 *Atl.* 151; *Pierce v. Parrish*, 111 Ga. 725, 37 S. E. 79; *Roberts v. Terry*, 161 Ky. 397, 170 S. W. 965; *Curle v. Eddy*, 24 Mo. 117, 66 *Am. Dec.* 699; *Bloomfield State Bank v. Miller*, 55 Neb. 243, 44 *L.R.A.* 387, 70 *Am. St. Rep.* 381, 75 N. W. 569; *Poarch v. Duncan*, 41 *Tex. Civ. App.* 275, 91 S. W. 1110; *Thompson v. George*, 86 Ky. 311, 5 S. W. 760; *Bailey v. Rockafellow*, 57 Ark. 216, 21 S. W. 227; *Albert v. Winn*, 5 Md. 66; *Browne, Stat. Fr.* § 267; *Allen v. Mitchell*, 99 Wash. 305, 169 *Pac.* 826; *Frank Clothing Co. v. Deegan*, — *Tex. Civ. App.* —, 204 S. W. 471; *McCue v. Smith*, 9 Minn. 257, Gil. 237, 86 *Am. Dec.* 103; *Heaton v. Eldridge*, 56 Ohio St. 87, 36 *L.R.A.*

817, 60 *Am. St. Rep.* 737, 46 N. E. 638; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Yeager v. Tuning*, 79 Ohio St. 121, 19 *L.R.A. (N.S.)* 700, 128 *Am. St. Rep.* 679, 86 N. E. 657; *Shahan v. Swan*, 48 Ohio St. 38, 29 *Am. St. Rep.* 517, 26 N. E. 222.

The refusal to perform an oral promise to give a mortgage is not fraud so as to give a court of equity jurisdiction.

Watson v. Erb, 33 Ohio St. 35; *Newton v. Taylor*, 32 Ohio St. 399; *Crabill v. Marsh*, 38 Ohio St. 331; *Irwin v. Hubbard*, 49 Ind. 350, 19 *Am. Rep.* 679; *Wooldridge v. Scott*, 69 Mo. 669.

The insolvency of the estate of Edward Newman does not bar the operation of the Statute of Frauds.

Brown v. Drew, 67 N. H. 569, 42 *Atl.* 177; *Pomeroy, Eq. Jur.* 4th ed. § 2246; *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *M'Kee v. Phillips*, 9 *Watts*, 85; *Bradley v. Owsley*, — *Tex.* —, 19 S. W. 340; *Townsend v. Fenton*, 32 *Minn.* 482, 21 N. W. 726; 36 *Cyc.* 651.

Johnson, J., delivered the opinion of the court:

In the case which involved the property first purchased, the testimony of Herman C. Newman, the plaintiff in the action, was the only evidence in support of some of the material allegations of his petition. In the case which concerned the property purchased several months later, the allegations of the petition were supported by the testimony of a son Arthur, brother to Edward E. Newman.

On the trial of the first case in the court of appeals, on appeal, that court held that, as Edward, the son to whom the money was loaned, had died, the father, Herman C. Newman, the plaintiff, was incompetent as a witness, and that the competent evidence introduced was not of sufficient probative force to warrant the relief prayed for.

It is contended that the rejection of the father's testimony by the court of appeals was error. Its holding was based upon § 11,495, General Code, the pertinent part of which follows: "A party shall not testify when the adverse party . . . is an executor or administrator, or claims or defends as heir,

grantee, assignee, devisee, or legatee, of a deceased person."

Certain specified exceptions are stated, and then follows the clause: "And when a case is plainly within the reason and spirit of the next three preceding sections, though not within the strict letter, their principles shall be applied."

It was the view of the court of appeals, that, although Theo Elizabeth, the wife of the deceased son, was not the grantee or devisee of a deceased person, yet the case was plainly within "the reason and spirit of the next three preceding sections."

The plaintiff in error earnestly insists that the cases of *Cochran v. Almack*, 39 Ohio St. 314, and *Cockley Mill. Co. v. Bunn*, 75 Ohio St. 270, 116 Am. St. Rep. 741, 79 N. E. 478; 9 Ann. Cas. 179, sustain his contention.

In the *Cochran Case* it is held in the syllabus: "A defendant is a competent witness to transactions with a deceased agent of plaintiff, though not occurring in his presence, if within the scope of such agent's authority."

It would seem to be clear that a deceased agent does not sustain a relation analogous to any of the persons named in the section. In the opinion the three sections of the statute here involved are discussed by the court, and it concludes by saying: "It follows that if a case is provided for, by the terms of either of the sections, no occasion can arise for invoking the spirit and reason of the statute to supply the omission of its letter or terms."

I do not think that conclusion logically follows.

In the *Cockley Case* it is held that the general manager of a corporation in a suit against an executor or administrator is not disqualified by § 5242, Revised Statutes (now § 11,495, General Code), to testify to facts occurring before the death of the decedent.

In *Elliott v. Shaw*, 32 Ohio St. 431, it is pointed out that, in its original form, the section only ex-

cluded the party when the adverse party was an executor or administrator, and that since then numerous amendments have been made from time to time. In that case the question was whether, in a suit by an assignee of a chose in action from a deceased person, the opposing party is barred. The court held that, as assignees were not mentioned in the statute, it did not apply. But the following year the legislature amended the statute so as to read in its present form, and in that amendment the reason and spirit clause was inserted.

The inference would seem to be reasonable that the legislature, by the insertion of the clause, intended to abrogate the construction requiring absolute particularity, which had theretofore been applied, and therefore enacted that when a case came within the reason and spirit of the sections the provision should apply, although it might not come within the letter.

Section 11,493, General Code, makes all persons competent witnesses except those of unsound mind, etc. Section 11,494, General Code, excludes privileged communications to attorneys, physicians, etc. Section 11,495, General Code, places a limit on the full competency of the party, and makes the party incompetent when the adverse party defends as grantee, devisee, etc., of a deceased person. And then comes the reason and spirit clause. Under this section Mr. Newman, the father, would be incompetent if the wife of the deceased son, Theo Elizabeth, was the grantee of her husband. She is not the grantee of her husband, but she is to all intents and purposes the grantee of her husband,—his real grantee. If the deceased son had taken the title in his own name, the title would have passed to his heir on his death, and the father in that event would be incompetent as a witness. If the son had taken the title and had willed the property to his wife, the father would be incompetent, and if the son had taken the title and later

conveyed it direct to his wife, as grantee, the father could not have testified.

Does the fact that the husband caused the grant to be made direct from the original owner to her, instead of to himself and then to her, change the spirit of it? I think not. The case is within the reason and spirit of the sections. To hold that if a witness came within either of the three sections he would be competent would be to regard only the letter of the statute. It would disregard and disobey the mandate of the legislature that courts should observe the reason and spirit of the statute.

However, the court is not agreed upon the question as to the competency of the father, and we come to the contention of counsel for the wife of the deceased son, that if it be conceded that an oral agreement was made by the son to give his father a mortgage, the agreement was void under the Statute of Frauds.

The facts shown are that in April, 1918, the father loaned to Edward, the son, \$5,000, and received from him his promissory note for that sum, payable in one year from its date; that the loan was made at the request of the son, who told his father he would use the money for the purchase of the land described in the petition, and that if his father would loan him the amount he would give him a mortgage on the property to secure the loan; that the loan was made pursuant to that arrangement; that the property was purchased, and on the son's direction was deeded directly to his wife, the defendant, Theo Elizabeth Newman; and that the mortgage was never delivered, and the son died from influenza in Kansas City the following Christmas.

As to the property subsequently purchased, the father, in June, 1918, loaned Edward \$4,900, and received his promissory note therefor, and the son Arthur testified that his brother told him he was going to give the father a mortgage on both parcels for the entire amount

loaned. The father had also testified to this; and his testimony was, as above stated, excluded in the court of appeals. No mortgage on either piece of property was ever signed, and the father holds the two notes—one for \$5,000 and one for \$4,900—unpaid.

There is no charge of actual fraud in the case, and the father, on the witness stand, expressly disclaimed that the son had any intent to cheat or deceive him, and no claim is made that the son overreached the father in any way. It is conceded that the son was an honest and conscientious business man.

The situation presented is that the father loaned the son the sums of money stated, and the son promised to give a mortgage to secure the promissory notes given to the father for the loans. Was the agreement to give the mortgage void within the Statute of Frauds? Were the circumstances such as to invoke the equity powers of the court to impress a trust on the property?

It is contended by counsel for the wife of Edward that the parol agreement to give the mortgage on the real estate is unenforceable under our statutes (Gen. Code, §§ 8620, 8621) as to conveyance and frauds and perjuries; that no trust was created by the transaction; that nothing akin to a vendor's lien is involved in it; that the failure to give the mortgage does not constitute a fraud, so as to give a court of equity jurisdiction; and that the insolvency of the estate of Edward does not prevent the operation of the Statute of Frauds.

Section 8620, General Code, provides: "No . . . interest . . . in, or out of lands, . . . shall be assigned, or granted except by deed, or note in writing, signed by the party so assigning or granting it, . . . or by act and operation of law."

Section 8621, General Code, provides: "No action shall be brought, whereby . . . to charge a person . . . upon a contract or sale of

lands, tenements, or hereditaments, or interest in, or concerning them; . . . unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith."

On the other hand counsel for the father contend that equity will not allow one party to be unjustly enriched by retaining benefits received under a contract, which is within the Statute of Frauds, and they contend that this is a case of unjust enrichment. They agree that the transaction itself did not create a trust in the property. But they ask the court to construct a trust as a remedy to prevent unjust enrichment. They do not claim that the transaction created a vendor's lien. They concede, as obviously it must be conceded, that the father does not stand in the position of one having a vendor's lien; that he could not enforce his claim against a creditor of Theo Elizabeth Newman who had levied on the property, or claimed a preference, in case she went into bankruptcy. They concede that a parol agreement to give a mortgage is, on its face, within the Statute of Frauds, and that, strictly speaking, the contract itself is unenforceable, although courts of equity do not always make this distinction. They insist that it may or may not be true that the refusal to perform an oral promise to give a mortgage "is not such fraud as to give a court of equity jurisdiction," but they contend that if the refusal amounts to a fraud, in that it allows one party to retain an unconscionable advantage, such refusal does perpetrate a fraud and give a court of equity jurisdiction. They rest their case on the proposition that equity will prevent an unjust enrichment under certain facts and circumstances, and contend that this case presents such a situation.

The briefs of counsel on both sides contain many authorities touching various phases of the questions presented. The authorities cited by counsel, in which proposi-

tions are stated upon which relief has been granted, or in which relief has been refused, do not in either alternative agree upon the grounds on which their conclusions are rested.

It is also apparent that in some jurisdictions courts have followed a different rule from that which has been consistently followed in Ohio; and likewise in a number of cases it is shown that the court in the exercise of its equity powers has, because of the peculiar circumstances of the cases, felt called upon to impress a trust upon the property involved.

In this state there has been a very substantial adherence to the rule that, upon parol contract for an interest in lands, mere payment of the consideration does not take the case out of the Statute of Frauds and Perjuries.

Specific performance—payment of price—effect.

In *Stansell v. Roberts*, 13 Ohio, 148, 42 Am. Dec. 193, it appeared that one Jennings loaned to Roberts the money to make the first payment on land purchased. Roberts executed a mortgage in Jennings's favor, but Jennings neglected to have his mortgage recorded until after a mortgage to Stansell was recorded. The claim of Jennings's counsel was that as Stansell knew of Jennings's mortgage, his lien must be postponed to that of Jennings's. In disposing of Jennings's claim that his lien was in the nature of a vendor's lien, the court says: "The purchase money is what passes between vendor and purchaser, and the lien is the right of the vendor to look to the thing sold, for the price for which it was sold. But money advanced by a third person, to enable the purchaser to buy, is no part of this transaction; nor is he who advances privy to the sale. Nor can it be construed into a resulting trust; that exists where land is purchased with the money of another."

In the case before us the property was not purchased with the money of Herman Newman, the father.

He concedes he loaned the money to Edward and received his note for it. He testifies that after he loaned it he had no right to direct what Edward was to do with it.

In *Watson v. Erb*, 33 Ohio St. 35, it is held that "the fraud against which equity will grant relief, notwithstanding the Statute of Frauds, consists in the refusal to perform an agreement upon the faith of which the plaintiff has been misled to his injury, or the defendant has secured an unconscionable advantage, and not in the mere moral wrong involved in a refusal to perform a contract which, by reason of the Statute of Frauds, cannot be enforced by action."

In the opinion at page 48, it is said: "It must appear that the promise was used as a means of imposition and deceit. If the case taken as a whole is one of fraud, the verbal promise may be received in evidence as one of the steps by which the fraud was accomplished. To deduce the fraud from the contract and then give effect to the contract on the score of fraud is reasoning in a circle. The fraud which will give jurisdiction to compel a performance of the parol trust must consist in something more than a mere breach of parol undertaking."

In the case before us it is not claimed that the son Edward sought to cheat and defraud his father by anything that was said or done in the making of the oral agreement. H. C. Newman, the father himself, disclaims that his son had any such purpose, or did anything to deceive him. There is no contention that Theo Newman, the wife of the son, was party to any arrangement, or has been in any of the transactions guilty of any fraud.

It is further said in *Watson v. Erb*, supra, page 48:

"Thus, if the actual purchaser agreed to buy and hold for the real purchaser, with money loaned by him to the latter for that purpose, he is a trustee of the title for the borrower. [Citing cases.]

"Upon the same principle, a deed absolute on its face may be converted into a mortgage, by showing that it was in consideration of a loan, and equity will treat the grantee as a trustee of the title, and compel a reconveyance on payment of the debt. This is so whether there was a verbal defeasance or not. But the mere breach of a parol agreement is not such a fraud as takes the case out of the statute. [Citing cases.]

"If this were not so, the consequence would be that the common-law rule that parol contemporaneous evidence cannot be admitted to vary the terms of a written agreement, and also the provisions of the Statute of Frauds, would be abrogated."

In *Newton v. Taylor*, 32 Ohio St. 399, it is held: "An implied or constructive trust may be established from the acts of a party who has obtained money upon the faith of his agreement to buy lands in the name of his wife, and, having bought them, takes the title to himself."

"If the husband is a participant in inducing the purchase for the wife's benefit, receives the money for that purpose to invest in her name, and then buys for himself, this is such a fraud as will create a trust against him and those claiming under him with notice."

In the opinion, at page 409, it is said: "The opinion, however, of Browne, in his treatise on frauds, seems to be that the fraud which suffices to lay the foundation of a trust is not simply that fraud which is involved in every deliberate breach of contract. There must have been some agency in bringing about the result, without which a mere refusal to perform the trust is not enough. . . . And Perry says that the mere breach of a parol agreement will not create a trust. . . . Washburne also seems to entertain the same opinion expressed by Perry and Browne, that a mere subsequent refusal to do what had been agreed is not such a fraud as will create a constructive trust."

In *Crabill v. Marsh*, 38 Ohio St.

331, it is held that, "on a verbal agreement for the conveyance of land, the payment of the purchase money, whether made in money or services, will not take the agreement out of the operation of the Statute of Frauds."

In the opinion, at page 338, it is said: "That mere payment of the purchase money, whether made in money or services, will not take the case out of the operation of the statute, we regard as well settled. . . . The ground upon which courts of equity interfere, in such cases, is that of fraud. The jurisdiction is founded not upon the agreement, but upon the fraud. And a mere refusal to perform a parol agreement, void under the Statute of Frauds, is in no sense fraud, either in law or equity."

The Statute of Frauds is founded in wisdom, and has been justified by long experience. As was said by Mr. Justice Grier in *Purcell v. Miner*, 4 Wall. 513, 517, 18 L. ed. 435, 436: The statute is "absolutely necessary to preserve the title to real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony."

It should be enforced. Courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions. But this case is barren of any averment or proof, or offer of proof, which ought to induce a court of equity to afford relief.

It is said in 39 Cyc. 135: "It is a well-settled rule that where money is advanced by way of a loan to be used by the borrower in the purchase of property in his own name, no resulting trust arises in favor of the lender, although the money is loaned under a parol agreement that the borrower's interest in the property shall rest in the lender to the extent of his loan."

In the brief of counsel for Theo Elizabeth Newman many authorities are cited in support of their contentions as to the various phases of the case, but, as is the case in the brief of counsel for the father, they

differ widely upon the grounds on which their conclusions are reached.

Concerning the contention of counsel for Herman C. Newman that the court should construct a trust as a remedy to prevent the unjust enrichment complained of, we think it may be said that in Ohio it is not the rule that the mere payment of the money in pursuance of the verbal contract is such a part performance as to take the case out of the operation of the statute, or, in the absence of fraud, that it is such a circumstance as would invoke the equity jurisdiction of the court to impress a trust upon the property for the security of the loan.

There is general concurrence in the view, which is obviously just and equitable, that if one has been induced to enter into and perform, or partly perform, an oral agreement concerning an interest in land by fraudulent misrepresentations as to existing conditions, financial ability of a party, or under circumstances which amount to fraud, a court of equity should refuse to let the statute be used as an instrument of fraud or to operate to prevent equitable relief. And there may be such part performance of a particular contract as to justify relief. As said in *Shahan v. Swan*, 48 Ohio St. 25, at page 40, 29 Am. St. Rep. 517, 26 N. E. 226: "Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal services of the party seeking relief, does not ordinarily constitute such part performance as will take a case out of the operation of the Statute of Frauds, we do not wish to be understood to hold that cases may not arise wherein specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services, not intended to be, and not susceptible of being, measured by a pecuniary standard."

But where the entire transaction leading up to the loan of money and the making of the verbal contract to execute the mortgage to secure the loan is open and free from fraud or

false representation, the subsequent failure to give the mortgage is not such a circumstance as to amount to fraud. Such a holding would open the door to the nullification of the Statute of Frauds under most any set of circumstances.

As we view the case, it was a simple transaction by which Edward, the son, bought a piece of real estate and borrowed the money from his father to pay for it. He gave his promissory note to his father, payable in one year after date, with interest, and promised at the time that when he had received the deed and the title he would give his father a mortgage to secure the note. Some months afterwards the son died while absent from home, without having executed and delivered the mortgage. When the father loaned the son the money, and received the note, the money became the property of the son.

When the father was on the witness stand he testified as follows:

Q. As far as Ed's making it out to Theo was concerned, that would be all right to you?

A. After I loaned him the money I had no right to direct what he was to do with it. He was to buy the property.

We see no feature in that transaction out of which a trust can arise or can be impressed on the land. Moreover, while we are convinced that there is no ground upon which to grant the relief prayed for in this case, the father is not without his proper remedy. The estate of Edward Newman is indebted to his father, Herman C. Newman, in the sum of approximately \$10,500.

It is conceded that when Edward Newman gave the money borrowed

from his father to his wife to buy the property, or when he paid the money to the owner of the property for the deed to his wife, he gave or transferred it to her without consideration, and it is conceded that he was insolvent. Under these circumstances the gift or transfer was void as to existing creditors. The father is entitled to proceed by suit to set aside the gift or transfer and subject the property to the benefit of the creditors of the son, preserving the legal rights of all parties concerned therein. But holding only the notes as evidence of the indebtedness to him, and not having received the mortgage as security for the notes, there is no ground to prefer the father's claim.

Fraudulent conveyance—fraud on purchaser—remedy.

It is said in 25 R. C. L. 267, § 68: "The courts are practically unanimous that the mere payment of a portion of the purchase money, unaccompanied by any other act, does not amount to part performance of an oral contract sufficient to take the case out of the Statute of Frauds. Even the payment of the whole consideration has been held not to be sufficient for that purpose. This is for the reason that the plaintiff is considered as having a sufficient remedy at law to recover back the money."

In cause No. 16,734, *Herman C. Newman v. Theo Elizabeth Newman et al.*, the judgment of the Court of Appeals is affirmed.

In cause No. 16,770, *Theo Elizabeth Newman et al. v. Herman C. Newman*, the judgment of the Court of Appeals is reversed.

Hough, Robinson, and Matthias, JJ., concur.

ANNOTATION.

Rights and remedies of one who advances money to purchase real estate under an oral agreement by the vendee to give a mortgage thereon as security.

- I. Resulting trust, 1099.
- II. Vendor's or equitable lien or mortgage, 1100.

It should be observed that, as is

indicated in the above title, the present note includes in general only cases in which there is an oral agreement by the vendee to give a mortgage on

the property as security. There are several cases referred to in the note in which the court held that an equitable lien or mortgage existed in favor of the lender of money, although there was no oral agreement for a mortgage, but this class of cases is not in general covered, as it does not clearly appear that the same rights and remedies would exist in such cases as where there is an express oral agreement between the parties for a mortgage as security.

1. Resulting trust.

The rule appears to be that the mere fact that one advances money to another to purchase real estate under a parol agreement, which is not carried out and which is unenforceable, for a mortgage on the land as security for the advance, does not entitle the lender in a court of equity to impress a resulting trust upon the land in the hands of the vendee. *NEWMAN v. NEWMAN* (reported herewith) ante, 1089; *Durant v. Davis* (1873) 10 Heisk. (Tenn.) 522. See also *Loftis v. Loftis* (1895) 94 Tenn. 232, 28 S. W. 1091; *Rogers v. Simpson* (1873) 10 Heisk. (Tenn.) 655; *Chapman v. Abrahams* (1878) 61 Ala. 108.

The above rule was applied in the reported case (*NEWMAN v. NEWMAN*) even though the borrower of the money had died insolvent, it being held that, in the absence of actual fraud or deceit, equity would not impress a trust on the property.

And where a married woman obtained a conveyance of land to her separate use, pursuant to an oral agreement with one who furnished a part of the purchase price that the land should be so conveyed and that she would execute a trust deed or mortgage on it to secure the amount borrowed, but afterwards refused to execute such deed or mortgage, the court in *Durant v. Davis* (Tenn.) supra, held that a resulting trust did not arise in the property in favor of the party so advancing the purchase money. The court, after holding that the lender had no right to subrogation to the vendor's lien, said: "There is equally as little room to maintain the

position that the facts raise a resulting trust in favor of complainant in the original bill. It is a case simply of a promise by a married woman to give a mortgage or a deed of trust to secure the payment of money loaned, for which she has given her promissory note. That this promise has been violated is certainly true on the facts in this record; but how this can raise a resulting trust, simply because the money so loaned was paid on a lot purchased by the borrower, we have been unable to see. It is insisted, however, that this is a case of outrageous fraud, and therefore a court of equity must give relief. It certainly has some of the worst elements of bad faith, but no more than in any other case where a party promises that which the law will not enforce, and refuses to comply with his promise. It is not such fraud as a court of equity can relieve against, unless we assume that the courts are authorized to declare such a promise, as is here shown, to be binding, and enforce it, notwithstanding the long-settled principle that such a contract of a married woman is not binding, either at law or in equity. In fact, the promise to give the deed of trust on land would not be enforced in any court, either against a married woman or a party free from disability, not being in writing. It had no binding legal force when made, and it was the folly of the other party to trust to it, against which the courts of equity can give no relief."

Also in *Chapman v. Abrahams* (Ala.) supra, it was held that one who advanced purchase money for land at the request of the prospective vendee under an agreement apparently in parol, for a mortgage on the land when the conveyance was executed, was not entitled to a resulting trust in the land after the conveyance. There was, however, in this case an actual execution of the mortgage; and the question under consideration was not discussed, the opinion being concerned chiefly with the effect of the mortgage.

And in *Loftis v. Loftis* (1895) 94 Tenn. 232, 28 S. W. 1091, supra, it was

held that an oral agreement made between a husband and wife that the latter should have a charge or lien upon lands which he was about to purchase, for the amount contributed by her as a part of the purchase price, did not establish a resulting trust in the land, on its conveyance to the husband, to the extent of her contribution, but that she was only a general creditor, without lien or priority as against the other creditors of the husband.

Attention is called also to *Rogers v. Simpson* (1873) 10 Heisk. (Tenn.) 655, holding that no resulting trust or lien could arise in favor of one who advanced money to another to purchase lands under an oral agreement that the interest of the purchaser in the lands should, to the extent of the money advanced, vest in the lender.

II. Vendor's or equitable lien or mortgage.

The cases are not harmonious on the question whether one who advances money to buy real estate, under an oral agreement for a mortgage on the property as security, is entitled to subrogation to the vendor's lien or is entitled to some form of equitable lien or mortgage which can be enforced against the property, where the vendee refuses to carry out the agreement for a mortgage. There are several cases which hold in favor of the right to a lien or equitable mortgage.

Alabama. — See *Gibson v. Gibson* (1917) 200 Ala. 591, 76 So. 949, *infra*.

Illinois. — *Grigaitis v. Gaidauskis* (1919) 214 Ill. App. 111.

Kansas. — *Foster Lumber Co. v. Harlan County Bank* (1905) 71 Kan. 158, 114 Am. St. Rep. 470, 80 Pac. 49, 6 Ann. Cas. 44.

Maryland. — *Cole v. Cole* (1875) 41 Md. 301.

Michigan. — *Williams v. Rice* (1886) 60 Mich. 102, 26 N. W. 846.

Minnesota. — See *Hughes v. Mulaney* (1904) 92 Minn. 485, 100 N. W. 217, *infra*.

Mississippi. — *Murphree v. Countiss* (1881) 58 Miss. 712.

New York. — See *Sprague v. Cochran* (1894) 144 N. Y. 104, 38 N. E. 1000, *infra*.

Wisconsin. — *Poole v. Tannis* (1908) 137 Wis. 363, 118 N. W. 188, 864.

Thus, it was held in *Foster Lumber Co. v. Harlan County Bank* (Kan.) *supra*, that if one advances money for the purpose of buying a specific tract of land, on the oral promise of the borrower to secure its repayment by a mortgage upon the property when title thereto is obtained, and, after the conveyance has been procured by the use of the money, the borrower refuses to execute the mortgage, equity will regard that as done which the borrower agreed should be done, and which ought to have been done, and will treat the transaction as creating an equitable mortgage upon the land in favor of the lender. It was held that the lien so created was not obnoxious to the Statute of Frauds because it depended in part upon an oral promise. The court observed that the lender had fully performed its part of the agreement; and quoted the doctrine that courts of equity never allow the provisions of the Statute of Frauds to be perverted and made instrumental in the accomplishment of fraud; that they decree the specific execution of agreements where there has been a performance on the one side, because the refusal to perform on the other side is a fraud, and they will not permit the statute designed to prevent fraud to be made an engine of fraud. Besides this, the court said: The lien decreed might be regarded as resulting from the operation of the law from the entire conduct of the parties, and hence as in terms excluded from the inhibition of the statute.

And the court in *Foster Lumber Co. v. Harlan County Bank* (Kan.) *supra*, held that the lender's equitable mortgage would be given precedence over a mortgage on the land taken by a party who had notice of the rights of the lender; and that such mortgage also was superior to the homestead rights of the borrower.

And where money was advanced for the purchase price of land under an oral agreement for a mortgage thereon as security, but the purchaser refused to carry out the agreement, it

was held in *Grigaitis v. Gaidauskis* (Ill.) supra, that the person advancing the money could enforce an equitable lien on the property. The court does not discuss the effect of the Statute of Frauds, but states that pursuant to the maxim that equity will consider that which ought to be done as already in being, the promise to give a mortgage to secure a loan may be treated as an actual mortgage.

Also in *Cole v. Cole* (Md.) supra, where it was orally agreed that for money advanced to pay the purchase price of land the borrower should execute a mortgage to secure repayment, a note for the advance being given at the time of the execution of the deed to stand as evidence until a mortgage could be executed, it was held in a suit by the borrower against the grantee to compel the sale of the land to satisfy the complainant's claim, or to compel the execution of the mortgage to secure its payment, that the giving of the note did not destroy the right of the complainant to have the mortgage executed; that the borrower was bound in equity and good conscience to performance on his part; that his interest in the property must be held answerable for the same, to the same extent as if the mortgage had been given according to the agreement; that a court of equity would hold him liable, and consider that as done which ought to have been done; and that there was nothing in the Statute of Frauds, if it had been pleaded, to prevent the application of this equitable principle, since courts of equity would not allow its provisions to be perverted and made instrumental in the accomplishment of fraud, but would decree a specific execution of agreements where there had been a performance on the one side, as the refusal to perform on the other side was a fraud. Since the time limited for repayment of the complainant had nearly expired, the court held that the execution of a mortgage might be dispensed with, and the defendant given the benefit of a stay of payment until the claim was due; but that a decree should be entered for the sale of the property and the

payment of the complainant's claim unless it was paid by the time specified.

And it being proved that the borrower's wife, who was made a party defendant, had notice of the complainant's equitable demands at the time the property was conveyed to her by her husband, any rights she acquired therein must be held subject to that of the complainant, and the deed to her should be vacated so far as it interfered with the complainant's equitable rights. *Ibid.*

So, a third party who advanced money for the purchase price of land, pursuant to an oral agreement for a trust deed of the property as security, which the purchaser refused to execute, was held in *Murphree v. Countiss* (1881) 58 Miss. 712, supra, entitled to an equitable lien on the property for the sum advanced, where the vendee entered into possession without giving a note for the purchase price, under an executory contract for title upon payment, and, when called upon for payment, applied to the third party for assistance, when an agreement was made between the latter and the vendor and vendee that the purchase money should be paid to the vendor by the third party, and that the latter should receive a note therefor and a trust deed as security from the vendee, the agreement being carried out by all the parties except that when the vendee, several weeks later, received a deed, he refused to execute the security. The court under these circumstances held that there was an assignable vendor's lien, and apparently regarded the third party as the equitable assignee of the vendor.

And in *Williams v. Rice* (1886) 60 Mich. 102, 26 N. W. 846, supra, where one who advanced money to buy real estate under an agreement (apparently by parol) that he should receive from the vendee a mortgage for the amount advanced, which mortgage the purchaser refused to execute, brought suit to establish a vendor's lien and to foreclose the same as a mortgage, the court held that the defendant's refusal to comply with the agreement was unconscionable, and that a decree

granting the relief prayed for should be affirmed. The opinion does not, however, discuss the questions of law involved.

And where the plaintiff loaned money to the defendant to buy real estate, under an oral agreement that the premises purchased should be security for the loan (there being no specific finding, however, that the security was to be in the form of a mortgage, as claimed by the plaintiff), but after the purchase the defendant refused to furnish security, it was held in *Hughes v. Mullaney* (1904) 92 Minn. 485, 100 N. W. 217, that a cause of action arose in the plaintiff to have the amount of the loan, with interest, adjudged a lien upon the premises, and that the same should be sold to satisfy the lien.

And third persons who advanced purchase money for land, under an agreement (whether oral or in writing does not appear) that the deed should be held in escrow until a mortgage to secure the purchase price was executed and delivered to them by the vendee, were held in *Gibson v. Gibson* (1917) 200 Ala. 591, 76 So. 949, entitled, on failure to execute the mortgage, to subrogation to the vendor's lien which they had discharged.

Although not on facts within the scope of the note, attention is called also to the statement in *Sprague v. Cochran* (1884) 144 N. Y. 104, 88 N. E. 1000, which supports the doctrine that one who advances money under an oral agreement for a mortgage on certain lands is entitled to an equitable mortgage on the property which is analogous to that of a vendor's lien. The court (arguendo) said: "There can be no doubt, upon the authorities, that where one party advances money to another upon the faith of a verbal agreement by the latter to secure its payment by a mortgage upon certain lands, but which is never executed, or which, if executed, is so defective or informal as to fail in effectuating the purpose of its execution, equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt.

. . . Some of these cases hold that the lien of the party who has advanced money under such circumstances is analogous to that of the vendor of real estate for the unpaid purchase money. The vendor's lien rests solely upon the doctrine of equity that it would be inequitable for the vendee who has received the legal title without payment of the purchase money to hold the estate discharged from the claim of the seller for its price, and it is certainly difficult to see any just distinction between the two cases. In one case a party receives the title to real property, without paying for it, with or without an agreement that his vendor shall be secured in the payment of the purchase price by a lien upon it by way of mortgage or otherwise. In the other case the party advances money under an agreement that its payment shall be secured by mortgage upon specific real estate, but which agreement has never been perfected. The right of the vendor and that of the person who has advanced the money are not essentially different, and each would seem to commend itself with equal force to the conscience of a court of equity. The doctrine of equitable mortgages is not limited to written instruments intended as mortgages, but which by reason of formal defects cannot have such operation without the aid of the court, but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transactions or agreements as to lands should be in writing in order to take them out of the operation of the Statute of Frauds, for two reasons: First, because they are completely executed by at least one of the parties and are no longer executory; and, secondly, because the statute by its own terms does not affect the power which courts of equity have always exercised to compel specific performance of such agreements."

Where money was advanced by the plaintiff to the defendant, her son, to purchase a lot and to erect a house thereon, under an oral agreement that she should receive a mortgage on the premises to secure the sum advanced,

but the defendant refused to execute the mortgage, it was held in *Poole v. Tannis* (1908) 137 Wis. 363, 118 N. W. 188, that a judgment awarding the plaintiff a vendor's lien on the property was improper, but that by reason of the agreement the plaintiff was entitled to an equitable lien thereon and to enforcement of the same by sale of the property; that under the circumstances in this case there was no material difference in the legal consequences of the two liens, and hence there was no prejudicial error. The court said: "There is no contention in this case that the claim sought to be enforced arises out of a transaction between vendor and vendee, and the facts clearly negative such a relationship. Hence the judgment of the trial court awarding plaintiff a vendor's lien is not well founded. . . . However, the question arises whether the plaintiff, under the established facts, is not entitled to the relief of an enforcement of an equitable lien upon the premises for the sums she contributed to the purchase of the lot and the building of the house thereon, in view of the fact that she relied on the agreement that the property should stand as security for the money she advanced to defendant to purchase and improve the lot, and defendant's refusal, after full performance of the agreement by plaintiff, to so secure the money advanced. It is shown that the money was advanced by the mother to the son upon the understanding that its repayment should be secured by a lien upon the premises, though the agreement established was not sufficiently clear and definite to provide for a mortgage security which she prayed should be specifically enforced. It is also plain that the son, through this arrangement and the confidential relationship between himself and his mother, obtained the money from her to acquire this property, and that he now refuses to carry out the agreement. The mother having advanced the money on the faith of the son's promise, and the defendant having used it for the acquisition of the property, give a basis for the interposition of equity to secure her

a lien on the property, and to enforce repayment out of it of the sum so advanced by her."

Cases which uphold the right in general of a third person who advances purchase money to buy real estate, to the benefit of the vendor's lien, would be authority apparently, a fortiori, for the proposition that such a third person has the right to substitution to the vendor's lien, or at least an equitable lien of some kind, where he advances the money under an oral agreement, which is not carried out, for a mortgage on the property,—unless the making of such an oral agreement should be regarded as negating any implied agreement for subrogation to the vendor's lien. But even in the latter event, it would seem that the case would be stronger in favor of the lender's right to an equitable lien than where no oral agreement is made, because, while the agreement itself is unenforceable, it shows that the intention of the parties was not to rely upon the personal security merely of the borrower, but upon the property itself.

As an example of the class of cases last referred to, attention is called to *Carey v. Boyle* (1881) 53 Wis. 574, 11 N. W. 47, where the court admitted that the extension of the right to a vendor's lien to third persons furnishing the purchase money could not be regarded as sustained by the weight of authority, the courts being in conflict on the question; but stated that so far as that state was concerned, it must be regarded as settled that such third persons are entitled to the full benefit of the vendor's lien. The court, however, said: "It must be understood that the extension of this equity to a third person is strictly confined to those who furnish or advance the purchase money to the purchaser in such manner that they can be said either to have paid it to the vendor, personally, or caused it to be paid on behalf or for the benefit of the purchaser; and to this extent they become parties to the transaction. It must not be a general loan, to be used by the purchaser to pay the consideration of the purchase or to be used

for any other purpose at his pleasure. In such case, the simple fact that the money can be traced into the land as having been paid by the purchaser to the vendor, as the whole or part of the purchase money, gives the person who loaned it no such right."

Although there was no agreement to execute a mortgage on the property to be purchased, and the case is, therefore, not on the facts within the scope of the note, attention is called to *Leary v. Corvin* (1905) 181 N. Y. 222, 106 Am. St. Rep. 542, 73 N. E. 984, 2 Ann. Cas. 664, where the plaintiff advanced money to her parents to buy a house for a home, under an agreement, which was void under the Statute of Frauds, that at their death the plaintiff should have the house; and it was held that, the plaintiff having contributed to the purchase of property on the faith of an agreement which had been violated by a failure to secure the same to her upon their deaths, and the relation being one of trust and confidence, she was entitled to an equitable lien upon the same for principal and interest; and that a decree should be entered for the sale of the property to satisfy the lien.

However, it has been held in several cases that the right to a vendor's or equitable lien does not extend to one advancing money to buy land under an oral agreement for a mortgage on the same as security. It may be observed that if the circumstances are not such that the vendor ever had a lien for the purchase money, then one element favorable to the right of the lender to substitution or subrogation is eliminated, because the view may be taken that there is, strictly speaking, no vendor's lien to which he can be subrogated, or of which he might be regarded as the equitable assignee.

Thus, a loan of money to purchase land, on the promise (presumably oral) of the purchaser to give the lender security on the land, was held in *Campan v. Molle* (1899) 124 Cal. 415, 57 Pac. 208, not to entitle the latter to a vendor's lien for the money advanced, although the purchaser refused to give the security. The court

said: "It is claimed in support of the appeal that, by virtue of the transaction between the plaintiff and the defendants, the plaintiff was subrogated to the rights of the vendor of the land, and is entitled to enforce the claim against the land as fully as could the vendor. The complaint does not, however, contain the contract between the vendor and the defendants, or show the relation between them. Nor does it appear therefrom that the vendor had any rights which he could enforce against them. It merely shows that the defendants had the right to purchase the land for a given sum of money. It does not appear at what time the defendants paid the money to the vendor, or when the land was conveyed to them, and, as the vendor was to retain title to the land until full payment therefor should be made, there was no vendor's lien to which the plaintiff could be subrogated. The transaction between the plaintiff and the defendants was merely a loan of money upon their agreement to give him security, which they afterwards refused to do."

It was held, also, in *Campan v. Molle* (Cal.) *supra*, that the lender had no lien upon the land in the nature of an equitable mortgage which would take precedence to the purchaser's declaration of homestead on the land, if the latter was effective, because the statute declared the homestead claim was superior to the lien of a mortgage unless the mortgage was "executed and recorded" prior thereto; and also because, by bringing an action upon the note evidencing the loan after the declaration of homestead had been filed, the lender had elected to look to the personal obligation of the purchaser instead of the security promised, and if he intended to claim priority to the homestead lien he should have asserted it in that action.

So, where a married woman borrowed money to buy a lot, under an oral agreement that the lot should be conveyed to the borrower for her sole and separate use, and that she would execute a trust deed or mortgage on it to secure the sum borrowed, and,

after the conveyance to her separate use, she refused to give the mortgage or deed of trust, the court in *Durant v. Davis* (1873) 10 Heisk. (Tenn.) 522, held that the lender was not entitled to substitution to the vendor's lien for the sum advanced. It was said: "This is clearly no case for substitution to the vendor's lien. The right of substitution grows ordinarily out of a discharge by one joint debtor, of a debt for which the other was primarily liable, as in case of payment by a surety he is entitled to be subrogated to all the liens and securities held by his creditor, for his reimbursement. . . . Nothing of the kind is found here, nor, in fact, any element out of which the right of subrogation can arise. The money was not paid in discharge of the debt due the vendor, which was a lien on the land; on the contrary, it was the cash payment agreed to be made. Again, it was a loan to the purchaser on security of her own note, with a promise of a deed of trust repelling the idea of discharging the purchaser's debt, and looking to substitution as the means of reimbursement. In a word, the simple question is, whether a party who loans another a sum of money to pay a debt, and takes his or her note for its payment, with a promise of a deed of trust to secure it, also, by this transaction, entitles himself, in addition, to be substituted to the right of the creditor whose debt has been paid by the money loaned. To this question, we take it, there can be but one answer, and that in the negative."

It was held in *Wooldridge v. Scott* (1879) 69 Mo. 669, that one who advances money to a purchaser of land under a bond for title, to pay off the purchase-money note, is not entitled to subrogation to the vendor's lien or to an equitable lien on the property, although the vendee orally agrees that the lender shall have a lien or trust deed as security, which was not given, provided the latter is not guilty of fraud. The court said, however, that if the vendee had made the agreement with a fraudulent purpose of

18 A.L.R.—70.

obtaining an advantage and then breaking faith with the lender, it might be disposed to afford relief, notwithstanding the Statute of Frauds.

And one who advanced money to another to purchase real estate, under a parol agreement that the purchaser should execute a mortgage to the lender, which, after the conveyance, the purchaser refused to execute, was held in *Marquat v. Marquat* (1853) 7 How. Pr. (N. Y.) 417, reversed on other grounds in (1855) 12 N. Y. 336, not entitled to an equitable lien on the property, since the parol agreement was within the Statute of Frauds, and a lien existed in general only as between the vendor and vendee or those representing them. It may be observed that the court of appeal, in affirming a judgment of the trial court, takes no exception to the position of the latter court that the lender was not entitled to an equitable lien, and that the advance of the money on his part was not such a part performance as to take the case out of the Statute of Frauds, but only entitled him to recover back the amount advanced, the agreement being void.

And the court in the reported case (*NEWMAN v. NEWMAN*, ante, 1089) said that counsel for the plaintiff did not claim that the transaction created a vendor's lien; that they conceded, as obviously it must be conceded, that the plaintiff did not stand in the position of one having such a lien,—the case being one where a son borrowed money from his father to purchase land, giving the latter a note for the amount and agreeing orally to execute a mortgage on the land to be purchased, but died before the mortgage was given, and his wife, in whose name the deed had been taken, refused to carry out the alleged agreement.

One who advanced purchase money for land under an alleged agreement, apparently by parol, for a mortgage when the land was conveyed, was held in *Chapman v. Abrahams* (1878) 61 Ala. 108, not to have the right to a vendor's lien. But the court does not discuss the question of the effect of

the agreement; and the case turns chiefly on the effect of the mortgage which was subsequently executed.

See also *Poole v. Tannis* (1908) 137

Wis. 363, 118 N. W. 188, 864, *supra*, and *Rogers v. Simpson* (1873) 10 *Heisk. (Tenn.)* 655, under *I. supra*.

R. E. H.

DAISY PETRO, Admr., etc., of John Petro, Deceased,
v.
WALKER D. HINES, Director General of Railroads, Appt.

Illinois Supreme Court—October 22, 1921.

(299 Ill. 236, 132 N. E. 462.)

Evidence — of habits to show care — questioning veracity of witnesses.

1. The mere fact that the veracity of alleged eyewitnesses to an accident resulting in death is challenged does not admit evidence of the habits of deceased with respect to care and prudence.

[See note on this question beginning on page 1109.]

— burden of proof — care of deceased person.

2. To recover damages for wrongful death, the personal representatives of the deceased person must show that deceased exercised ordinary care to avoid the injury.

[See 8 R. C. L. 859.]

— circumstantial evidence.

3. That one killed by another's negligence was in the exercise of ordinary care to avoid injury may be proved by circumstantial evidence.

[See 8 R. C. L. 867, 868.]

Appeal — when court can find negligence or contributory negligence.

4. Before the appellate court can say that there was no negligence on the part of a railroad company which killed a pedestrian at its crossing, or that there was such contributory negligence on the part of deceased as would defeat a recovery, it must be able to say that all reasonable minds must agree that defendant was not negligent or that the injury was the result of the negligence of deceased.

APPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Kankakee County (DeSelm, J.) in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her decedent. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. R. Hunter and C. M. Clay Buntain, for appellant:

Notwithstanding there were eyewitnesses to the death of deceased, the court, over objection by defendant, permitted plaintiff to prove by witnesses that the deceased was a man of careful habits.

Chicago & A. R. Co. v. Wilson, 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56; *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113.

Proof of habits of deceased is not competent unless there is no living witness as to what was done by deceased just prior to his death.

Illinois C. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

Proof of habits is admissible only when no one was present or knew how the accident occurred, and only as a matter of necessity, in the absence of better proof.

Gardner v. Chicago, R. I. & P. R. Co. 17 Ill. App. 262; *Jackson v. Johnson*, 212 Ill. App. 61; *Cox v. Chicago & N. W. R. Co.* 92 Ill. App. 15; *Indiana, D. & W. R. Co. v. Koons*, 72 Ill. App. 497; *Chicago, B. & Q. R. Co. v. Gunderson*, 65 Ill. App. 638.

If a party throws himself into danger when he sees a train approach-

ing, there can be no recovery if he is killed.

Chicago, R. I. & P. R. Co. v. Bell, 70 Ill. 102; Patterson v. Chicago & W. I. R. Co. 111 Ill. App. 441.

Attempting to beat an on-coming train across a crossing is such contributory negligence as to bar a recovery.

Simon v. Aurora, E. & C. R. Co. 180 Ill. App. 444; Chicago & E. I. R. Co. v. Nichols, 74 Ill. App. 197; Lake Shore & M. S. R. Co. v. Sunderlin, 2 Ill. App. 307; Chicago, B. & Q. R. Co. v. Thorson, 68 Ill. App. 288; Cook v. Chicago, B. & Q. R. Co. 193 Ill. App. 527; Stein v. Chicago & E. I. R. Co. 199 Ill. App. 48; Chicago & A. R. Co. v. Fears, 53 Ill. 115.

It was the duty of deceased to stop, and not attempt to pass in front of the train, which was approaching the farm crossing.

Newell v. Cleveland, C. C. & St. L. R. Co. 261 Ill. 505, 104 N. E. 223; Toledo, St. L. & W. R. Co. v. Gallagher, 109 Ill. App. 67.

There can be no recovery, because there is no competent proof to sustain the material and necessary allegation that the deceased was in the exercise of due care for his safety.

Casey v. Chicago R. Co. 269 Ill. 386, L.R.A.1916B, 824, 109 N. E. 984; Gibbons v. Aurora, E & C. R. Co. 263 Ill. 266, 104 N. E. 1063; Newell v. Cleveland, C. C. & St. L. R. Co. 261 Ill. 505, 104 N. E. 223; Vastardes v. Chicago & A. R. Co. 210 Ill. App. 546.

Where there is no competent evidence tending to show that a person was in the exercise of due care and caution for his safety, it is the function and duty of the court to direct a verdict for the defendant.

Devine v. Pfaelzer, 277 Ill. 255, L.R.A.1917C, 1080, 115 N. E. 126, 16 N. C. C. A. 167; Wilson v. Illinois C. R. Co. 210 Ill. 603, 71 N. E. 398; Beidler v. Branshaw, 200 Ill. 425, 65 N. E. 1086, 13 Am. Neg. Rep. 262; Chicago City R. Co. v. Strampel, 110 Ill. App. 482.

The declaration does not state a good cause of action, as there is no averment in either of the counts that the deceased was in the exercise of due care before he got upon the crossing.

Bale v. Chicago Junction R. Co. 259 Ill. 476, 102 N. E. 808; Krieger v. Aurora, E. & C. R. Co. 242 Ill. 544, 90 N. E. 266; Chicago, M. & St. P. R.

Co. v. Halsey, 133 Ill. 248, 23 N. E. 1028.

A person approaching a railroad crossing is bound to know it is a place of danger, and if he permits himself to become oblivious to his present surroundings he does so at his peril.

Chicago, M. & St. P. R. Co. v. Halsey, *supra*.

Messrs. Augustine J. Bowe and William J. Bowe for appellee.

Thompson, J., delivered the opinion of the court:

April 1, 1918, appellant, Walker D. Hines, as Director General of Railroads, was operating the Chicago & Eastern Illinois Railroad from Chicago south through the state of Illinois. Between Grant park and Momence, in Kankakee county, the road ran through a farm operated by John Petro, deceased. West of the right of way is a wooded hill, on which are located the farm buildings. East of the right of way are level, open fields. There are three tracks on the right of way through this farm. The railroad runs almost directly south from Grant park until it reaches this farm, when it curves to the west around the hill on which the buildings are located. Across the tracks east of the buildings is a farm crossing. The right of way is fenced, and there is a gate in each fence. At the farm crossing the tracks are planked. During the day deceased had worked in one of the fields on the east side of the right of way. About sundown he left his work, and started toward the house. Appellant's south-bound passenger train, due out of Grant park at 7:13 P. M., left there a few minutes late. It was running on the west or south-bound track. The fireman, who was sitting on the left-hand side of the engine cab at the time of the accident, testified that when the train was between 1,000 and 1,300 feet north of the farm crossing he saw deceased at the gate on the east side; that deceased turned from the gate and walked at an ordinary pace toward the tracks; that the engineer sounded the whistle for the crossing about this time and that

the bell was automatically ringing; that deceased continued to walk toward the south-bound track, and that he looked toward the train when it was 75 or 100 feet away, and then began to run across the track in front of the train. The engineer, who was sitting on the right-hand side of the engine cab, testified that the first he knew of the presence of deceased was when he saw his body rolling into the ditch on the west side of the track. The train was stopped and deceased was taken to Mokena, where he died without gaining consciousness. Appellee filed her declaration in the circuit court of Kankakee county, in which she charged that appellant operated his train without a headlight after sundown, in violation of the statute, and that he otherwise negligently and carelessly operated and managed said train. A plea of general issue was filed and the cause was submitted to a jury. They returned a verdict of guilty, fixing appellee's damages at \$10,000. Judgment was rendered on this verdict, and this judgment was affirmed on review by the appellate court for the second district. A certificate of importance was granted and this appeal prosecuted.

Appellee, over the objection of appellant, was permitted to prove that deceased was a man of careful habits. Such proof is admissible where there are no eyewitnesses to the accident. The rule adopted in this state and approved by repeated decisions requires the plaintiff in a personal injury case to prove that the person injured was in the exercise of due care at the time he sustained the injury for which damages are sought. Where the injury results in death and suit is brought by a personal representative, the personal representative must show that deceased exercised ordinary care to avoid the injury, but it is not necessary, especially where no one saw the killing, to prove such care by direct testimony, but such care may be

proven by circumstantial evidence. *Illinois C. R. Co. v. Nowicki*, 148 Ill. —circumstantial evidence. 29, 35 N. E. 358; *Cleveland, C. C. & St. L. R. Co. v. Keenan*, 190 Ill. 217, 60 N. E. 107; *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435; *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50, 116 Am. St. Rep. 102, 80 N. E. 56; *Collison v. Illinois C. R. Co.* 239 Ill. 532, 88 N. E. 251; *Moore v. Bloomington, D. & C. R. Co.* 295 Ill. 63, 128 N. E. 721. But where there is an eyewitness who saw the infliction of the injury, the jury must then determine from the testimony of this witness and from the facts and circumstances surrounding the injury whether deceased was careful or negligent, and in such case evidence of the habits of deceased as to care and prudence is not admissible. *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113. There was at least one eyewitness to this accident, and the court erred in refusing to exclude this evidence.

The fireman who testified on this trial that he was an eyewitness to the accident had testified at the coroner's inquest and at a former trial of this cause. On both of these occasions he had given substantially the same testimony that he gave on this trial. When appellee offered to show that deceased was a man of careful and prudent habits, appellant objected on the ground that the evidence was incompetent unless appellee could show that there were no eyewitnesses. Counsel for appellee contended that under the rule laid down in *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521, the testimony was competent if appellee could raise a substantial doubt as to whether there was actually an eyewitness; his point being that the fireman testified falsely, and that he did not actually see deceased go upon the track. The rule announced in the *Ashline Case* is no different from the rule announced in all other cases in this state on the subject. It was said in the *Ashline Case*: "The evidence leaves the question in

Evidence—burden of proof—care of deceased person.

doubt whether any person saw the deceased when he was struck by the train, and when such is the case we are inclined to think the evidence admissible."

The evidence is not set out in the opinion, and we are not able, from the opinion, to determine exactly what was meant when the court said that there was doubt whether there was an eyewitness. Whatever was meant by the language used, it did not mean that the trial court could permit evidence of habits of care and prudence to go to the jury whenever a party to a suit challenges the veracity of witnesses who

-of habits to
show care-
questioning
veracity of wit-
nesses.

testify that they saw the accident.

If they have a right to challenge the

veracity of one witness, they would have an equal right to challenge the veracity of any number of witnesses. Appellant did not tender his witness to appellee at the time he made his objection. Granting, without deciding, that the trial court committed no error by permitting this evidence to go to the jury in the first instance, it was without question error to deny appellant's motion, at the close of all the evidence, to exclude the evidence of careful habits of deceased.

At the close of appellee's evidence, and again at the close of all the evidence, appellant moved the court to instruct the jury to find the defendant not guilty, on the ground that there was not sufficient evidence before the jury to sustain her cause of action. All controverted questions of fact have been settled by the judgment of the appellate court, and we are limited in our review of the case to the determination of the question of law presented by this motion. The general rule is that

negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. Chicago, St. L. & P. R. Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Austin v. Public Service Co. 299 Ill. 112, 17 A.L.R. 795, 132 N. E. 458. Before we can say as a matter of law, that there was no negligence on the part of the defendant, or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts, or that the injury was the result of plaintiff's own negligence. Inasmuch as we have decided that this judgment must be reversed, we prefer to remand the case for a new trial, and to leave this question open, to be determined in view of whatever evidence may be submitted on that trial.

Appeal—when
court can find
negligence or
contributory
negligence.

There are other errors assigned and argued; but, inasmuch as they are not likely to occur on another trial of this cause, we have concluded that to discuss them would unnecessarily lengthen this opinion.

After striking out the evidence of careful habits of deceased, there is no evidence in this record of due care, and the judgments of the Appellate Court and the Circuit Court are reversed, and the cause is remanded to the Circuit Court of Kankakee County for a new trial.

ANNOTATION.

Habit, custom, or reputation of one injured or killed as evidence of his own negligence or freedom from negligence.

(Supplementing annotation in 15 A.L.R. 125.)

It is shown in the prior annotation

that the strong current of authority is to the effect that, in the absence of eyewitnesses, evidence of the habits

of one killed by the alleged negligence of another is admissible, but if there are eyewitnesses, such evidence is not admissible.

The reported case (*PETRO v. HINES*, ante, 1106) recognizes this rule, but introduces the somewhat novel proposition that false testimony by the eyewitness will render evidence of habits admissible. The court does not approve of this contention.

The reported case is the only one upon the subject which has been published since the former annotation was prepared, but there are a few cases decided before that time which were not referred to in the former note, to which attention is called in this place.

Jackson v. Johnson (1918) 212 Ill. App. 61, which is referred to in the brief of counsel, and not in the former annotation, was an action by the receiver of a railroad to recover damages for injuries to a train by its derailment through collision with an automobile driven by a person killed in the collision. The court charged that the jury might consider upon the question of negligence of the driver of the automobile, the natural instinct of self-preservation, but the appellate court held that where eyewitnesses have testified to the facts and circumstances surrounding the accident, the rule which entitles the jury to consider the instinct of self-preservation and the presumption which may arise from proof of the habitual exercise of due care on the part of deceased does not apply.

In *Chicago, B. & Q. R. Co. v.*

Gunderson (1896) 65 Ill. App. 638, which is also referred to in the brief of counsel, and not in the former annotation, a pedestrian was killed at a railroad crossing by a fast train passing at that point a freight, for the passage of which deceased had waited at the crossing. He was seen standing at the crossing waiting the passage of the train, and the court held it was for the jury to judge, from all the circumstances, whether it was negligence for him to stand or walk on the tracks at the time. It was held that evidence that he was a careful man was improperly admitted, the court saying this class of evidence is only admissible as a matter of necessity in the absence of better proof.

In *Moore v. Bloomington, D. & C. R. Co.* (1920) 295 Ill. 63, 128 N. E. 721, where a person was killed in a collision between a train and his automobile at a railroad crossing, and his administratrix relied on proof of careful habits to show care on his part, after which defendant produced eyewitnesses, and the court struck out the testimony as to habits of deceased, defendant complained that it was prejudicial to have had the evidence in the record at all, but the court held that, defendant having offered no testimony of eyewitnesses, it was not error to admit testimony of careful habits, and that if defendant knew that it had such witnesses it should have offered them when plaintiff was putting in her evidence if it desired to avoid the effect of having the testimony of habits go before the jury.

H. P. F.

ROBERT BYRAM, Respt.,

v.

JOHN BARTON PAYNE, Agent, etc., of Union Pacific Railroad Company,
Appt.

Utah Supreme Court—August 30, 1921.

(— Utah, —, 201 Pac. 401.)

Carriers — liability for injury to sheep from unwholesome water.

1. A carrier of sheep in interstate commerce is liable for their loss through drinking unwholesome water furnished by it.

[See note on this question beginning on page 1116.]

—absence of knowledge of unwholesomeness—effect.

2. Lack of knowledge of the unwholesome character of water furnished by a carrier for use of sheep in interstate transit does not relieve it from liability for injury caused to the sheep by drinking the water.

Damages — loss of sheep — market value.

3. A shipper of sheep killed in transit by the carrier's negligence is entitled to recover their market value at point of destination.

[See 4 R. C. L. 997.]

Witness — competence — value of sheep.

4. Persons in the sheep business who have sold sheep on a certain market are competent to testify to the value of sheep on that market.

[See 4 R. C. L. 1000; 2 R. C. L. Supp. 1254.]

Evidence — value — absence of prejudice.

5. A carrier is not prejudiced by the reception of evidence of the value of sheep lost through its negligence at a point short of destination, in the absence of anything to rebut the presumption that they would be worth

more at destination than at the point mentioned.

Trial — weight of evidence — question for jury.

6. The weight of testimony including that of expert witnesses is wholly a subject for the determination of the jury.

[See 11 R. C. L. 586; 2 R. C. L. Supp. 1276; 16 R. C. L. 183.]

—directed verdict — substantial evidence.

7. A verdict cannot be directed for defendant when there is substantial evidence to support the plaintiff's case.

[See 26 R. C. L. 1077.]

Evidence — shipping contract — lack of pleadings.

8. In the absence of any pleadings of fault on the part of the shipper, the shipping contract is not admissible in evidence on behalf of the carrier in an action to hold it liable for loss of sheep en route.

Appeal — exclusion of evidence — absence of exception.

9. Exclusion of evidence is not reversible error in the absence of exception.

[See 2 R. C. L. 78.]

APPEAL by defendant from a judgment of the District Court for Weber County (Agee, J.) denying motions for nonsuit, and for direction of a verdict in his favor, in an action brought to recover damages for loss of sheep through drinking unwholesome water while in transit, for which defendant was alleged to be responsible. *Affirmed*.

The facts are stated in the opinion of the court.

Messrs. George H. Smith, John V. Lyle, C. B. Diehl, and C. R. Hollingsworth for appellant:

Where a recovery is sought for the sickness of live stock in transit or for death resulting from sickness, the burden is on the plaintiff to prove the carrier's negligence.

Chicago, I. & L. R. Co. v. Blankenship, — Ind. App. —, 127 N. E. 209; Illinois C. R. Co. v. Word, 149 Ky. 229, 147 S. W. 949; McDowell v. Louisville & N. R. Co. — Ky. —, 113 S. W. 519; Gillespie v. Louisville & N. R. Co. 144 Mo. App. 508, 129 S. W. 277; Weed v. International & G. N. R. Co. — Tex. Civ. App. —, 53 S. W. 356; Louisville & N. R. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185; Boland v. Chicago & N. W. R. Co. 159 Wis. 609, 150 N. W. 967.

In any event, the measure of plain-

tiff's damages is the market value of the sheep at Omaha at the time when they should have arrived there.

Barry v. Los Angeles & S. L. R. Co. — Utah, —, 189 Pac. 70; 10 C. J. 385; Bingham v. San Pedro, L. A. & S. L. R. Co. 39 Utah, 407, 117 Pac. 606; Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co. 171 C. C. A. 561, 260 Fed. 835, affirmed in 253 U. S. 97, 64 L. ed. 801, 40 Sup. Ct. Rep. 504; Williams v. Pittsburgh, C. C. & St. L. R. Co. 68 Ind. App. 93, 120 N. E. 46.

The burden was upon the plaintiff to show that the death of the sheep was due to the negligence of the defendant. Plaintiff in his proof failed to make the showing, and the defendant, being required to introduce evidence to sustain the allegation of his answer, proved conclusively that the sheep died of hemorrhagic septicemia.

Louisville & N. R. Co. v. Cecil, 145 Ky. 271, 140 N. W. 186; Hurt v. Louisville & N. R. Co. 116 Ky. 545, 76 S. W. 502; Louisville Gas Co. v. Kaufman, S. & Co. 105 Ky. 131, 48 S. W. 434.

Mr. J. G. Willis, for respondent:

It was not error to deny defendant's motion for a nonsuit.

Illinois C. R. Co. v. Word, 149 Ky. 229, 147 S. W. 949.

Plaintiff was entitled to recover for full loss, full damage, and not damage at any particular place.

Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co. 171 C. C. A. 561, 260 Fed. 835.

Weber, J., delivered the opinion of the court:

Defendant, the Director General of Railroads, appeals from a judgment in favor of plaintiff on two causes of action.

At Huntsville, Utah, on September 6, 1919, plaintiff delivered to defendant, for transportation to Omaha, Nebraska, seven carloads of sheep, and Fred J. Cobabe delivered three carloads of sheep for the same purpose. The ten cars were shipped together. Two hundred and thirty of plaintiff's sheep and 135 of Cobabe's died at North Platte, Nebraska, Cobabe's claim was assigned to plaintiff before this action was brought.

In the first cause of action the allegations of negligence are that plaintiff's sheep were negligently unloaded by defendant from the cars upon which they were being transported into the yards at the station at North Platte, Nebraska, which yards contained water unwholesome and poisonous and dangerous to the life of sheep if partaken of by them, and of which said water the defendant negligently permitted said sheep to drink, from the effects of which they died; and at the time the sheep were placed in the yards by the defendant he knew, or by the exercise of ordinary care might have known, that the yards contained large quantities of said water, and that the sheep were likely to drink of the same and be thereby poisoned. The same allega-

tions of negligence were contained in the second count of the complaint.

The answer denied these allegations of negligence, and averred a separate and distinct affirmative defense to each cause of action, to the effect that whatever, if any, damage was done to the shipment of sheep was caused not by any negligent act of commission or omission on the part of defendant, but by the inherent nature and disposition of said sheep themselves, or by sickness, or disease, or condition existing in said sheep, over which sickness, disease, and condition defendant had no control and of which he had no knowledge.

When plaintiff had completed the presentation of testimony, defendant moved for a nonsuit upon the grounds that there was no evidence that the sheep died from drinking poisonous or unwholesome water; that there was a complete absence of testimony to show that the defendant knew at the time the water to be poisonous, or any testimony to show that by the exercise of ordinary care the defendant might have known that the water was poisonous or unwholesome; and that there was no evidence of the market value of the sheep at Omaha, the destination of the shipment. The motion for nonsuit was denied, and the ruling is assigned as error.

The substance of plaintiff's testimony was that the sheep had been driven from their mountain range, about 35 miles from Huntsville, Utah, eating grass and drinking pure mountain water on the way; that the shipment of the sheep arrived at North Platte at 1:35 P. M., September 9, 1919, and was unloaded between 5 and 6 o'clock of that day; and that the sheep were then driven into a pasture containing a slough of stagnant water, which was testified to as being alkaline. The plaintiff and his assignor were experienced sheep men. They had frequently observed sheep die from drinking alkaline water. They testified that the water which the sheep drank was alkaline and

that its drainage was from alkaline land. They further testified that sheep, after being "alkalied," stand and tremble; that some die right away, while others live for a few hours or a day or two afterwards; that the actions, conduct, and appearance of the sheep at North Platte, on the morning after they arrived there, were similar to the conduct and appearance of sheep which the witness had seen die from alkaline water on other occasions. Except two of the sheep that were apparently trampled to death, none of them died before reaching North Platte, and none of them died after leaving that station.

Plaintiff and Mr. Cobabe, plaintiff's assignor, accompanied the sheep. Not having been notified that the sheep would be unloaded at North Platte, they remained on the train and were carried a mile or so beyond North Platte, when the train was stopped, and they walked back to the stockyards. Upon their arrival at the stockyards, the sheep were being unloaded, and 300 or 400 of them were drinking the water in the pasture into which they were being driven. The pasture was described by plaintiff as "a kind of salt grass and alkali field," and was one of the feeding places provided there and covered about 80 acres. The shipment of sheep consisted of lambs, yearlings, two-year olds, and some ewes probably six years old.

After qualifying as a witness as to the market value of the sheep, the plaintiff testified that the 235 head of his sheep which died at North Platte were worth \$7.40 per head "right here in Morgan." Plaintiff's assignor, who was also a qualified witness on the subject, testified that he estimated the Byram sheep at \$7.40 per head. He himself lost 135 sheep which he said were worth \$5.90 per head, the difference in value being because the Byram sheep were in better condition than those owned by the witness.

The defendant claims that the testimony was insufficient to constitute prima facie proof of the

averments of plaintiff's complaint. True, plaintiff's evidence is not strong. However, some substantial evidence was produced showing that the water was alkaline, that such water injures and often kills sheep, and that the sheep, which were presumably in good condition and apparently free from disease when delivered to defendant, died from the effects of drinking water furnished by defendant.

This was an interstate shipment. The Federal law provides that when animals are unloaded they "shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad . . . company." 34 Stat. at L. 608, chap. 3594, § 2, Comp. Stat. § 8652, 1 Fed. Stat. Anno. 2d ed. p. 386. It is the duty of the carrier to provide reasonable facilities for feeding, watering, and resting stock during transit, and "where the carrier undertakes to feed and water stock, notwithstanding a contract imposing this duty on the shipper, it is bound to exercise due care to see that the stock are given suitable food and water." 10 C. J. p. 26, § 108. It being the carrier's duty to furnish water, it must furnish wholesome, not poisonous, water. And if it furnishes water that is unwholesome, and sheep drink of it and die from the effects of

drinking such water, the carrier is liable. Thus, it has been held that, "if the carrier permits salt water to stand in pens accessible to lambs offered for shipment, it is guilty of negligence and liable for loss occasioned thereby." 10 C. J. p. 80, § 82, citing cases.

It is argued that before defendant could be held liable proof of notice to him, or knowledge by him, of the condition of the water, must be adduced. The fact that a slough existed in the pasture in which there was stagnant water, the color

Carrier—liability for injury to sheep from unwholesome water.

and appearance thereof, together with the alkaline character of the surrounding land, constituted some notice to defendant of the unwholesome condition of the water if notice was necessary to make defendant liable. However, it was defendant's duty to furnish suitable food and wholesome water. If a common carrier furnishes unwholesome and poisonous water to stock that is being transported by it, it is

—absence of
knowledge of
unwholesome-
ness—effect.

no defense to say that he did not know the water was unwholesome or poisonous. It is the carrier's duty to know, and if poisonous food or water is furnished the carrier furnishes it at his peril.

The evidence of value of the sheep was definite and exact,—\$7.40 per head for some of the sheep and \$5.90 per head for others. Byram testified that his sheep were worth \$7.40 per head "right here in Morgan," a station on the Union Pacific railroad a few miles east of Ogden; the latter being the nearest railroad station to Huntsville, the initial point of shipment.

Damages—loss of
sheep—market
value.

Plaintiff was entitled to recover the market value of the sheep at Omaha, Nebraska, the point of destination. Presumably the market value was higher at Omaha than at Huntsville, Ogden, or Morgan Utah, or North Platte, Nebraska. The value at Huntsville, plus the freight which had been paid, would ordinarily be the market value at Omaha. The market fluctuations might make a decided difference one way or the other. The witnesses were shown to be competent. They had sold their sheep on the Omaha market. They were in the sheep

Witness—com-
petence—value
of sheep.

business, and were fully qualified to testify as to the market value in Utah and as to the market value in Omaha. On cross-examination no questions were asked of the witnesses regarding the subject of value. Both parties

seemed to be satisfied with the proof.

In *Dee v. San Pedro, L. A. & S. L. R. R. Co.* 50 Utah, 167, 167 Pac. 246, one of the questions involved was as to the value of horses at Salt Lake City. There was no direct proof at all of the value in Salt Lake City, the place where the value of the horses ought to have been shown. It was shown, however, that the horses were purchased at Pocatello for \$125 each, then shipped via Salt Lake City to Los Angeles, the higher market. They were rebilled at Salt Lake City. Referring to the question of value in the *Dee Case*, at page 179 of the Utah report, Mr. Justice Thurman announces the rule which is applicable here as being: "The presumption is almost conclusive that the horses were worth more in Salt Lake City than in Pocatello, because they were nearer the better market."

Plaintiff established the value of the sheep at Morgan, east of Ogden. Presumably the sheep would have been worth more at North Platte, and still more at Omaha. The defendant, therefore, could not have been prejudiced by proof of value at Huntsville, Ogden, or Morgan, at least in the absence of any evidence rebutting the presumption they were worth more at Omaha.

Evidence—value
—absence of
prejudice.

Considering all of the testimony produced by plaintiff in the light most favorable to him, it was sufficient to justify the court in denying the motion for nonsuit.

After both parties had rested, the defendant moved for a directed verdict in his favor. The denial of this motion by the court is assigned as error.

On the part of the defendant evidence contradicting that of plaintiff was introduced. The plaintiff was corroborated by the testimony of one of the defendant's witnesses as to the claim of the alkaline nature of the land about North Platte. Evidence was adduced tending to

establish the affirmative defense that the sheep died from disease. A veterinarian of North Platte, who examined the sheep, testified that in his opinion they died from hemorrhagic septicemia. Ears were cut from some of the sheep that died and sent to a prominent veterinarian at Kansas City, who made a microscopical examination of blood from each ear sent him. Other tests were made by this veterinarian, and from all of them he concluded that the sheep had died from hemorrhagic septicemia. He said that he found "the presence of a gram of negative bipolar nonmotile hemorrhagic septicemia which fulfils the characteristics of the hemorrhagic septicemia bacterium. How any of the sheep survived is a mystery that "passeth all understanding." From the verdict it is apparent that to the jury this exposé was confusing rather than informative, obfuscating rather than illuminating. Counsel, however, contend that the expert testimony should have been accepted by the jury as conclusive. Possibly the jury failed to give to the testimony of these expert witnesses the weight

Trial—weight of evidence—question for jury.

to which it was entitled, but the weight of testimony, including that of expert witnesses, is wholly a subject for the jury's determination. Doubtless the defendant presented a strong defense, but it is evident from their verdict that the jurors believed the sheep men and farmers, and doubted or rejected the testimony of the veterinarians and biologists. It is not within the province of an appellate court to pass upon the evidence and say that the opinion of the jury was wrong.

Counsel for defendant say that, "under the facts and the law of this case the burden was upon the plaintiff to prove the carrier's negligence, that is, that the sheep drank poisonous and unwholesome water in the stockyards at North Platte, and that such condition of the water

was known to the defendant and was the cause of the death of the sheep."

The jury were properly instructed that the burden of proof was upon the plaintiff, and while the plaintiff's testimony does not seem especially convincing, there was some substantial testimony from which it could logically be inferred and concluded, not only that the water was unwholesome or poisonous, but that drinking of it killed the sheep. So far as notice of the condition of the water to defendant is concerned, the evidence adduced by plaintiff in rebuttal, to which no objection was made, was sufficient to prove notice to defendant that sheep drinking from this water frequently died. Mr. Marriott, a witness for plaintiff, testified that prior to 1919 he had watered sheep in the pasture connected with the North Platte stockyards, and had sheep die from drinking the water. When in 1919 he selected a pasture south of the stockyards, in which there was no stagnant water, his sheep "did fine." So that, if notice of the condition of the water was necessary to make defendant liable, testimony was produced by plaintiff tending to show that the condition of the water had existed for such length of time that notice of its unwholesome and poisonous character was imputed to defendant.

The request for a directed verdict was therefore properly denied.

—directed verdict—substantial evidence.

When testifying on cross-examination, the plaintiff stated that he had read the contract under which the sheep were transported. Thereupon the defendant offered the shipping contract in evidence for the purpose of showing that the plaintiff himself understood and contracted to unload the sheep. It was claimed that the contract was material because the witness said in direct examination that the carrier drove the sheep into the

pasture. In the language of defendant's counsel: "We want to show that if these sheep were permitted to rush to that water and it was going to be detrimental to them, I don't care whether it was fresh or poisonous, then plaintiff himself was to blame."

An objection to the introduction of the contract was sustained by the court. This ruling is assigned as error.

Contributory negligence is not pleaded by the defendant. Nor is any contract imposing special conditions pleaded in the answer. No claim is made in defendant's answer that plaintiff failed to perform any duty that devolved upon him. The objection to the introduction of the contract was therefore properly sustained, for the reason that the proposed proof would have been proper only for the pur-

pose of establishing contributory negligence on the part of plaintiff, and that he did not care for the sheep as he should have done. Another reason why the ruling would not be reversible error is that no exception was taken to the court's ruling.

Evidence—shipping contract—lack of pleadings.

An examination of the court's instructions, to which many exceptions were taken by defendant, discloses no material or prejudicial error. Numerous requests to instruct

Appeal—exclusion of evidence—absence of exception.

were made by defendant. Those that were correct and that were applicable to the facts were given in substance.

There being no reversible error in the record, the judgment is affirmed.

Corfman, Ch. J., and Gideon, Thurman, and Frick, JJ., concur.

ANNOTATION.

Liability of carrier for furnishing unwholesome water or food to live stock.

As to duty of carrier as to conditions of stock pens, or yards, see note in 15 A.L.R. 200.

Where live stock is shipped under a contract by which the owner, in person or by his employees, accompanies the stock for the purpose of caring for it during transit, no presumption of negligence arises merely from proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, was occasioned by the negligence of the carrier. 4 R. C. L. 995.

When an owner or agent attends a shipment of stock as caretaker, and the stock is being fed in the carrier's yard, the carrier, while bound to furnish facilities for feeding, is not liable at common law as an insurer against injury, but is only liable for negligence. *Starr v. Chicago, B. & Q. R. Co.* (1919) 103 Neb. 645, 173 N. W. 682.

Nor is the common-law liability in that regard changed as to interstate

shipments by the Carmack Amendment, that a carrier shall be liable for all injuries "caused by it." *Ibid.*

So, in absence of a showing of negligence on the part of a carrier, the carrier will not be liable for loss to shipment of horses fed in transit, due to poison in hay which was furnished by the carrier at the shipper's expense, and fed to the horses in the presence of a caretaker furnished by the shipper. *Ibid.*

In *Chicago, R. I. & P. R. Co. v. Mitchell* (1905) — *Tex. Civ. App.* —, 85 S. W. 286, where it does not appear whether or not the shipment was under a contract calling for a caretaker, it was said that it is *prima facie* negligence to give cattle water that is injurious in its effect. And see the statement in the reported case (*BYRAM v. PAYNE*, ante, 1110) that if a common carrier furnishes unwholesome and poisonous water to stock that is being transported by it, it is no defense to say that it did not know that the water was unwhole-

some or poisonous, that it is the carrier's duty to know, and if poisonous food or water is furnished, the carrier furnishes it at his peril.

It may, perhaps, be doubted whether the court intended to go so far as this language implies toward making the carrier an insurer as regards food and water.

In *Russell v. Considine* (1917) 101 Kan. 631, 168 Pac. 1095, a carrier was held not liable for the death of cattle which had drunk water from a ditch on its premises, which was polluted by the splashing and overflow of an arsenic solution from a dipping vat, since the dipping vat was operated by a private individual on premises leased from the carrier, and the carrier had nothing to do with the dipping, and was not in control of the cattle while being dipped, or afterwards, and did not know, or have reason to know, that the ditch on its premises was so polluted.

And in *Lancaster v. Pitzer* (1921) — Tex. —, 228 S. W. 923, where hogs, during delay due to negligence of shipper in getting entrance to a carrier's shipping pen, and while still under the care and control of the shipper, wandered into dipping pens adjoining the shipping pen, but not under the control of the carrier, and ate poison found there, the carrier was held "not to be liable for the consequent injuries," the court citing with approval *Russell v. Considine* (Kan.) *supra*.

In *Patterson v. Chicago & A. R. Co.* (1916) — Mo. App. —, 182 S. W. 1034, an action for damages alleged to have been sustained through negligence of carrier in transportation of cattle, where the evidence of the shipper of cattle, controverted by the carrier, tended to show that his cattle were compelled to drink muddy water, and had difficulty in getting sufficient water, and that they could be fed only by throwing their food upon the ground, but did not show what, if any, injury or damage was occasioned thereby, nor was any distinct loss therefrom shown,—it was held that the action could not be sustained up-

on the theory of negligence on the part of a carrier in this respect.

It amounts to negligence on the part of a carrier to give live stock alkaline water, which is injurious to cattle not accustomed to it, where, from the contract of shipment, the carrier must have known that such stock was shipped from a place outside of an alkaline district. *Ibid*,

And that alkaline water was the only water afforded by the section where the cattle were watered en route will not relieve a carrier from liability for the consequences of giving them such water, where there is evidence that water was hauled in for the people of that place, and so it was not impracticable by reasonable efforts to have had other water for the stock. *Ibid*.

And see the reported case (*BYRAM v. PAYNE*, ante, 1110).

Permitting salt water to run through pens provided by a carrier of live stock to facilitate shipment, so that it is accessible to animals placed in the pens, is negligence which will render the carrier liable for injuries caused to animals placed in the pens for shipment, by drinking of the water. *Norfolk & W. R. Co. v. Harman* (1895) 91 Va. 601, 44 L.R.A. 289, 50 Am. St. Rep. 855, 22 S. E. 490.

Nor is the carrier relieved by the fact that the animals did not die until they were in possession of a connecting carrier. *Ibid*.

A carrier will be liable for injury to cattle due to negligence and carelessness of its servants or employees in permitting an improper amount of salt to be placed in feeding troughs at place of unloading and feeding. *Pecos & N. T. R. Co. v. Meyer* (1913) — Tex. Civ. App. —, 155 S. W. 309. But the carrier is not liable if its agent, employees, or servants did not place such salt there and did not know that it was there, and its presence could not have been discovered by them by the exercise of ordinary care. *Ibid*.

The knowledge of the seller of live stock to be delivered in the shipping

pen, of a railroad, of the existence of salt water therein, does not charge the buyer, who has contracted for their transportation, with contributory negligence precluding recovery for damages to stock from drinking such water. *Ibid.*; *Norfolk & W. R. Co. v. Harman (Va.) supra.*

But an owner experienced in the care of sheep, who accompanies a

shipment, is guilty of contributory negligence so as to bar recovery for loss of shipment due to overeating in a rich pasture furnished en route by a railroad company, where, with personal knowledge of the richness of the pasture, he permits them to overeat. *Short v. Oregon Short Line R. Co. (1914) 190 Ill. App. 25.*

J. H. B.

THEODORE L. HENSLEY, Admr., etc., of William J. Smith, Deceased,
Appt.,

v.

HERMAN E. RICH et al.

PATRICK F. RYAN, Foreign Admr., etc., of William J. Smith, Deceased.

Indiana Supreme Court—November 1, 1921.

(— Ind. —, 132 N. E. 632.)

Executors and administrators — conflict between rights of domiciliary and ancillary administrators.

1. A foreign domiciliary administrator has no right as against a domestic ancillary administrator, to recover on a note held by decedent against a resident of a state other than that of the holder's residence, and secured by mortgage on real estate located at the maker's residence, where there are debts of the holder at the place of the maker's residence.

[See note on this question beginning on page 1125.]

— right to remove assets from state.

2. At common law the assets of a nonresident decedent could not be removed from the state until claims of citizens of the state were first paid or provided for.

[See 11 R. C. L. 437, 441; 2 R. C. L. Supp. 1250.]

— extent of authority of administrator.

3. The authority of an administrator appointed in a county where assets are found extends to all the estate of decedent in all counties of the state, to the exclusion of all other administrators.

[See 11 R. C. L. 438; note in 1 A.L.R. 1359.]

— locality of promissory note as assets.

4. A past-due promissory note held by a citizen of one state against one of another is not assets at the domicil of the creditor rather than at the domicil of the maker.

[See 11 R. C. L. 71, 72.]

Estoppel — from questioning validity of judgment.

5. An ancillary administrator, by preventing the repayment of money collected by a domiciliary administrator under a judgment against a local debtor to the debtor, and also preventing the money from earning interest for the debtor, estops himself as against the judgment debtor from questioning the validity of the judgment under which the domiciliary administrator collected the money.

Appeal — from unfavorable portion of judgment.

6. One accepting the benefit of a judgment and taking the money recovered thereunder cannot appeal from a refusal to allow attorney's fees.

[See 2 R. C. L. 63; 2 R. C. L. Supp. 379.]

— right of one who has satisfied judgment to be heard.

7. A mortgagor who procures satis-

faction of the mortgage upon the record after paying a judgment for its amount recovered by a domiciliary administrator has no further interest to

be heard in the controversy between the domiciliary and the ancillary administrator as to the right to the proceeds.

APPEAL by plaintiff from a judgment of the Circuit Court for Madison County (Pence, J.) in favor of defendant Ryan on his cross complaint and overruling a motion for new trial in an action on a promissory note, with interest and attorneys' fees, and to foreclose a mortgage on certain land by which the note was secured. *Affirmed in part.*

The facts are stated in the opinion of the court.

Messrs. James W. Noel, Hubert Hickam, Willis Hickam, Sr., and Willis Hickam, Jr., for appellant:

The situs of the debt and the right to collect it is in the Indiana administrator, and the judgment should have been for him instead of for Ryan, the Tennessee administrator.

State ex rel. McClamrock v. Gregory, 88 Ind. 110; Young v. O'Neal, 3 Sneed, 55; McIlvoy v. Alsop, 45 Miss. 366; McCully v. Cooper, 114 Cal. 258, 35 L.R.A. 494, 55 Am. St. Rep. 66, 46 Pac. 82; Abbott v. Coburn, 28 Vt. 663, 67 Am. Dec. 735; Jones v. Drewry, 72 Ala. 311; Grayson v. Robertson, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229; Banta v. Moore, 15 N. J. Eq. 97; 18 Am. & Eng. Enc. Law, p. 1227, B; Holyoke v. Union Mut. L. Ins. Co. 22 Hun, 75; 12 C. J. p. 470, § 64; Dial v. Gary, 14 S. C. 573, 37 Am. Rep. 737; Moore v. Jordan, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; Reynolds v. McMullen, 55 Mich. 568, 54 Am. Rep. 386, 22 N. W. 41; Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; 13 Am. & Eng. Enc. Law, 933; Reed v. Bishop, 51 Ind. App. 187, 97 N. E. 1025; Bishop v. Ross, 56 Ind. App. 610, 103 N. E. 505; Owen v. Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Atty.-Gen. v. Bouwens, 4 Mees. & W. 171, 150 Eng. Reprint, 1390, 1 Horn & H. 319, 7 L. J. Exch. N. S. 297; Pinney v. McGregory, 102 Mass. 186; Clark v. Blackington, 110 Mass. 369; Maas v. German Sav. Bank, 176 N. Y. 377, 98 Am. St. Rep. 689, 68 N. E. 658; Story, Conf. L. 8th ed. 514b; Ela v. Edwards, 13 Allen, 48, 90 Am. Dec. 176; Fletcher v. Sanders, 7 Dana, 345, 32 Am. Dec. 96; Shinn's Estate, 45 Am. St. Rep. 656, note, 166 Pa. 121, 30 Atl. 1026, 1030; Merrell v. New England Mut. L. Ins. Co. 103 Mass. 245, 4 Am. Rep. 549; Vaughn v. Barrett, 5 Vt. 333, 26 Am. Dec. 306; Catlin v. Hull, 21 Vt. 152; New Orleans v. Stempel,

175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Klein v. French, 57 Miss. 670; Cosby v. Gilchrist, 7 Dana, 207; Nathan Miller & Sons v. Blinn, 219 Mass. 266, 106 N. E. 985; Richardson v. Busch, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894; Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; Fletcher v. American Trust & Bkg. Co. 111 Ga. 300, 78 Am. St. Rep. 179, 36 S. E. 767; Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432.

The mortgage could only be enforced in the Grant circuit court by an administrator empowered to bring such suit. Ryan, as a foreign administrator, had no such power, as against Hensley, the Indiana administrator.

Dial v. Gary, 14 S. C. 573, 37 Am. Rep. 737; Banta v. Moore, 15 N. J. Eq. 97; State ex rel. McClamrock v. Gregory, 88 Ind. 115; McCully v. Cooper, 114 Cal. 258, 35 L.R.A. 494, 55 Am. St. Rep. 66, 46 Pac. 82; Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; Moore v. Jordan, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; Reynolds v. McMullen, 55 Mich. 568, 54 Am. Rep. 386, 22 N. W. 41; Abbott v. Coburn, 28 Vt. 663, 67 Am. Dec. 735; 13 Am. & Eng. Enc. Law, 2d ed. 933; Vaughn v. Barrett, 5 Vt. 333, 26 Am. Dec. 306; Reed v. Bishop, 51 Ind. App. 187, 97 N. E. 1023; Bishop v. Ross, 56 Ind. App. 610, 103 N. E. 505; Grayson v. Robertson, 82 Am. St. Rep. 80, note, 122 Ala. 330, 25 So. 229; Merrell v. New England Mut. L. Ins. Co. 103 Mass. 245, 4 Am. Rep. 549; 16 C. J. Conflict of Laws, 470; 13 Am. & Eng. Enc. Law, 1227, B.

The debt, the debtors, and the creditors, as well as the land mortgaged, are all in Indiana, and there are no intervening rights of other parties that affect the rights of the Indiana administrator to collect it.

Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed.

1068, 3 Sup. Ct. Rep. 417; *McCully v. Cooper*, 114 Cal. 258, 35 L.R.A. 494, 55 Am. St. Rep. 66, 46 Pac. 82; 13 Am. & Eng. Enc. Law, 2d ed. 934; 18 Am. & Eng. Enc. Law, 1227, B.

The authority of an administrator does not extend beyond the jurisdiction of the government or state appointing him.

Apple's Estate, 66 Cal. 432, 6 Pac. 7; *McCully v. Cooper*, 114 Cal. 258, 35 L.R.A. 494, 55 Am. St. Rep. 66, 46 Pac. 82; *Abbott v. Coburn*, 28 Vt. 663, 67 Am. Dec. 735; 18 Am. & Eng. Enc. Law, 1227, B, *supra*; *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229; 12 C. J. Conflict of Laws, p. 470.

A foreign administrator can only be permitted to sue in the ancillary jurisdiction by applying for and obtaining letters of administration in that jurisdiction, and where there are next of kin or creditors applying for letters in the ancillary jurisdiction, the domestic administrator cannot obtain letters of administration, and it was the duty of the domiciliary administrator, Ryan, to turn over the note and mortgage to the ancillary administrator for collection.

Bishop v. Ross, 56 Ind. App. 610, 103 N. E. 505; *Reed v. Bishop*, 51 Ind. App. 187, 97 N. E. 1023; *State ex rel. McClamrock v. Gregory*, 88 Ind. 110.

Messrs. Philip B. O'Neill and Bagot & Free for appellees.

Ewbank, J., delivered the opinion of the court:

The appellant, as administrator de bonis non of the estate of William J. Smith, deceased, appointed by the circuit court of Owen county, Indiana, brought suit in the circuit court of Grant county, Indiana, upon a promissory note for \$8,000, with interest and attorney fees, and to foreclose a mortgage on lands in Grant county, by which the note was secured, and the cause was removed by change of venue to Madison county. The note was dated at Jonesboro, Indiana, August 14, 1911, and was payable to William J. Smith at the Jonesboro Bank five years after date, with 6 per cent interest, payable annually, and attorney fees, and both it and the mortgage of the same date were executed by the appellees, Herman E. Rich and Ra-

chael J. Rich, husband and wife. This action was commenced October 13, 1916, sixty days after the maturity of the note. The complaint alleged that said appellees executed the note and mortgage; that the debt was due and unpaid; that the payee, William J. Smith, had died on April 2, 1912, a resident of Sullivan county in the state of Tennessee, leaving property there, and also leaving real and personal property in Owen county in the state of Indiana, and leaving unpaid debts owing to creditors in Owen and Grant counties in the state of Indiana, but leaving neither heirs nor devisees in this state; that on April 6, 1912, the appellee Patrick F. Ryan was appointed and confirmed as administrator of the estate of said decedent in Sullivan county in the state of Tennessee, and on April 23, 1912, an administrator of said estate was appointed in Owen county in the state of Indiana, who collected the annual instalments of interest on the said note and mortgage as they became due, except the interest for the last year before maturity, and then died; that on April 1, 1916, appellant was duly appointed as administrator de bonis non of the estate of said William J. Smith by the circuit court of Owen county, Indiana, after the appellee Patrick J. Ryan had asked for such appointment and had been refused, and that appellant duly qualified as such administrator; that many claims had been filed and allowed against the estate in Owen county, Indiana, which appellant could not pay without the collection of the demand sued on; that appellant had been compelled to employ an attorney, for whose services \$500 would be a reasonable fee, and that the appellee Ryan, as administrator in Tennessee, had possession of the note, and was claiming an interest in it and the right to collect the debt in question.

To this complaint the appellee Ryan filed an answer of denial, and a cross complaint alleging many of the same facts as above set out, and denying certain others, and further

averring that he received the note and mortgage sued on in the state of Tennessee, of which he was then a resident, as part of the assets of the estate of William J. Smith, and that they had since remained in his custody and possession as administrator under appointment in the state of Tennessee, and that he was charged therewith as part of his inventory in that state, and had paid tax on them in Tennessee, and had never surrendered them to anybody.

The appellees Rich & Rich filed an answer of general denial, and also a special denial of the fact that the nonpayment of the note at maturity was due to any default on their part. They also filed what they called an "interpleader," which, as amended, admitted the execution of the note and mortgage, and that the note and interest for one year were due, and asked for an order of court that they might pay the sum of \$8,480 into court and be discharged from liability, because of certain alleged facts. No such order was made, however, and the court found against them on the issue tendered by the answer.

The evidence consisted chiefly of an agreed statement of facts, and the facts as above set out were proved without conflict, together with the following additional facts:

That claims aggregating \$12,800.94 against the estate of said William J. Smith, deceased, had been filed in Owen county, Indiana, by eleven different claimants, of which the claims of nine persons had been allowed in the total sum of \$9,175.81, and that two others for the aggregate sum of \$725.13 were unadjudicated and still pending; that the allowance of one of said claims, in the sum of \$7,100, was contested, and an appeal therefrom had been taken to the supreme court; that of the claims allowed \$1,231 was for notes given by William J. Smith in the state of Indiana, which were debts owed by him at the time when he removed from Indiana to Tennessee; that the amounts stated do not include court costs or interest

from the dates when said claims were severally allowed; and that if he is entitled to recover attorney fees, \$300 would be a reasonable fee for appellant's attorneys.

The court found against the appellant (plaintiff) that he was not entitled to recover anything, and in favor of the appellee Ryan, the foreign administrator, that he was entitled to recover the face of the note, with interest to the date of the finding, in the total amount of \$9,880, but without attorney fees, and the foreclosure of the mortgage as against the appellees Rich & Rich for that sum. Judgment was rendered accordingly. The appellant thereupon filed his motion for a new trial for the alleged reasons that the decision was not sustained by sufficient evidence and was contrary to law, which motion the court overruled, and appellant excepted. Thereafter the appellant duly perfected a vacation appeal, and has assigned as error the overruling of his motion for a new trial, which is the only alleged error discussed by appellant's brief.

The first question presented is whether a domiciliary administrator, appointed by a court of Tennessee, who applied for and was refused ancillary letters of administration in a county of this state, was entitled to recover judgment in a court of this state for the amount of a past-due note, and the foreclosure of a mortgage securing it, which constituted part of the estate of his decedent, and were found among his effects in Tennessee after his death there, when an administrator to whom a court in a county of the state of Indiana, where the deceased left personal and real property and debts, had granted letters of ancillary administration, was in court, seeking to recover on the same note and mortgage, and it was made to appear that valid debts in excess of all other personal property of the decedent in Indiana had already been filed with and allowed by such Indiana administrator, and that other claims filed but not yet passed

on, and still others allowed but in controversy in pending appeals, brought the total of all claims filed to an amount exceeding the amount due on the note and all other personal estate in Indiana, combined.

At common law the assets of a nonresident decedent could not be removed from the state until the

Executors and administrators—right to remove assets from state.

claims of citizens of the state were first paid or provided for. *Wyman v. Halstead* (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417. And so far from changing the rule at common law, our statute (Burns's Anno. Stat. 1914, § 2746) must be deemed a legislative declaration that it is the policy of the state of Indiana that where a resident of another state has died the owner of property located here, and there are creditors, legatees, or heirs entitled to distribution who are inhabitants of this state, and they take out letters of administration in a county in this state, the further authority of the foreign domiciliary administrator is limited to receiving for final distribution the residue of assets in Indiana which shall remain after the local ancillary administrator shall have reduced all such assets to possession and paid the lawful demands of inhabitants of this state. Burns's Anno. Stat. 1914, § 2746.

Assets having been found in Owen county, Indiana, and the appellant having been granted letters of administration in that county, his

—extent of authority of administrator.

right of administration extended to all the estate of the decedent in all counties of the state, to the exclusion of all other administrators. Burns's Anno. Stat. 1914, § 2743; *Sample v. Adams*, 54 Ind. App. 680, 100 N. E. 573; *Marchant v. Olson*, 184 Ind. 17, 110 N. E. 200. We have found only one decision, hereinafter distinguished, of a court of last resort in any jurisdiction, where a foreign domiciliary administrator and a domestic ancillary ad-

ministrator were both before the court, each contesting the right of the other to recover a debt due from an inhabitant of the state to their decedent, in which the court held the foreign administrator entitled to prevail. But many cases have held that an administrator appointed in one state could not recover on the note of a resident of another state, secured by mortgage on lands in such other state, even where no letters of ancillary administration had been taken out in the latter state, unless specially authorized by statute. *McCully v. Cooper*, 114 Cal. 258, 35 L.R.A. 492, 55 Am. St. Rep. 66, 46 Pac. 82; *Moore v. Jordan*, 36 Kan. 271, 59 Am. Rep. 550, 553, 13 Pac. 337; *Abbott v. Coburn*, 28 Vt. 663, 67 Am. Dec. 735, 738, 739; *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229; *Grimball v. Patton*, 70 Ala. 626; *Merrill v. New England Mut. L. Ins. Co.* 103 Mass. 245, 4 Am. Rep. 548; *Reynolds v. McMullen*, 55 Mich. 582, 54 Am. Rep. 386, 22 N. W. 41.

And obviously the appointment of an administrator in the state where the intestate died could not affect the duty or the right of the administrator in this state to proceed with diligence to collect debts due the estate here. *State ex rel. McClamrock v. Gregory*, 88 Ind.

110, 115. But the title of the ancillary administrator to assets within his state

—conflict between rights of domiciliary and ancillary administrators.

is exclusive, until the local claims against such assets have been satisfied or otherwise discharged. 18 Cyc. 1228 (2) and authorities cited.

Where a person domiciled and dying in one state is indebted to persons living in another state in which there are personal assets of the deceased, "it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from (such other state) without the payment of such debts, and thus to leave the creditors to seek their remedy in the domicil of the original executor or administrator, and perhaps there to

meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law." Story, Conf. L. 8th ed. § 512, p. 713; Moore v. Jordan, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337.

In Ames v. Citizens Nat. Bank, 105 Kan. 83, 181 Pac. 564, where the foreign administrator had presented some certificates of deposit to the bank which issued them and demanded payment, and had brought suit on them some weeks before an administrator was appointed in Kansas, and it appeared that the only indebtedness of the estate in Kansas was for \$2.50, which the foreign administrator promptly paid, the court decided that a judgment in favor of the ancillary administrator was erroneous, and that the foreign administrator was entitled to the money. And in St. John v. Hodges, 9 Baxt. 334, where a resident of Alabama died the owner of notes executed by a resident of Arkansas, and the administrator appointed in Alabama sent them for collection to an attorney at Memphis, Tennessee, who, without authority from his principal, procured an administrator to be appointed in Arkansas, and in his name compromised the claim for one twentieth of the face of the notes in cash, together with one fourth of their face in new notes, it was held that the Alabama administrator, having taken out letters in Tennessee, could there sue in attachment on the original notes. The right result may have been reached in each of these cases upon the facts there involved. But the proposition that a promissory note, even though past due and to be collected by suit at the home of the debtor as part of

the assets of the estate, is assets at the domicile of the intestate, and not where the debtor resides, on which proposition both decisions purport to be based, does not appeal to us as being sound.

It was error to overrule the motion of appellant for a new trial.

Appellant further urges that he

was entitled to recover an attorney fee of \$300 under the undisputed facts. But it appears from the records of this court that at the time the appellant filed his transcript and assignment of errors he also filed his own affidavit, stating that the appellees Rich & Rich had paid the judgment appealed from, in the sum of \$10,024.85, and the costs, and that the appellee Ryan, as administrator, had received from the clerk of the court below the full amount of the judgment and interest to the date of such payment, in the sum of \$10,024.85, and still had said money in his possession and under his control, but was about to carry it away, out of the state of Indiana. And by means of that affidavit, appellant procured an order of this court to issue, commanding that the appellee Ryan, individually and as administrator, be and thereby was "enjoined from withdrawing the said sum of \$10,024.85 received by them upon the judgment of the Madison circuit court . . . from which this appeal is taken, and they are further restrained and enjoined from removing the same . . . from the state of Indiana, or from the jurisdiction of this court, and from in any way expending or disposing of said moneys or any part thereof . . . (and) are hereby ordered by the court to return said moneys and to pay the same forthwith to the clerk of this court, to be held until the final determination of this appeal, and to be paid out only upon the order of this court as hereinafter made."

Upon the hearing it was made to appear that the money was on deposit in a bank at Indianapolis, and by agreement of parties the injunction was made permanent; pending the appeal, but was modified so as to provide that the money should remain in the bank, "and that said funds be removed from the custody of said bank only on the order of this court." Until this order was issued the appellees Rich & Rich remained liable to appellant for any judgment which appellant might re-

—locality of promissory note as assets.

cover against them upon a retrial of this case, if the first judgment should be reversed, and appellee Ryan remained liable for whatever he held of the money or property of Rich & Rich to which he was not entitled, in case it should be adjudged on appeal that he had no right of action. But so far as appellant was concerned, if he chose to stand on his right to recover upon a second trial of the case, such right would not have been affected if Ryan had paid the money back to Rich & Rich, or had put it out at interest for their benefit.

By electing to follow the specific funds paid into court by Rich & Rich in satisfaction of the judgment and decree, and obtaining an order of court which necessarily operated to prevent Rich & Rich from receiving their money back, and prevented the money from earning interest for their benefit in the hands of Ryan, appellant has estopped himself to challenge the judgment as against

Estoppel—from questioning validity of judgment.

the appellees Rich & Rich. A party cannot seize upon and hold for his own benefit the amount of a judgment paid in by the party against whom the judgment was recovered, and at the same time successfully maintain an appeal on the ground that there was no valid judgment. *Williams v. Richards*, 152 Ind. 528, 53 N. E. 765; *Western Constr. Co. v. Carroll County*, 178 Ind. 684, 688, 98 N. E. 347; *Ewbank*, Manual, 2d ed. §§ 112, 112a.

The statute granting appeals provides that "the party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon." *Burns's Anno. Stat.* 1914, § 671.

And while as between appellant and appellee Ryan the appellant could not be deemed to have "received" the money deposited in the bank, we think that obtaining an injunction which forbade it to be drawn out of the bank was a sufficient "receipt" of the money, as be-

tween appellant and the debtors who paid it on the judgment, to constitute a binding election that the fund thus seized upon should be substituted for the original debt.

Therefore we must decline to pass on the question whether or not the finding and judgment should have included a fee for appellant's attorney.

Appeal—from unfavorable portion of judgment.

The appellees Rich & Rich did not assign cross errors, but have devoted their brief to an attempt to show that the judgment ought to be affirmed. It appears without dispute that they have procured the clerk of the circuit court to satisfy the mortgage of record, which could only be lawfully done on the ground that a valid judgment of foreclosure had been rendered and paid. *Burns's Anno. Stat.* 1914, § 1155.

Therefore they have no further interest which can be affected by treating this appeal as a controversy between the two administrators to determine which of them shall receive the money recovered by this action, and we shall not consider or pass upon any questions as to the judgment being for the correct amount.

—right of one who has satisfied judgment to be heard.

The facts are not in dispute. All the facts that control the decision as to which of the administrators shall receive the money recovered were agreed upon by the parties, and were presented to the court by an agreed statement of facts that was read in evidence. No good purpose could be served by ordering a new trial, and we shall proceed to enter final judgment upon the facts as so established.

So much of the finding and judgment as found and adjudged that the administrator of the estate of William J. Smith, deceased, was entitled to recover judgment on the note sued on for the sum of \$9,880 and costs, with a decree foreclosing the mortgage sued on, is affirmed.

But so much thereof as found and adjudged that the appellee Patrick

F. Ryan, as administrator of said estate in the state of Tennessee, was entitled to the money so recovered, is reversed. And it is considered and adjudged by this court that the appellant, Theodore L. Hensley, as administrator of the estate of William J. Smith, deceased, shall recover from the appellee Ryan, as administrator, the possession and control of the sum of \$10,124.83 paid by the appellees Herman E. Rich and Rachael J. Rich, in satisfaction of the judgment and decree recovered against them in this action, and receipted for by said appellee Patrick F. Ryan, as administrator of the estate of William J. Smith, deceased, which money is

now held under an order of this court in the Continental National Bank of Indianapolis, Indiana, and that said money shall be paid by the said Continental National Bank of Indianapolis, Indiana, to the said Theodore L. Hensley, administrator of the estate of William J. Smith, deceased, and shall be receipted for by him, and shall be and constitute assets of said estate in his hands to be disposed of according to law, and that such payment, and the indorsement of his receipt for the same, as such administrator, on the judgment docket of this court, shall constitute a complete satisfaction of this judgment in favor of said bank and all of the appellees.

ANNOTATION.

What actions may be maintained or rights vindicated by ancillary executor or administrator.

The question what actions may be maintained and what rights vindicated by an ancillary executor or administrator was exhaustively discussed in the annotation in 1 A.L.R., beginning at page 1359. The reported case (**HENSLEY v. RICH**, ante, 1118) seems to be the only subsequent case

considering that question. It is held in that case that when an ancillary administrator is appointed, his power to administer the assets in the state of his appointment extends to all the counties thereof, to the exclusion of all other administrators. W. A. S.

FREDERICK McFERREN, Appt.,

v.

GOLDSMITH-STERN COMPANY.

Maryland Court of Appeals — January 13, 1921.

(137 Md. 573, 113 Atl. 107.)

Husband and wife — liability of husband for necessities — separate means of wife.

1. That a wife has means of her own does not prevent her pledging her husband's credit for necessities with which he fails to supply her.

[See note on this question beginning on page 1131.]

— when right to pledge credit arises.

2. The right of a woman to pledge her husband's credit for necessities arises only when he fails to provide them, or furnish her with means to procure them.

[See 13 R. C. L. 1199.]

Evidence — burden of proof — failure to furnish necessities.

3. One seeking to charge a man for purchases on credit by his wife has the burden of showing that he furnished neither the necessities nor the means of procuring them.

[See 13 R. C. L. 1199.]

—effect of payment of alimony.

4. Where a man separated from his wife furnishes her maintenance by payment of money at stated intervals, either under order of court or under an agreement between them, fixing an amount as adequate and satisfactory, she cannot pledge his credit for necessities.

—right of wife to pledge husband's credit.

5. The right of a wife to procure articles on the credit of her husband is not established merely by the fact that he had paid for similar articles procured by her on former occasions.

—presumption that letter was received.

6. The presumption that a letter properly addressed and mailed reached the addressee is not conclusively rebutted by his testimony that he did not remember seeing it.

[See 21 R. C. L. 769.]

Trial — instruction — omitting necessary element.

7. In an action to hold a man liable

for necessities furnished his wife, a prayer should be refused which withdraws from the consideration of the jury an alleged payment by him to her of periodical instalments of money which had been agreed upon as sufficient for her maintenance.

—basing recovery on fault of husband.

8. An instruction in an action to hold a man liable for necessities furnished his wife should be refused which does not require the jury to find that plaintiff supplied the alleged articles, and bases the right to recover on the mere fact that the wife was without the necessary articles through the fault of the husband.

—withdrawal of cause of action from jury.

9. The court cannot withdraw from the jury, in an action to hold a man liable for necessities furnished his wife, the consideration of evidence tending to show that his wife was his actual agent for the purpose of securing such articles.

APPEAL by defendant from a judgment of the Superior Court of Baltimore City (Heusler, J.) in favor of plaintiff in an action brought to recover the price of certain wearing apparel alleged to have been furnished by it to defendant's wife. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Harry N. Abercrombie for appellant.

Mr. B. H. Hartogensis, for appellee:

Defendant and his wife were not separated at the time the purchases were made by her.

Jewsbury v. Newbold, 40 Eng. L. & Eq. Rep. 518; *Noel v. O'Neill*, 128 Md. 206, 97 Atl. 513; *Schouler*, Dom. Rel. 5th ed. p. 101, § 63; 13 R. C. L. 1178.

The husband will be answerable for goods purchased after the wife leaves him without cause, to a person from whom she had previously bought goods, paid for by her husband, if such person has no knowledge or reason to know of the separation.

Anthony v. Phillips (*Cowell v. Phillips*) 17 R. I. 188, 11 L.R.A. 182, 20 Atl. 933; 13 R. C. L. § 211, p. 1181; *Vanuxen v. Rose*, 7 Ind. 222; *Norton v. Fazan*, 1 Bos. & P. 226, 126 Eng. Reprint, 873.

A husband will be liable for necessities furnished his wife where the allowance which he promised to make has not been paid, or if he does not pay it regularly.

Baker v. Barney, 8 Johns. 72, 5 Am. Dec. 326; *Fredd v. Eves*, 4 Harr. (Del.) 385; *Beale v. Arabin*, 36 L. T. N. S. 249.

The husband's liability in case of a separation does not cease, but it depends on the circumstances and causes of separation.

Dixon v. Hurrell, 8 Car. & P. 717; 13 R. C. L. §§ 237, 238; *Lidlow v. Wilmot*, 2 Starkie, 86, 19 Revised Rep. 684; *Brown v. Brown*, 5 Gill, 255; 1 Poe, Pl. § 368; *Schouler*, Dom. Rel. p. 108; *Fredd v. Eves*, 4 Harr. (Del.) 385; *Ott v. Hentall*, 70 N. H. 231, 51 L.R.A. 226, 47 Atl. 80.

Pendency of divorce proceedings will not relieve a husband from liability for his wife's support, who is living apart from him, where no alimony has been decreed, and he has not made any other provision for her maintenance.

Johnstone v. Allen, 6 Abb. Pr. N. S. 306; *Minck v. Martin*, 22 Jones & S. 136; *Denver Dry Goods Co. v. Jester*, L.R.A.1917A, 969, note; *Keegan v. Smith*, 8 Dowl. & R. 118, 5 Barn. & C.

375, 108 Eng. Reprint, 140, 4 L. J. K. B. 189, 29 Revised Rep. 273; 13 R. C. L. 1182; Anthony v. Phillips, *supra*; Constable v. Rosener, 82 App. Div. 155, 81 N. Y. Supp. 376; Wanamaker v. Weaver, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 629, 68 N. E. 135; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Schindel v. Schindel, 12 Md. 108.

Offutt, J., delivered the opinion of the court:

The appeal in this case was taken from a judgment of the superior court of Baltimore city against the appellant in favor of the plaintiff in an action in assumpsit brought by the appellee against the appellant and Adelaide McFerren, his wife, to recover the price of certain wearing apparel alleged to have been furnished by it to the said Adelaide McFerren.

The theory upon which the plaintiff sought to recover against the appellant was that the articles furnished were necessities suitable to the wife's station in life, which her husband refused to supply, and which he furnished her no means to procure, and that therefore she was entitled to purchase them upon his credit, and that he thereupon became obliged to pay for them.

The wife's defense to the suit was that she had been compelled to separate from her husband because of his cruelty and abuse, and that, after the separation, she was in need of wearing apparel, and since her husband did not supply her with the means to procure it, she was compelled to buy it on his credit, and that he, and not she, was responsible for the payment of the debt so incurred.

The husband's defense was that he supplied his wife with such things as were necessary to her comfort and convenience in their station in life, and that when she separated from him, she did so voluntarily and without any fault on his part, and that, during the separation, he paid her a fixed weekly sum for her support and maintenance as alimony in a divorce proceeding which she has instituted;

that the sum so aforesaid was fixed by agreement, and that he had notified the plaintiff, before a part of the goods for the price of which the suit was brought had been purchased, that he would not be responsible for any purchases not made by him in person.

Since the legal sufficiency of the evidence is not in issue, and as we are not called upon to weigh it, it is unnecessary to review it in detail, and it is sufficient to say that there was testimony in the case tending to support each of these conflicting contentions.

The record contains seven exceptions, the first six of which relate to questions of evidence and one to the rulings on the prayers.

The six exceptions relating to the admissibility of evidence may be grouped, as they all relate to the action of the lower court in refusing to allow questions asked in the cross-examination of Adelaide McFerren, a witness for the appellee, which were designed to show that at the time she purchased the articles in question she had means of her own, not furnished by her husband for her support, from which she could have paid for them. The proposition upon which the court's rulings in respect to the questions involved in these exceptions rests is that the husband's obligation, arising from the marriage relation, to supply his wife with necessities suitable to her station in life, is not affected by the fact that she may have means of her own from which she could procure them. While this question, in the precise form in which it occurs in this case, does not appear to have arisen in this state, the general principles controlling it have been frequently stated by this court. In *Jones v. Gutman*, 88 Md. 364, 41 Atl. 794, the court said: "The husband is bound to provide his wife with such necessities as, in her situation in life, are suitable and proper, and if he fail in the performance of this duty she may contract debts for them, and it will be presumed as matter of law that she had the pow-

er to do so. 1 Bl. Com. 443. In all such cases a presumption conclusively arises, whether the parties live together or not."

And that this principle is not affected by the fact that she had means of her own is to be inferred from the language used in *Stonesifer v. Shriver*, 100 Md. 30, 59 Atl. 141, where there was an effort to charge the wife's separate estate with her funeral expenses and medical attendance. In holding that these expenses could not be charged against the wife's estate, it was said: "The duty of a husband to bury his wife in a suitable manner is involved in the obligation to maintain her while living," etc.

And in *Wanamaker v. Weaver*, 176 N. Y. 75, 65 L.R.A. 529, 98 Am. St. Rep. 621, 68 N. E. 135, cited in *Noel v. O'Neill*, 128 Md. 205, 97 Atl. 513, it is said: "It is a settled principle in the law of husband and wife that, by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife, so long as she does not violate her duties as wife."

If, then, the husband's duty to supply his wife with necessities depends upon the marital relation and the obligations incident thereto, it cannot be said to depend upon or be affected by her ability to procure such necessities from her separate estate, and such seems to be the general view. Although there are decisions to the contrary (see *Hunt v. Hayes*, 64 Vt. 89, 15 L.R.A. 661, 33 Am. St. Rep. 917, 23 Atl. 920), it is "generally held that a husband's duty of support exists though his wife has a statutory or equitable separate estate" (13 R. C. L. p. 1202; *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Moore v. Copley*, 165 Pa. 294, 44 Am. St. Rep. 664, 30 Atl. 829; *Ott v. Hentall*, 70 N. H. 231, 51 L.R.A. 226, 47 Atl. 80). Many of the cases dealing with this question are collected in a note to the case of *Wanamaker v.*

Weaver, 98 Am. St. Rep. 644, in which, after referring to the cases holding a contrary view, it is said: "The soundness of these decisions may well be doubted. The right of a wife to support from her husband, and his duty to support her, do not depend upon the inadequacy of her means, but upon the marriage relation. Her implied authority to pledge his credit springs from his obligation, as husband, to provide for her, and not from the fact that otherwise she will be destitute."

And, in our opinion, the principles so stated are not only established by our decisions, but are entirely consonant with reason and the best-considered authority elsewhere.

Applying these principles to the question before us, in our opinion, there was no error in the rulings involved in these six exceptions.

The plaintiff offered five prayers, the defendant *Adelaide McFerren* two, and the defendant *Frederick C. McFerren* seven. All the prayers of the plaintiff and the defendant *Adelaide McFerren* were granted, as were the first, third, fourth, and fifth prayers of the appellant, and the others were refused.

The legal principles controlling the rights of the several parties to the case in which this appeal was taken present no difficulty. The husband was obliged to provide his wife such necessities as were appropriate to her station in life, and when, and only when, he failed to provide them, or furnish her means to procure them, she became authorized to pledge his credit to obtain them.

The agency thus presumed is one which arises ex necessitate, and is not the conventional agency created by express language, or implied from the conduct and course of dealing of the principal. This is obviously true because, if the existence of the facts from which this agency of necessity is implied is established, the husband will not be allowed either to revoke it or deny its existence; whereas, in the case

Husband and wife—liability of husband for necessities—separate means of wife.

—when right to pledge credit arises.

of an actual conventional agency, he could terminate the agent's right to act under it at any time. 2 Mechem, Agency, ¶ 563.

But the rule thus stated rests upon the assumption that the husband has neither furnished the necessities nor the means to procure them; and if it appear that he has supplied either the one or the other, then there is no presumption of an agency of necessity, and whoever seeks

Evidence—burden of proof—failure to furnish necessities. to charge the husband for purchases on his credit by the wife must prove

agency as in other cases when her right to pledge his credit is questioned. And where the husband and wife are separated, and he provides for her maintenance and support by the payment of money or other valuable commodity at stated intervals, either as alimony, under an order of

—effect of payment of alimony. some court of competent jurisdiction, or in accordance

with an agreement between the husband and wife, fixing such an amount as adequate and satisfactory, then she is not authorized to pledge his credit under the presumed authority of an agency of necessity; and the person seeking to charge the husband under such circumstances assumes the burden of proving an agency in fact. Jones v. Gutman, 88 Md. 361, 41 Atl. 792.

These principles, which are generally approved and may be regarded as settled law, are very clearly stated in Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 442, where it is said: "In the absence of any express promise, the power of a wife separated from her husband without her fault rests on an implied authority to bind him for necessities, when he has made no sufficient provision for her support. If he makes sufficient provision, or if he makes provision to an amount she assents to receive without coercion, he is not bound to make good her contracts for necessities. This is not questioned."

Applying these principles to the

questions involved here, in our opinion there was error in the rulings of the lower court on the prayers.

By the appellee's first prayer the jury was told that if the garments for the price of which the suit was brought were purchased upon the credit of the appellant by his wife, and that she had purchased from the appellee "similar garments on many occasions," and her husband had in each case paid for them, the plaintiff was entitled to recover, unless her husband had provided her with necessary wearing apparel, or with sufficient money "to procure the same." By this prayer the appellee's right to recover rested upon the hypothesis of an agency in fact, not arising from or necessarily incident to the marriage relation; and as the authority of the agent under such circumstances could have been terminated by the principal at any time before it was executed (1 Mechem,

Agency, ¶ 563), **—right of wife to pledge husband's credit.** whether the principal had terminated his wife's

agency before she purchased the articles in question was, under the circumstances of the case, a material and important fact to be considered by the jury in determining whether, at the time Mrs. McFerrer made the purchase, she was acting as her husband's agent. There was proof in the case that the appellee had been notified by the appellant, prior to the day on which the greater part of the articles were purchased, that he would not be responsible for any debts not contracted by him personally. He testified that he himself signed such a notice and mailed it, properly addressed, to the appellee, and upon that proof a presumption arose that the appellee received it; and while one of appellee's officers testified he did not remember seeing the letter, and he was sure it had not been received, such

—presumption that letter was received. testimony did not conclusively rebut the presumption of its receipt arising from the proof that it had been mailed, but was to be considered by

the jury, together with any other facts or circumstances tending to rebut such presumption. *Lawrence Bank v. Raney & B. Iron Co.* 77 Md. 328, 26 Atl. 119; *Southern Engine & Boiler Works v. Vaughan*, 98 Ark. 388, 135 S. W. 913, Ann. Cas. 1912D, 1062, 49 L.R.A. (N.S.) 468, note.

And since the statement in the prayer that the plaintiff was entitled to recover if the jury found the facts stated therein in effect withdrew from their consideration the question of the revocation of the agency, it should not have been granted. *Corbett v. Wolford*, 84 Md. 429, 35 Atl. 1088.

The plaintiff's second prayer submitted in somewhat greater detail the same proposition as was set forth in its first prayer, and since it ignored entirely the testimony concerning the revocation of the wife's agency to purchase the articles in question, for reasons already assigned, it, too, should have been refused.

By the plaintiff's third prayer the jury were told, in effect, that if McFerren and his wife were separated as a result of his misconduct, he was responsible for necessary apparel furnished by the plaintiff; and if she "had not means of supplying herself therewith," their verdict should be for the plaintiff.

Its fourth prayer instructed the jury that if the "male and female defendants herein" separated by mutual consent "after May 7, 1919, and nothing was said *then*" as to his providing for her necessary wearing apparel, and that the articles purchased on May 20th were necessary wearing apparel, that the jury could infer that he intended that his credit should be pledged with the plaintiff, and the verdict should be for the plaintiff.

The propositions announced by these two prayers, while inartificially phrased, are, in the main, correct statements of law, and the fourth prayer was properly granted; but the third prayer is exceedingly mis-

leading, in that it, in effect, withdraws from the consideration of the jury the testimony tending to show that the appellant paid his wife a definite weekly allowance for her maintenance and support, the amount of which was fixed as sufficient for such purpose by agreement made by their respective counsel, which she ratified. For reasons already stated, such an agreement, if it existed, went to the very root of the appellee's case, and there was error in withdrawing it from the consideration of the jury, and for this reason this prayer should have been refused.

Trial-instruction—omitting necessary element.

The plaintiff's fifth prayer instructed the jury, in effect, that if the wife was without necessary wearing apparel through the fault of her husband, the appellant, and if she received "no money from him for such necessary garments," their verdict should be for the plaintiff, even though it had been notified on May 20th not to credit the wife. This instruction is palpably defective, in that it failed to require the jury to find that the plaintiff sold or supplied the articles

—basing recovery on fault of husband.

in question, or, indeed, anything at all, either to the appellant or to his wife; and since, in any possible aspect of the case, the mere fact that Mrs. McFerren was without necessary wearing apparel through the fault of her husband did not in itself create a cause of action in favor of the plaintiff, it follows that this prayer should have been refused.

Two prayers were granted at the instance of Mrs. McFerren, but as the objections to them were not pressed in this court, and as no reversible error has been discovered in the rulings in regard to them, they need not be further discussed.

The appellant's second, sixth, and seventh prayers, while they were, for reasons already stated, otherwise valid, were properly refused because they withdrew from the consideration of the jury the evi-

dence in the case tending to show that the appellee was warranted in inferring from the appellant's course of dealing and his conduct that his wife was his agent in fact as distinguished from an agent in law or of necessity for him. There

—withdrawal of
cause of action
from jury.

was proof in the case from which such an inference could have been drawn, and its

weight was for the jury, to whom it should have been submitted.

Because of the errors pointed out in the rulings of the lower court on the prayers, it follows that the judgment appealed from must be reversed.

Judgment reversed with costs, and cause remanded for a new trial.

Petition for rehearing denied March 3, 1921.

ANNOTATION.

Duty of husband to provide necessaries for wife as affected by her possession of independent means.

I. Scope, 1131.

II. In general, 1131.

III. Liability of husband through whose fault wife is living apart from him, 1136.

IV. Separation by mutual consent or agreement, 1139.

V. Precarious or uncertain income of wife, 1140.

I. Scope.

The annotation is confined to civil cases, and does not include the question of criminal responsibility.

There are a considerable number of cases which may with propriety be regarded as assuming or supporting by inference the view that, notwithstanding the fact that the wife is possessed of a separate estate or income, the husband remains liable for necessaries furnished to her; at least, where they are living together. While a few of these cases are referred to, the note, in the main, has been confined to cases which have directly considered the point under annotation, as to the effect of the possession by the wife of separate means or income upon the husband's duty to support her. This question may arise where it is attempted to hold the husband liable for necessaries furnished to the wife, and it appears that the latter had available separate resources to pay for such necessaries. There are cases also presenting the question where the action was by the wife, to obtain reimbursement from the husband or his estate for advances out

of her own property for necessaries. The liability of a married woman for necessaries is treated in the annotation in 15 A.L.R. 833. And the cases on that question are not considered in the present annotation, either for their direct decisions or for any implication that they may carry upon the question now under annotation.

It should be observed, also, that the question of the husband's liability for necessaries furnished to the wife may depend upon the question whether credit was given exclusively to the wife; this class of cases should be distinguished from that under consideration. Thus, it was held in *Connerat v. Goldsmith* (1849) 6 Ga. 14, that the husband was not liable to a third party for household furniture, furnished to the wife, and used by them jointly, because the evidence showed that the credit was given to the wife, who had a large separate estate, the plaintiff having given her a receipt and taken her note for the property. The court said that the idea of agency was precluded, because, the wife having a separate estate and being competent to contract so as to bind such estate, the court had the right to infer that the plaintiff contracted with her as a feme covert having a separate estate, and, as to that estate, a feme sole; and she was, therefore, the principal in the contract.

II. In general.

The primary duty of supporting the

wife and family rests, of course, upon the husband, and ordinarily he is not relieved of this duty merely because the wife may have a separate estate or means of her own, available for her support. As sustaining this general proposition the following cases may be cited:

Alabama. — See *Neil v. Johnson* (1847) 11 Ala. 615, *infra*.

California.—*Meyer's Estate* (1878) Myrick, Prob. Ct. Rep. 178; *Shebley v. Peters* (1921) — Cal. App. —, 200 Pac. 364.

Colorado.—*Poole v. People* (1898) 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025.

Illinois.—*H. G. Goelitz Co. v. Industrial Bd.* (1917) 278 Ill. 164, 115 N. E. 855; *American Mill. Co. v. Industrial Bd.* (1917) 279 Ill. 560, 117 N. E. 147.

Iowa.—See *State v. Hill* (1913) 161 Iowa, 279, 142 N. W. 231 (rule recognized).

Maine. — See *Thorpe v. Shapleigh* (1877) 67 Me. 235, *infra*.

Maryland. — *McFERRIN v. GOLD-SMITH-STERN Co.* (reported herewith) ante, 1125.

Minnesota. — *Kosanke v. Kosanke* (1917) 137 Minn. 115, 162 N. W. 1060.

New Hampshire.—*Ott v. Hentall* (1900) 70 N. H. 231, 51 L.R.A. 226, 47 Atl. 80.

Oklahoma.—*Sodowsky v. Sodowsky* (1915) 51 Okla. 689, 152 Pac. 390.

Texas. — *Callahan v. Patterson* (1849) 4 Tex. 61, 51 Am. Dec. 712.

Virginia.—*Mihalcove v. Holub* (1921) — Va. —, 107 S. E. 704.

England.—*Re Wood* (1863) 1 DeG. J. & S. 465, 46 Eng. Reprint, 185, 9 Jur. N. S. 589, 32 L. J. Ch. N. S. 400, 8 L. T. N. S. 476, 11 Week. Rep. 791.

Canada. — *Griffin v. Patterson* (1881) 45 U. C. Q. B. 536.

The rule was laid down in *Callahan v. Patterson* (Tex.) *supra*, that the husband is bound to support the wife out of his own property, if able to do so, without resorting to her separate property; but that, if he is not able to support the wife and children, her separate property may be resorted to and made liable for that purpose.

It was held in *Re Wood* (Eng.)

supra, where the husband had been placed in an asylum and found to be a lunatic, and the wife, during a delay in the payment of her separate income, borrowed certain sums of money for maintenance, that these sums should be allowed against his estate, the contention being overruled that the circumstances should be regarded as constituting a separation by consent, and that, where the wife is living separate from her husband and has a separate income, she is not entitled to pledge her husband's credit. It may be observed that the smallness of the wife's separate income apparently affected this decision, the combined incomes of husband and wife amounting to less than £250 per annum, and that of the wife being less than half this amount. The court said that the amount of the income in this case made it unnecessary to give any opinion on the cases cited; that the husband's income was wholly applied for his benefit, and the wife was supplied with these small sums in payment of her necessary expenses; and that the decision of the lower court was clearly right, and the appeal frivolous.

And in *Meyer's Estate* (1878) Myrick, Prob. Ct. Rep. (Cal.) 178, *supra*, the husband applied for an order on the guardian of the wife, who was insane, to refund out of her estate the amount which he had expended for her support, it appearing that she had a large separate estate and that he also was wealthy. The court, in denying the application, said that it was the duty of the husband to maintain the wife, and that while he had the ability so to do, resort could not be had to her estate.

In discussing the question of damages for the death of the husband through the defendant's negligence the court, in *Shebley v. Peters* (1921) — Cal. App. —, 200 Pac. 364, *supra*, in holding that evidence should not have been admitted of the dependence of the widow and children upon the husband for support, said: "The admissibility of evidence to show that they were dependent upon the decedent for support depends upon the

question whether that fact does or does not enhance their loss. We think it is clear that such evidence is not admissible, and that this is so because their loss is the same, regardless of their dependence upon him for support. They were entitled to demand of him a support in accordance with his station in life. Such support it is the right of every wife and minor child to receive from the husband and father, even if they are not dependent upon him at all, but have ample means of their own."

That a husband owes the duty of maintaining his wife notwithstanding she has a dower estate in lands of a former husband finds support in *Neil v. Johnson* (1847) 11 Ala. 615, *supra*, where, however, the question was as to the liability of the widow's dower to levy and sale under execution for debts of the second husband.

In *Poole v. People* (1898) 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025, *supra*, a prosecution under a statute making it unlawful for any man residing in the state wilfully to neglect, fail, or refuse to provide reasonable support and maintenance for his wife, and providing that any person guilty of such neglect, upon the complaint of the wife, should, on conviction, be adjudged guilty of a misdemeanor, and committed to jail, unless it appeared that, owing to physical incapacity or other good cause, he was unable to furnish such support, the court, in affirming a conviction, said that the husband was not relieved from furnishing support on account of the financial means of his wife, either by the general law or the statute; and that therefore the offer of the plaintiff in error to prove that the prosecuting witness had means of her own, at a time several months prior to the institution of the proceedings, was wholly immaterial, it not being claimed that such means were obtained from the husband.

The rule that the husband's duty to support the wife exists although the wife has a separate estate is recognized in *State v. Hill* (1913) 161 Iowa, 279, 142 N. W. 231, also, al-

though it does not appear that the question was presented in this case.

The rule that, as between husband and wife who are living together, the former must pay for household necessities, although the wife has separate property, is supported also by *Griffin v. Patterson* (1881) 45 U. C. Q. B. 536, *supra*, where, in an action by a third party against the husband and wife for goods sold to the latter, who had a separate estate, the court, in holding that she was not liable, said: "No case, as far as I am aware, has decided that a married woman living with her husband and family must be held to pledge her personal credit or bind her separate estate merely by ordering goods for the ordinary wear, use, or support of herself, her husband, and children. I certainly am not prepared, unless bound by authority, to accede to such a proposition.

. . . I cannot believe that the legislature ever intended that a married woman, living with her husband and family, becomes, by the mere fact of her possessing some separate provision, liable for the household stuff or provisions ordered by her in the ordinary way as managing the household."

And it was said in *American Mill Co. v. Industrial Bd.* (1917) 279 Ill. 560, 117 N. E. 147, that the duty to support the wife is imposed by law on the husband, and this duty does not depend upon the adequacy of the wife's means, but upon the marriage relation. The particular question involved in this case, as to the right of the wife under the Workmen's Compensation Act,—that is, whether it is necessary for her to prove that she was dependent upon the husband in order to recover under the act for his death,—is beyond the scope of the note. The statute provided for recovery if the employee left a widow "whom he was under legal obligation to support" at the time of the injury. And the court held that there could be recovery without proof that the deceased made contributions to his wife for her support, and that she was de-

pendent upon and relied upon such contributions for support.

To similar effect, holding that the "legal obligation" of the husband to support the wife within the meaning of the Workmen's Compensation Statute of that state does not depend on the inadequacy of the wife's means, but on the marriage relation, is *H. G. Goelitz Co. v. Industrial Bd.* (1917) 278 Ill. 164, 115 N. E. 855.

The question under consideration was presented, but was found not essential to the decision, in *Dolan v. Brooks* (1897) 168 Mass. 350, 47 N. E. 408, where the court expressly stated that it did not mean to intimate that the fact that a wife has an income of her own will relieve the husband from his obligation to support her, or absolve him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. In this case the wife, who, for several years, had purchased dresses from the plaintiff, had been accustomed to pay for the same from her separate income, with her own check, and the plaintiff had sent the bills to the wife. It did not appear that the husband had refused or neglected to provide the wife with suitable clothing. And it was held that a finding for the defendant, in an action against the husband for the price of a dress furnished by the plaintiff to the wife, could be sustained, either on the ground that credit was given to the wife, and not to the husband, or that, assuming that the dress was suitable to the wife's station in life, it was not a necessary for which he would be liable.

That the husband is primarily liable for household necessities, even though the wife has a separate estate, and that this rule is not affected by statutory provisions making husband and wife jointly and severally liable for all necessary household articles and supplies furnished to and used by the family, is supported by *Kosanke v. Kosanke* (1917) 137 Minn. 115, 162 N. W. 1060, *supra*, where the wife was held entitled to reimbursement from the husband's estate for amounts paid by her from her sepa-

rate property for household necessities furnished to them while they were living together, on the ground that the payments were made by her with the expectation of repayment by the husband.

And that, if the husband and wife are living together, it is his duty to support her, without regard to whether she has separate means of support, and that the same is true if they are living apart without her fault, at least unless she had ample separate means, was the rule laid down in *Sodowsky v. Sodowsky* (1915) 51 Okla. 689, 152 Pac. 390, which was decided under the Oklahoma statutes providing that "the husband must support himself and his wife out of his property or by his labor;" that the wife must support the husband, when he has not deserted her, out of her separate property when he has no separate property, and is unable, from infirmity, to support himself; that the separate property of the wife is not liable for the debts of the husband; and expressly declaring the common-law rule that if the husband neglects to make adequate provision for the support of the wife, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The question arose on the pleadings, and it does not expressly appear whether the parties were living separate, or whether the wife had ample, or any, means of her own. The court said: "In view of the independent legal status and remedies vouchsafed to her in respect to her personal rights and property by the several sections of the statutes hereinbefore quoted, it appears that if he breaches his duty of support, while she is living with him as his wife, or apart from him, through no fault of her own, and especially if without ample means of her own, and she involuntarily expends her own separate means in procuring articles necessary to her support, he is in duty bound to reimburse her, and she may, after due demand, or where it is evident that such demand would be futile, sue and

recover judgment against him for the same. . . . None of the provisions of the statutes relating to the question of the support of the wife predicate her right and her husband's duty in regard to her support upon any question of her ability to support herself by her own labor or out of her own separate property; and we do not feel warranted in construing the statutes as limiting this duty, as it existed at common law, and imposing it upon the husband only when the wife is unable to support herself."

There are other cases indirectly supporting the doctrine of the husband's primary obligation to pay for necessities furnished the wife, although she has a separate estate, which do not discuss the question under consideration. Thus, in *Underhill v. Mayer* (1917) 174 Ky. 229, 192 S. W. 14, the court held that a wife was not liable on a note given by her to a physician for his services in attendance on her, the services being furnished at the instance and upon contract with the husband, and being charged to him, since the husband was primarily liable for such necessities, and, this being his debt, her estate could not become bound for it, under a statute of that state, except by deed or mortgage.

That the husband continues liable for necessities furnished the wife while they are living together, although she has a separate estate, seems to be assumed in *Moore v. Copley* (1895) 165 Pa. 294, 44 Am. St. Rep. 664, 30 Atl. 829, where it was held that the wife's separate estate was not liable for medical services rendered to herself and children while living with her husband, the court saying that while the power of the husband over the separate estate of the wife had been taken away, his liability for her support and that of his children remained; that he was liable for necessities furnished the wife and children, whether with or without his knowledge, and that she was not liable unless she expressly engaged to become so.

So, the rule that the husband must provide necessities even though the

wife has a separate estate is assumed also in *Anderson v. Davis* (1904) 55 W. Va. 429, 47 S. E. 157, where the court took the view that, the husband being the head of the family, and under a legal duty to support it, the separate estate of the wife is not liable for family necessities supplied by a third person, when it is not shown that she has agreed to pay for them, or has estopped herself from denying liability therefor.

And in *Israel v. Silsbee* (1883) 57 Wis. 222, 15 N. W. 144, it is held that the husband alone is liable for support of his wife and child, unless she expressly made the amount chargeable upon her separate estate.

And the doctrine that the husband may be liable for necessities furnished the wife, although she has a separate estate, seems supported also by such cases as *Ketterer v. Nelson* (1911) 146 Ky. 7, 37 L.R.A. (N.S.) 754, 141 S. W. 409, where it was held that, as the husband was primarily liable for such necessities as the physician's and nurse's bill for the wife and her burial expenses, he was not entitled to be reimbursed out of her estate the amount which he had paid therefor. And to a similar effect, see *Stonesifer v. Shriver* (1904) 100 Md. 30, 59 Atl. 141, set out in the reported case (*McFERREN v. GOLDSMITH-STERN*, Co. ante, 1125).

It appears to be assumed also in *Bowen v. Daugherty* (1915) 168 N. C. 242, 34 S. E. 265, Ann. Cas. 1917B, 1161, that the fact that the wife has a separate estate does not prevent recovery from the husband for necessities furnished to her while they are living together, in the absence of an express agreement by the wife to pay therefor, it being held in this instance that although, under the Married Women's Act, the wife might bind herself by contract, her estate could not be held liable for expenses of doctor's bills and nursing during her last illness, and her funeral expenses, the primary obligation being upon the husband.

And among other cases which, on principle, seem to support the doctrine of the husband's liability for

necessaries even though the wife has a separate estate, is *Staple's Appeal* (1884) 52 Conn. 425, holding that a husband cannot charge his wife's estate for her funeral expenses.

III. Liability of husband through whose fault wife is living apart from him.

The better rule appears to be that even though husband and wife are living apart because of his desertion or misconduct, the wife, if without fault, is still entitled to his support for necessities, and this right does not depend upon the question whether she has means of her own, available for that purpose. Some of the cases do not go to the full extent of this rule, but, subject to the explanation of individual cases given below, it finds support in the following:

Maine. — *Thorpe v. Shapleigh* (1877) 67 Me. 235.

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Massachusetts. — *Hall v. Weir* (1861) 1 Allen, 261.

New Hampshire. — *Ott v. Hentall* (1900) 70 N. H. 231, 51 L.R.A. 226, 47 Atl. 80.

New York. — *Brauwer v. Brauwer* (1911) 203 N. Y. 460, 38 L.R.A. (N.S.) 508, 96 N. E. 722; *Weiserbs v. Weiserbs* (1918) 169 N. Y. Supp. 111.

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Where the defendant's wife, who, for good cause, had separated from him, owned a dwelling house and furniture exceeding in value the amount of the plaintiff's claim for alleged necessities furnished to the wife, it was held in *Thorpe v. Shapleigh* (Me.) *supra*, that the court properly refused to instruct the jury that the plaintiff could not recover from the defendant for necessities furnished to his wife while she was the owner of a dwelling house and land which she omitted to appropriate to the relief of her neces-

sities. The court said: "The request was properly refused. When a husband wrongfully turns his wife away, he is by law liable for her support. A dwelling house would seem to be as much a necessity for a wife and family, to protect her from the inclemencies of the weather, as food to save her from starvation. The request implies an obligation to appropriate what is, in and of itself, a necessity, to procure other necessities, which would not be more needed than the one omitted to be appropriated. Whether, if the wife had sufficient means of her own, or was able to earn a living for herself, the husband would be liable to support her, has been questioned. *Johnston v. Sumner* (1858) 3 Hurlst. & N. 261, 157 Eng. Reprint, 469, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574; *Lidlow v. Wilmot* (1817) 2 Starkie (Eng.) 86, 19 Revised Rep. 684; 1 Chitty, Contr. 241. But it is not necessary to determine this question."

In the reported case (*McFERRIN v. GOLDSMITH-STERN Co.* ante, 1125), where the husband and wife were living apart because, as she contended, of his misconduct, it was held that the husband's obligation, arising from the marriage relation, to supply his wife with necessities suitable to her station in life, was not affected by the fact that she might have means of her own from which she could procure them. It will be observed that the court, while reaching a conclusion which is in accord with what appears to be the weight of authority, seemingly adopts the doctrine of agency of necessity, which would appear to be a doubtful theory under the circumstances.

In *Hall v. Weir* (Mass.) *supra*, the defendant, who had wrongfully deserted his wife and family, and furnished no adequate means for their support, was held liable for necessities furnished them by the plaintiff, although she received the monthly earnings of her two daughters, who lived with her, which earnings, combined, it appeared, were nearly equal to those of the husband.

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231, 51 L.R.A. 226, 47 Atl. 80, in holding that a wife's financial ability to provide for herself does not deprive her of the right to pledge her husband's credit for necessities, when she is living apart from him on account of his misconduct, the court said that the wife's marital rights and the husband's correlative duty did not depend upon the inadequacy of the wife's means, but upon the marriage relation; that the husband's obligations created the necessity for the wife's agency, if it be so termed, not the fact that she would otherwise be destitute. Continuing, the court said: "The husband is by nature, as well as by law, the leading and responsible party in the undertaking. Among other things, he takes upon himself the duty of providing a home, and suitably maintaining the wife and children. The wife's ability to provide herself with the necessities of life does not relieve him from the duty while they live together; and no good reason is perceived why it should do so while she is living apart from him in consequence of his misconduct. The duty is taken into consideration in awarding alimony to the wife in connection with or after a divorce. . . . If the wife does not desire a divorce, or the husband's misconduct has not continued a sufficient length of time to constitute a cause for divorce, the court, upon petition of the wife, 'may make to her reasonable allowance out of the estate of the husband for the support of herself and children.' . . . The fact that the wife has means of her own does not deprive her of the right to alimony in the one case, or to an allowance, in the other. So far as her right and the husband's correlative duty are concerned, the necessity for clothing her with authority to obtain necessities upon the husband's credit exists when she has means, the same as when she has none. This is the necessity upon which the law bases the husband's implied promise when he fails in the performance of his duty."

That the husband is under obligation to support the wife after he has abandoned her, although she has a
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separate estate, consisting in part of the proceeds of her own labor and in part of money received by inheritance, is apparently assumed in such cases as *Brauwere v. Brauwere* (1911) 203 N. Y. 460, 38 L.R.A. (N.S.) 508, 96 N. E. 722, where it was held that since the passage of the Married Women's Act, a wife who had been deserted by her husband could maintain an action against him to recover the amount which she had expended from her separate estate for the necessary support of herself and her children.

To the same effect is *Weiserbs v. Weiserbs* (1918) 169 N. Y. Supp. 111, holding that the wife could recover from the husband for money expended by her out of her separate estate for necessities for herself and children, where the husband had failed to furnish adequate and proper support.

It was held in *Cunningham v. Irwin* (1821) 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458, that if husband and wife are living separate, without her fault, the liability of the husband for necessities furnished by a third person is not the difference between what she can earn by her own labor and the amount necessary for her support. The court said that the husband had no right to say to the wife that she should earn all she could by her own labor, and he would be answerable only for the difference, as indicated; that he must support his wife himself, or pay those who do support her in a reasonable manner.

In *Mihalcov v. Holub* (1921) — Va. —, 107 S. E. 704, the court said: "A husband is bound to support his wife. This is his legal duty, independent of any separate estate which she may possess. . . . When they live apart through no fault of the wife, the husband's duty to support her is not affected by the fact of the separation, and he is liable to third persons who furnish her with the necessary means of support on his credit. She has the authority, growing out of his legal duty, to pledge his credit for this purpose."

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There are, however, authorities which are opposed to the above, and which hold that the power of the wife

to pledge the husband's credit for necessities, where they are living apart because of his misconduct and through no fault of hers, depends upon the question whether she has property or means of her own available for her support, and the adequacy of such means. If the doctrine of agency may be regarded as the ground upon which the wife's right rests,—an agency implied from the fact of cohabitation or her necessity,—then these cases are apparently sound. But if, as appears to be the better doctrine, the wife's right is founded on the obligations and duties arising from the marriage relation, then these decisions appear at least doubtful.

That the husband is not liable for the support of the wife after he has left her, if she is able to earn her own living, was possibly, although not clearly, the holding in an early case. *War v. Huntly* (1703) 1 Salk. 118, 91 Eng. Reprint, 111, the entire report of which is as follows: "The case was: an ordinary workingman married a woman of the like condition; and after cohabitation for some time the husband left her, and during his absence, the wife worked; and this action being brought for her diet, it was held that the money she earned should go to keep her."

And the doctrine is laid down in *Lidlow v. Wilmot* (1817) 2 Starkie (Eng.) 86, 19 Revised Rep. 684, that while a husband who turns his wife out of doors, or, by the indecency of his conduct, precludes her from living with him, is bound to provide her means of support adequate to her situation, yet if, either from the husband or from other sources, she is possessed of such means, the law gives no remedy against the husband for necessities furnished her by third persons. The court said the husband was liable only in case of the insufficiency of her funds; and that the only credit given to the husband is an implied one, arising from his situation and the inadequacy of the funds of the wife; and that if she is adequately provided for, the circumstance repels all idea of implied credit.

The court also, in *Hunt v. Hayes*

(1891) 64 Vt. 89, 15 L.R.A. 661, 33 Am. St. Rep. 917, 23 Atl. 920, took the position that a wife wrongfully turned away by her husband could not pledge his credit for necessities if she had an adequate income of her own with which she could supply herself. But it may be observed that in this case the wife's separate income was apparently derived from the husband, there being an antenuptial contract by which the wife was to be paid \$2,000 per year, which it was conceded, had been regularly paid. The husband, in an action against him by a third person for necessities furnished the wife when they were living apart, contended that he was not liable except for such support as he failed to furnish, or as his wife had not the means of obtaining. But the lower court ruled that he was liable for her proper support notwithstanding the provisions contained in the antenuptial contract and their performance, as fully as though the contract had not been executed and performed. It was held that this ruling was erroneous. The court said if the husband's liability, when he has turned his wife away, is put upon the ground of agency arising from necessity, as many of the cases place it, it logically follows that when there is no necessity, there can be no agency; and that there can be no necessity when the wife has means of her own with which she can supply herself. The court, however, approved the rule that a precarious income is not enough; and stated that in cases like the one before it, the question is for the jury to determine whether the wife has adequate means or not for her support.

So, in *Prescott v. Webster* (1900) 175 Mass. 316, 56 N. E. 577, the court, after stating that the general rule is that, when the wife lives apart from her husband, without any fault on her part, the husband is liable for her adequate maintenance in her station in life, and, in case he fails in that duty, is liable to a third person for necessities furnished to the wife, said that the husband was not so liable if the wife had property adequate to her support; that he was liable

only upon the ground of reasonable necessities; but that, where the wife had some means, the question as to whether, in any particular case, her means are such as to relieve the husband from liability for the articles furnished, is generally a question of fact, and not of law. It was held that the court had properly declined to rule that, "the wife having property of her own, the husband was not liable for necessities furnished to her without his knowledge or assent, by one who knew the wife's circumstances," where it appeared that the wife, who had been deserted by her husband, the defendant, without justifiable cause, owned only a \$2,000 equity of redemption in a house, the rents of which were not more than enough to pay interest and taxes. In this case the plaintiff, who had furnished board to the defendant's wife, recovered therefor, it being said that whether the wife's necessity was so great as to make the defendant liable was a question of fact, and not of law.

And it was held in *Litson v. Brown* (1866) 26 Ind. 489, that if the husband and wife separate and live apart, even though that condition is due to his improper conduct, the implied agency of the wife to contract for necessities, arising from cohabitation, no longer exists, and in the absence of an express promise to pay, the husband is thereafter liable for necessities furnished the wife only in case she has no means of her own for her support. The court said: "If the wife, of her own will, elopes or leaves the husband, without his fault, he is not responsible even for necessities furnished her by one having a knowledge of the separation. But if the husband expels the wife from his house without her fault, or compels her to leave his house by cruelty to her, and without the means of support, he sends with her credit for her reasonable expenses. This liability does not, in such case, rest upon an implied agency, but is an obligation imposed by the law from necessity, and is founded on the marital relation and the duty of the husband to maintain the wife. If the husband, who,

in violation of his marital obligations, drives his wife from his house without the means to procure the necessities of life, could also deny the credit to supply them, she would be liable to suffer or perish from want. The law, therefore, from necessity, authorizes anyone to supply her necessary wants, under such circumstances, and to look to the husband for compensation. But if she has the means of support, while so separated from her husband, come from what source they may, whether furnished by the husband or arising from her separate estate, no necessity exists that they should be furnished by others, and in such case the husband could only be held liable upon an express promise to pay."

And where, after the wife had left the husband because of his misconduct, she was, for a time, destitute of means, so that the husband was rendered liable for necessities furnished to her by a third person, it was held, in *Litson v. Brown* (Ind.) supra, that the husband's liability, having once attached, was not discharged by the subsequent receipt by the wife of money in her own right, although, for necessities furnished after the receipt of such money, the husband, it was held, would not be liable.

The court, also, in *Johnston v. Sumner* (1858) 3 Hurlst. & N. 261, 157 Eng. Reprint, 469, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574, was inclined to the view that although the husband, by his fault, caused his wife to leave him, he might not be liable to a third person for necessities furnished to her if she had sufficient separate income. See this case under IV. infra.

IV. Separation by mutual consent or agreement.

The authorities are to the effect that if the husband and wife separate by mutual consent or agreement, it must be shown that the wife is without adequate means or property of her own, in order to warrant recovery from the husband for necessities furnished her by a third party. Thus, it was held in *Decker & Bros. v. Moyer* (1910) 121 N. Y. Supp. 630, that,

under the laws of New Jersey, a husband was not liable for necessities supplied to his wife when they were living apart, except in cases where the separation was due to his fault, or where, the separation being by agreement, the wife was without means of her own; and that the husband was not liable in this action for necessities furnished a wife where, although the plaintiff proves that he was not furnishing her with money, it was not shown that she had no separate estate, or that the husband was not justified in leaving her.

And in *Fredd v. Eves* (1846) 4 Harr. (Del.) 385, the court held that where the husband and wife separate by mutual agreement, and live apart by mutual consent, the husband will not be liable for necessities furnished the wife, if she has a sufficient separate maintenance, although no part of it is supplied by the husband.

The view was taken in *Dixon v. Hurrell* (1838) 8 Car. & P. (Eng.) 717, that if a husband and wife separate by mutual consent, the husband is liable for necessities supplied to the wife, unless she has a competent provision, either from the husband or from her own resources; and that the question of the sufficiency of her separate provision, where it is shown that she has one, is for the jury to determine, depending on the station of the parties and the circumstances of the particular case.

And it was held in *Johnston v. Sumner* (1858) 3 Hurlst. & N. 261, 157 Eng. Reprint, 469, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574, that a third party who sues the husband for the value of articles furnished for the personal use of the wife after their separation by mutual consent has the burden of proving that the wife's separate allowance is insufficient, so as to show an implied authority, arising from necessity, to pledge his credit. In this case, where the wife had an income of £200 a year, covenanted to her by her mother at the time of the marriage, for her separate use, and on the separation of the husband and wife it was agreed that the wife should continue to receive this yearly sum for her sole use, it

was held that the plaintiff, who sued for the value of wearing apparel furnished the wife after the separation, was properly nonsuited, as she had failed to produce evidence sufficient for the jury that the allowance was insufficient, and that the plaintiff was authorized to charge the husband. The court, it may be observed, was doubtful whether, even if the husband had wrongfully turned the wife away, she would have implied authority to pledge his credit for necessities if she had a sufficient separate income. It was said: "If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity; for she by law has no property, and may not be able to earn her living; but we should hesitate to say that, if a laboring man turned his wife away, she being capable of earning, and earning as much as he did; or if a man turned his wife away, she having a settlement double his income in amount, the wife in such cases could bind the husband."

V. Precarious or uncertain income of wife.

The doctrine that a precarious or uncertain income belonging to the wife will not relieve the husband from liability for her support is supported by *Thompson v. Hervy* (1768) 4 Burr. 2177, 98 Eng. Reprint, 136, where it was held that the fact that a wife had a pension granted to her in her own name from the Crown, terminable at the will of the Crown, would not prevent recovery against the husband for necessities furnished by third parties to the wife, after he had wrongfully compelled her to leave his house. The court said that the pension was only a voluntary grace and bounty of the Crown, and only during the pleasure of the Crown, and was not what any creditor of hers, even for her necessary subsistence, could be supposed to give her credit upon.

That a precarious income belonging to the wife will not relieve the husband from the duty to support her is approved also by the Vermont court in *Hunt v. Hayes* (Vt.) under III. supra. R. E. H.

ROBERT L. STEVENS et al., Exrs., etc., of Frederick C. Stevens, Deceased, Respts.,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appt.

New York Court of Appeals—January 6, 1920.

(227 N. Y. 524, 125 N. E. 682.)

Insurance — validity of provision.

1. A stipulation by one borrowing money on a paid-up life insurance policy that the policy may be canceled upon nonpayment of the loan, without notice to the borrower, is not illegal or inequitable.

[See note on this question beginning on page 1145.]

—cancellation of paid-up policy — necessity of notice.

2. Notice to insured who has borrowed money on his paid-up life policy, of cancellation for nonpayment of a loan at maturity, is not necessary where the note provides for cancellation without notice.

[See note in 4 A.L.R. 896.]

—delay in declaring cancellation — effect.

3. A delay by a life insurance company of forty-five days before canceling a paid-up policy according to its

right under the contract for nonpayment of a loan at maturity is immaterial.

—extension of time for payment.

4. Extension of time for repaying a loan on a paid-up insurance policy so as to prevent cancellation of the policy according to the terms of the contract is not effected by letters written before and after maturity of the loan, informing insured as to the date of maturity, that the policy had lapsed, but might be reinstated by prompt action, and asking insured to take up the matter of restoring the policy.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Wyoming County (Brown, J.) in favor of plaintiffs, and from an order denying a motion for new trial, in an action brought to recover the amount alleged to be due under five life insurance policies. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Murray Downs, with Mr. Frederick L. Allen, for appellant:

Defendant was not required to make any demand for payment of the loan or interest, or to give the insured notice of cancellation, or, having canceled, to give notice of the application of the cash-surrender consideration to the payment of the loans, or that there was a surplus.

Clare v. Mutual L. Ins. Co. 201 N. Y. 492, 35 L.R.A. (N.S.) 1123, 95 N. E. 1075; Palmer v. Mutual L. Ins. Co. 38 Misc. 318, 77 N. Y. Supp. 869; Frese v. Mutual L. Ins. Co. 11 Cal. App. 387, 105 Pac. 265; Fountain v. Security Mut. L. Ins. Co. 20 Ga. App. 483; 93 S. E. 118; Eagle v. New York L. Ins. Co. 48 Ind. App. 284, 91 N. E. 814; Wilson v. Royal Union Mut. L. Ins. Co. 137 Iowa, 184, 114 N. W. 1051; Ruane v. Manhattan L. Ins. Co. 194 Mo. App.

214, 186 S. W. 1188; Cilek v. New York L. Ins. Co. 95 Neb. 275, 145 N. W. 693; Salig v. United States L. Ins. Co. 236 Pa. 460, 84 Atl. 826; Mills v. National L. Ins. Co. 136 Tenn. 350, 189 S. W. 691; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; Fidelity Mut. Ins. Co. v. Oliver, 111 Miss. 133, 71 So. 302; Hartford L. Ins. Co. v. Benson, — Tex. Civ. App. —, 187 S. W. 351; Sherman v. Mutual L. Ins. Co. 53 Wash. 523, 102 Pac. 419.

This is also true where policies have been used as collateral for the payment of interest upon notes given in part payment of premiums, and particularly where the policies were paid-up policies upon which the insured was no longer required to pay premiums.

Fowler v. Metropolitan L. Ins. Co. 116 N. Y. 389, 5 L.R.A. 805, 22 N. E.

576; *People v. Knickerbocker L. Ins. Co.* 103 N. Y. 480, 9 N. E. 35; *Holman v. Continental L. Ins. Co.* 54 Conn. 195, 1 Am. St. Rep. 97, 6 Atl. 405; *Knickerbocker L. Ins. Co. v. Dietz*, 52 Md. 16; *Knickerbocker L. Ins. Co. v. Harlan*, 56 Miss. 512; *Patch v. Phoenix Mut. L. Ins. Co.* 44 Vt. 481.

The trial court applied the rule laid down in fire insurance policy cases, which rule has no application to life insurance contracts, and thereby committed error.

Weyand v. Park Terrace Co. 202 N. Y. 231, 36 L.R.A. (N.S.) 308, 95 N. E. 723, Ann. Cas. 1912D, 1010; 31 Cyc. 866, ¶ d; *Jones, Collateral Securities*, 3d ed. §§ 649, 650, pp. 774, 776.

There is no statutory procedure for canceling life policies.

New York Security & T. Co. v. Saratoga Gas & E. L. Co. 88 Hun, 569, 34 N. Y. Supp. 890; *Pizer v. Herzig*, 120 App. Div. 102, 105 N. Y. Supp. 38; *Hothorn v. Louis*, 52 App. Div. 218, 65 N. Y. Supp. 155, 170 N. Y. 576, 65 N. E. 1096.

Payment of surplus to Stevens was no part of the cancellation.

Lockwood v. New York L. Ins. Co. 175 App. Div. 24, 161 N. Y. Supp. 700, 223 N. Y. 714, 120 N. E. 867; *Gately-Haire Co. v. Niagara F. Ins. Co.* 221 N. Y. 162, 116 N. E. 1015, Ann. Cas. 1918C, 115; *Crown Point Iron Co. v. Aetna Ins. Co.* 127 N. Y. 608, 14 L.R.A. 147, 28 N. E. 653; *Buckley v. Citizens' Ins. Co.* 188 N. Y. 399, 13 L.R.A. (N.S.) 889, 81 N. E. 165; *Board of Assessors v. New York L. Ins. Co.* 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385.

Mr. Louis L. Babcock, with Messrs. Stevens & Reynolds, for respondents:

The notes in question, as well as the notices served, should be liberally construed in favor of the assured.

Hoffman v. Aetna F. Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; *Marshall v. Commercial Travelers' Mut. Acci. Asso.* 170 N. Y. 434, 63 N. E. 446; *Janneck v. Metropolitan L. Ins. Co.* 162 N. Y. 576, 57 N. E. 182.

Defendant was obligated, if it desired to cancel, to make that act complete by complying with the terms of the note. It was bound to deliver up the notes, to inform Mr. Stevens what had been done, and to tender him in cash what was his due.

Van Valkenburgh v. Lenox F. Ins. Co. 51 N. Y. 465; *Tisdell v. New Hampshire F. Ins. Co.* 155 N. Y. 163, 40 L.R.A. 765, 49 N. E. 664; *Richards, Ins. Law*, § 288.

Defendant did not elect within a reasonable time to cancel the policies. On the contrary, it elected to continue the policies in force, and communicated this intention to the insured.

Modern Woodmen v. Vincent, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475, 14 Ann. Cas. 89; *Glens Falls Ins. Co. v. Michale*, 167 Ind. 659, 8 L.R.A. (N.S.) 708, 74 N. E. 964, 79 N. E. 905; *Croft v. Lumley*, 6 H. L. Cas. 705, 10 Eng. Reprint, 1472, 27 L. J. Q. B. N. S. 321, 4 Jur. N. S. 903, 6 Week. Rep. 523; *Mutual L. Ins. Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443; *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059; *Bailey v. American Deposit & Loan Co.* 52 App. Div. 402, 65 N. Y. Supp. 380, affirmed in 165 N. Y. 672, 59 N. E. 1118; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Bishop, Contr.* §§ 784, 844; *Bigelow, Estoppel*, p. 696; *Ewart, Estoppel*, p. 133; *Thomson v. Poor*, 147 N. Y. 402, 42 N. E. 13; *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315; *Gallagher v. Nichols*, 60 N. Y. 438.

Andrews, J., delivered the opinion of the court:

On May 16, 1914, Frederick C. Stevens held five paid-up life policies issued by the Mutual Life Insurance Company. On that day he borrowed from the company \$1,837 on each policy and executed five notes, in each promising to pay that sum and interest on January 24, 1915, and in each stating that he had deposited with and assigned to the company as collateral security one of such policies, and agreeing that, if he failed to repay the note or interest when due, the company, "without further notice and without further demand for payment, may cancel said policy as of the date of default," and apply to the payment of the note and interest \$1,920, fixed as the cash-surrender value of the policy, and pay the balance (if any) on demand to the parties entitled thereto. The notes also provided that upon request and upon the payment of interest the time for their payment might be extended for six months or one year. If that was done the same provisions for cancellation were applicable, except that

the amount fixed for the cash surrender value might be increased.

On January 24, 1915, all interest was paid and the loan extended to January 24, 1916. At some time, apparently prior to that date in view of the language used, five notices were sent to Mr. Stevens, each stating that the loan and interest would be payable on January 24th, and asking him, if he wished to continue the loan, to remit the interest. The notices also contained certain statements not applicable to paid-up policies. No attention was paid to these notices and no payments made. The company did not, however, at once cancel the policies. As thirty days' grace is allowed for the payment of premiums its custom is said to be to allow the same privilege for the payment of interest and fifteen days in addition so as to enable it to hear from distant points and make certain that no payments have in fact been made. Instead, on February 12th it wrote to Mr. Stevens on what were evidently forms relating to the nonpayment of premiums, that interest on each loan "will expire on January 24, 1916," and that it trusts he will remit "before that time, . . . that the insurance may not lapse," the interest and 46 cents, which was evidently compound interest from January 24, 1916. It further stated that, unless a remittance was received before the date of expiration, restoration of the insurance would be subject to certain conditions, and asked Mr. Stevens to give the matter his prompt attention. Still nothing was done, and on February 28th five other letters were sent by the company. Like the last, they were a clumsy attempt to adapt a form letter as to premiums to the circumstances surrounding the loans. They each notified Mr. Stevens that he had allowed his "policy to lapse" by default in the payment of interest. They then discussed matters in terms not appropriate to paid-up policies. But they say that a policy is too valuable an asset to be cast aside, and ask Mr. Stevens to take up the matter

of restoring those issued to him. Finally a note at the end distinctly gives the number of the policy referred to, states that it is paid up, and that \$110.22 interest on a loan was due January 24, 1916. Once more no notice was taken of these letters, and on March 9th the company canceled each policy by pasting upon it a cancellation slip as of January 24, 1916. On the 13th the company wrote him that each policy had been canceled because the loan had not been paid or renewed, gave a statement of the transaction, and inclosed a check of \$28.78 on each policy, being the balance due. These letters and checks were forwarded to the defendant's agents at Washington, and were there mailed to Mr. Stevens at his home in Attica before his death, which occurred suddenly on the 14th. They were not received, however, until afterwards, and the checks were then returned to the company by his executors. These executors now claim that they are entitled to the face value of the paid-up policies less the amount due on the loans. To recover that amount this action is brought.

The trial court directed a verdict for the plaintiffs on the ground that the cancellation of the policies did not become effective until notice thereof reached Mr. Stevens and until he was either paid the balance due or was informed that the company held that sum subject to his demand. The appellate division did not adopt the reasoning of the trial judge, but affirmed his action on the ground that the company had waived its right to cancel without further notice of such intention. We think the action cannot be maintained on either theory.

The contract is clear. Its terms are not ambiguous. On default the company may cancel the policy without further notice or further demand. This cancellation is the basis for further action. After it, but necessarily only after it has

Insurance—
cancellation of
paid-up policy—
necessity of
notice.

been effected, the company applies the surrender value of the policy to the payment of the note. If any balance remains, it will pay it to the borrower on demand. The provisions are independent. They do not resemble those in fire policies where the manner in which cancelation may be effected is prescribed. Here the borrower expressly agrees that

—validity of provision.

the cancelation may be made without notice by the action of the company. Such an agreement is not illegal. *Clare v. Mutual L. Ins. Co.* 201 N. Y. 492, 35 L.R.A. (N.S.) 1123, 94 N. E. 1075. Nor is it inequitable. The borrower knows when the loan is due. He knows the privilege he has conferred. He knows it will generally be to the advantage of the company to enforce the cancelation. It is for him to ascertain if cancelation has been effected because of his default, and, if so, to demand any balance that may be due to him. In most banking loans on collateral the bank reserves the right to sell the collateral on default or to retain it itself at a fair value and apply the proceeds on the loan. Any balance due belongs to the borrower. But it has never been held that the transaction is not closed until notice is given that such a balance is in its hands.

As we have said, the time of payment of the notes was extended until January 24, 1916. The evidence of interest payments and the statements of plaintiffs' counsel show this fact beyond a doubt. If so, a mere delay of forty-five days in canceling the policy is immaterial.

—delay in declaring cancelation—effect.

Nothing in the collateral note required the company to exercise its option to cancel on the very day it became due. The agreement expresses the contrary intent. The cancelation is to be made "as of the date of default." This implies action subsequent to that date. It is true the delay might be so great as to permit an inference of fact that

the company had made an election not to cancel. Once made, the insured might rely upon such election, and cancelation would require reasonable notice and demand. But such a delay as here occurred would not of itself permit such an inference.

Is there anything in the letters and notices that requires a different result? If the company extended indefinitely the time for the payment of the principal and interest, or if because of its actions the insured was justified in believing such an extension had been granted, and failed to make required payments, relying on such a belief, again no cancelation could be had without reasonable notice and demand.

The defendant does not appear to have knowingly and intentionally extended the time. Nor do the letters and notices justify a belief on the part of Mr. Stevens that such an extension had

—extension of time for payment.

been granted. He was a business man and had been a banker. We must infer in him a reasonably intelligent appreciation of the meaning of them. The first simply informed him that his loan would become due on January 24, 1916, and that some action on his part was required if it was to be extended. Certain provisions on the back of this paper referring to loans on ordinary policies, and to extensions of loans if premiums were promptly paid, he knew did not apply to him. From that of February 12th the most that he could infer was that, although in default, he might still be permitted, if he acted immediately, to pay his interest as of January 24th and so obtain an extension. The word "lapse" was inappropriate; but a business man, as was Mr. Stevens, could not have understood he was given an indefinite time within which to make his payments, and that good faith, therefore, required a further notice before cancelation was enforced. The letter of February 25th was en-

tirely unfitted to the circumstances; but at least it was a clear notice that the policies were no longer in force and that further negotiations were required to restore them. Finally, there is no direct evidence that Mr. Stevens understood an extension was granted him, and no facts appear from which the inference may be drawn either that he so believed or that he relied on such belief. The truth probably is that

he intended to allow his policies to be canceled so as to pay his notes.

As we find no question of fact to be submitted to a jury, the judgments of the Trial Term and of the Appellate Division should be reversed, and the complaint dismissed, with costs in all courts.

Hiscock, Ch. J., and Hogan, Cardozo, McLaughlin, and Elkus, JJ., concur.

Pound, J., not voting.

ANNOTATION.

Cancellation of paid-up life insurance policy for nonpayment of loan.

As to breaches of loan agreements in insurance policies, see annotation in 4 A.L.R. 895.

Where the cash surrender value allowed by the insured is the actual cash surrender value, and not one arbitrarily fixed, the right of an insurer to cancel a paid-up insurance policy for the nonpayment of a loan is generally sustained under loan agreements giving the insurer a right, upon default, to cancel the policy, apply the surrender value to the satisfaction of the loan, and pay the balance to the insured.

It will be observed that in the reported case *STEVENS v. MUTUAL L. INS. CO.* ante, 1141) it was held that notice to insured, who had borrowed money on his paid-up life policy, of cancellation for nonpayment of a loan at maturity, was not necessary where the note provided for cancellation without notice, the court holding that the agreement by the borrower that the policy might be canceled upon nonpayment of the loan, without notice to the borrower, was not illegal or inequitable.

And in the following cases, where the holder of a paid-up policy obtained a loan under an agreement similar to that in *STEVENS v. MUTUAL L. INS. CO.*, which also authorized the insurer, upon default, to apply the customary cash surrender value then allowed to the payment of the loan, and pay the balance, if any, to the insured, the agreement and a cancela-

tion thereunder were held valid. *Clare v. Mutual L. Ins. Co.* (1911) 201 N. Y. 492, 35 L.R.A. (N.S.) 1123, 95 N. E. 1075; *Sherman v. Mutual L. Ins. Co.* (1909) 53 Wash. 523, 102 Pac. 419.

And in *Palmer v. Mutual L. Ins. Co.* (1911) 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912B, 957, where a loan was made by the insurer to a holder of one of its paid-up policies, which contained no agreement as to the surrender or loan value under an agreement like those in the preceding cases, it was held that if the cash surrender consideration allowed by the insurer was the actual cash surrender value, and not an amount arbitrarily fixed by the insurer without regard to the actual value, the agreement was valid, and that a cancellation by the insurer for default in the payment of the loan terminated the rights under the policy, but that if the actual value of the policy exceeded the customary surrender value allowed by the insurer the contract would be one exacting a penalty, and invalid. The court said: "For the purpose of insuring the payment of the loan, and, in case of default, of foreclosing the rights of the pledgee in the pledged property, the contract in the case at bar provides for a forfeiture of the policy, and authorized defendant to cancel the same by applying the 'customary cash surrender consideration then allowed by the company for the surrender for cancellation of similar

policies, namely, \$1,445,' to the payment of the loan, paying the balance, if any, to the pledgeor. The debt was not paid and defendant exercised the right thus conferred, and canceled the policy. The general rule of the common law for the enforcement of pledge contracts, in the absence of special agreement otherwise providing, requires a sale of the property upon due notice to the pledgeor, and an application of the proceeds to the payment of the debt, the surplus, if any, going to the pledgeor. The rule is, however, not of universal application, and does not apply to commercial paper, and perhaps other species of choses in action. But it is well settled that the parties may stipulate the terms and methods of enforcement, and that agreements in this respect, not obnoxious to the law, will control the rights of the parties.

... Even this rule is not without its exceptions, for it has been held that an agreement that the pledgee may appropriate the property to the satisfaction of the debt is void and not enforceable. ... The rule requiring the sale of the property cannot well be made applicable to a life insurance policy, pledged to the company issuing it as security for the payment of a loan; for, whether fully paid or not, it has no marketable sale value, and an attempt to thus dispose of it would be futile. So that some method of enforcement, other than a sale, or unconditional relinquishment of ownership by the pledgeor, must be resorted to. A careful consideration of the subject leads to the conclusion that the remedy by cancellation at the cash surrender value of the policy is not inconsistent with sound public policy or violative of the substantial rights of the pledgeor. On the contrary, it is a reasonable and practicable method of bringing the contract to a final termination. ... But a contract providing for that remedy should not be construed to vest in the pledgee the right arbitrarily to determine the value of the policy at a sum substantially less than its actual cash surrender value. Pledge contracts so construed have been held to

impose a penalty for the nonpayment of the debt, and therefore void. . . . If the contract provides for an application of the actual cash surrender value of the policy to the payment of the debt, and the surplus to the pledgeor, the result grants to the pledgeor all that he is entitled to, and the law is in no sense offended. And if the 'cash surrender consideration . . . allowed by the company,' upon which the cancellation of the policy in question was based, was the actual cash surrender value, and not an amount arbitrarily fixed by defendant, without regard to the actual value, the cancellation of the policy was valid, and plaintiffs have no cause of complaint. It is not conclusive that the parties, by the contract, agreed upon a surrender value of the policy. If the value so agreed upon resulted, in fact, in imposing upon Palmer a penalty for his default, the agreement is none the less invalid because assented to by him. While the law seldom interferes with the right of contract, and permits parties to enter into such agreements as their interests may seem to them proper, yet there are instances where the law steps in to prevent unfair and unreasonable advantage being taken by one of the contracting parties. Express agreements fixing an amount to be paid for the breach of a contract, if entered into fairly and without fraud, and the amount agreed upon be not greatly disproportionate to the actual loss sustained in consequence of the breach, are valid, and the courts uphold them. But where the agreed compensation for the failure of performance is out of all proportion to the loss suffered, and the actual injury or damage may be readily ascertained and determined, not left to conjecture or speculation, the agreed amount is, by the authorities, treated as a penalty, and not enforceable. . . . The rule is especially applicable to contracts between the necessities borrower and the money lender. The determination of the question in the case at bar should be guided by this rule; and if it shall be made to appear with reasonable certainty that

the sum of \$1,445, the amount agreed upon as the surrender value, in view of all pertinent facts and circumstances, is substantially disproportionate to the actual value of the policy, the agreement for cancelation will fall within the rule of prohibited penalties, and fail of force or effect. It is alleged in the complaint that the actual value of the policy exceeded the customary surrender value allowed by the company by several hundred dollars, and if these allegations be sustained by sufficient competent evidence on the trial, the result necessarily will be that defendant by the contract exacted of Palmer a penalty for his default, which the law will not approve. The allegations of the complaint in this respect, though to some extent mingled with conclusions of law, present issues of fact, and the case must, therefore, go back for trial."

The decision in the preceding case was held the law of the case on a subsequent appeal in (1913) 121 Minn. 395, 141 N. W. 518, Ann. Cas. 1914D, 160, where a finding that the value of the policy fixed by the insurer was \$512 less than its true value was held sustained by the evidence, and this sum was held to be so large as to amount to a penalty and render the agreement and cancelation thereunder invalid; and it was also held that a cancelation not based on the agreement was not an appropriate remedy to enforce payment of the loan, where no notice was given.

And in *Palmer v. Mutual L. Ins. Co.* (1902) 38 Misc. 318, 77 N. Y. Supp. 869, where the holder of a policy obtained a loan and assigned the policy under an agreement like that in the foregoing cases, and subsequently, upon default, this policy was exchanged for a paid-up policy, with reference to which the same loan agreement was made, and upon a default in the payment of the loan the insured notified the insured, canceled the paid-up policy, retained the amount of the debt due to it, and paid the balance of the surrender value to the insured,—it was held that the insured could not thereafter maintain

an action to redeem or to reinstate the policy. The court said: "Without questioning the accuracy of the plaintiff's statement of the law defining the rights of the debtor with respect to the property pledged or mortgaged by him, it does not seem to me, however, that, under the circumstances in this case, the equitable right of redemption, which is said to be 'inseparably attached to every pledge or mortgage, and of which a borrower is incapable, in the instrument of pledge or mortgage, of parting with, can here and now permit him to redeem, or secure the restoration or reinstatement of his policy, upon payment of the debt and interest, as a pledgee or mortgagor is ordinarily permitted to do. The agreement of the parties, containing the assignment of the policy as collateral security, did not expressly provide that the legal right, title, and interest in and to the policy should vest in the assignee subject to defeasance upon the payment of the debt for which it was assigned as security, nor did it expressly state that, as in the case of the ordinary pledge, the legal title should remain in the assignor and that the assignee should have only a special interest therein. A policy of insurance is, however, a non-negotiable chose in action, subject to the legal rules applicable to that class of property. Under an assignment thereof as security for a debt the legal title passes to the assignee. The only interest remaining to the assignor is what remains of the policy after the advances have been satisfied; the assignee may recover the whole amount of the policy from the insurer, but he acquires only such an interest in the proceeds of the policy as may be necessary to discharge the indebtedness and represent the advances made by him. . . . And, as in the case of any pledge, the assignee or pledgee has the right, upon a default in payment at maturity of the debt for which the property is held as security, to dispose of or realize upon the pledge, that he may thereby obtain the amount of his debt; and

his character is that of a trustee for the pledgeor, for these purposes—first, to pay the debt; and, second, to pay over the surplus. In accordance with these legal rules, as above briefly stated, the parties expressly provided that, upon default in payment of the debt at maturity, the policy pledged as security therefor should be disposed of, and its value should be ascertained according to adopted and ‘customary’ standards, and should be agreed upon as thus determined, and the proceeds should be applied to the payment of the indebtedness, the balance to be turned over to the pledgeor. The debt became due and was unpaid at maturity. The defendant was under no obligation, and probably possessed no power, to maintain the policy until its maturity, by the payment of premiums thereon. On the other hand, it then had the right, both in law and by its express agreement with the plaintiff, to secure the payment of its debt by disposing of or realizing upon the pledge of the policy in the form and manner prescribed. Owing to the peculiar nature of that property it could not make a sale thereof for these purposes, and it was therefore necessary to dispose of the policy in some way, and to determine in some way its value as of the time of the default. Instead of, as in the case of an ordinary pledge, leaving the value to be determined by a sale by the pledgee as trustee for the pledgeor, the parties agreed that the value of the pledged policy should be its customary cash surrender value, and agreed upon that value in advance, and the defendant secured the same for the benefit of itself as a creditor and of the plaintiff as pledgeor by the cancelation of the policy in accordance with the agreement and with the practice of companies such as the defendant. The defendant has done no more than the law permits the ordinary creditor with whom property is pledged to do, and no more than the parties agreed that it should have the right to do. The property pledged as security for the defendant is not now owned, held or possessed by the defendant; it is

no longer in existence; in accordance with law and with the agreement of the parties, it has been disposed of in the only manner possible and as agreed upon by the borrower and lender. Upon this disposition its value was determined, not arbitrarily, not by any advantage taken of the lender by the borrower, but according to a prescribed, adopted, uniform standard, and the amount thereof has been divided among the parties, the plaintiff receiving, accepting, and retaining his share of the proceeds.”

And it has been held in other cases that provisions in paid-up policies, which were issued in lieu of other policies, on which notes had been given in payment of part of the premiums, that they should be void in case the interest on such notes was not paid when due, were not unconscionable or oppressive, and that the policies might be terminated on default in the payment of interest. *Atty. Gen. v. North America L. Ins. Co.* (1880) 82 N. Y. 172; *Fowler v. Metropolitan L. Ins. Co.* (1889) 116 N. Y. 389, 5 L.R.A. 805, 22 N. E. 576.

In *Knickerbocker L. Ins. Co. v. Harlan* (1879) 56 Miss. 512, where insured, after having for some years paid the cash half of the premium and given notes for the credit part, surrendered the policy for “a paid-up” policy of a less amount, and executed a note for the credit part of the premiums on the old policy, the new policy providing that, if the interest on the note given should not be paid, the insurer should not be liable to pay the sum assured, or any part thereof, and that the policy should cease and determine and become null and void without notice to any parties interested, it was held that the policy was a “paid-up” one only in name, and that the right to recover the sum assured was to be earned only by the prompt payment of the interest on the note mentioned, and that no recovery could be had by the beneficiary after the insured’s death, where there had been a default in the payment of the interest on the note, since the policy was forfeited.

In *New York L. Ins. Co. v. Curry*

(1902) 115 Ky. 100, 61 L.R.A. 268, 103 Am. St. Rep. 297, 72 S. W. 736, where an insurer made a loan to the holder of one of its paid-up policies, a provision in the loan agreement like that involved in the reported case was held invalid. The court said: "In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of the money, had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policyholders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business, or charter rights, so far as we are advised, which entitles it to privileges, when loaning its money, not enjoyed generally by banks, trust companies, and other corporations and individuals. We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the nonpayment of the interest upon the loan is void.

And, citing *New York L. Ins. Co. v. Curry* (Ky.) *supra*, the court in *Mutual L. Ins. Co. v. Twyman* (1906) 122 Ky. 513, 121 Am. St. Rep. 471, 92 S. W. 335, said that an insurer which had made a loan to a holder of a paid-up policy, under an agreement like that in the *Curry* Case, had not the right, upon default in the payment of the loan, arbitrarily to cancel the policy at its own option, and certainly not upon such an inequitable basis as to deprive the insured of any part of the surrender value over and above the amount of the loan. The court said: "When the appellee James C. Twyman failed to pay the note due appellant, and accrued interest, according to the terms of the contract, the latter, instead of treating such failure as a forfeiture of the assigned policy, and, without his consent, arbitrarily fixing its cash surrender value, should, like any other creditor holding

a debt secured by lien, have resorted to a court of equity for the enforcement of its rights. . Though, in an action for such a purpose, a decree for the sale of the policy, as other collateral or mortgaged property may be sold, would not be allowed, for the sale of a policy of insurance in that way, as already said, is forbidden by law, the court could decree its cancellation upon allowing to the insured its full cash surrender value, less appellant's debt."

In *Travelers' Ins. Co. v. Lazenby* (1918) 16 Ala. App. 549, 80 So. 25, certiorari denied in (1918) 202 Ala. 207, 80 So. 29, where an insured holding a paid-up policy obtained a loan from the insurer, and pledged the policy under an agreement providing that if default should be made in the payment of the principal of the loan, or of the interest thereon, for thirty-one days after they should become payable, then the insurer should pay to the insured, upon execution and delivery of a surrender deed, the excess, if any, of the cash value of the contract pledged, and that upon such default the provisions of the contract for the payment of the principal sum at death, or for extended or paid-up insurance values, should be void,—it was held, a default in the payment of the loan and interest having occurred, and there having been no demand for repayment of the principal, nor an execution and delivery of a surrender deed of the policy by the insured up to the time of his death, and no foreclosure by due process of law, that the insurer acquired no legal title to the policy, and could not cancel it, and that the stipulation in the loan agreement could not be enforced as a penalty, so that the policy was in full force at the time of the insured's death. The court said: "In the present case, the question of the payment of premiums being eliminated, the question stands exactly in the position of any other party lending the money and taking the policy as a pledge to secure its repayment. There is no need for us to look to other facts or to phrases in the loan contract in order to see what that transaction was.

By the terms of the agreement between the parties the deposit of the 'paid-up policy' was a pledge, and, as such, the title remained in the pledgee or (31 Cyc. 789; *Williamson v. Culpepper* (1849) 16 Ala. 211, 50 Am. Rep. 175; *Denis, Contr. of Pledge*, ¶ 306), with the right in the pledgee to sell in case of default, but not to confiscate. Where the provision is that, upon the debtor's default, the title shall become absolute in the pledgee, it is void. 31 Cyc. 790; *Williamson v. Culpepper* (1849) 16 Ala. 211, 50 Am. Rep. 175, *supra*; *Smith v. 49 & 56 Quartz Min. Co.* (1859) 14 Cal. 242. The sale is necessary because, by default of payment or redemption, the pledge does not become the property of the pledgee. He has only a lien on it. There must be a foreclosure of the pledge to pass the ownership of the thing either to the pledgee himself or to another purchaser. *Denis, Contr. of Pledge*, chap. 25, ¶ 306. There is nothing in the loan contract that provides for the extinguishment of the debt without the execution of a deed to the policy, the provision of paragraph (b) being for a settlement of the debt upon the execution and delivery of a surrender deed upon the company's form. This is the only provision in the contract for a foreclosure of the pledge, except the penalty, which, if exercised before the deed is executed, would leave the debt still owing to the company

secured by a pledge of less value. This clause recognizes the necessity for a change of title to the policy, and there is no pretense that this transfer was ever made. Until the title to the policy is transferred according to its terms, or foreclosed by due process, the title is still in the insured, with a debt owing by the insured to the company, with nothing to prevent the company from enforcing its claim by suit or otherwise; but it cannot penalize the insured by voiding and rendering less valuable the security which it holds. Such a rule would be unconscionable, and not to be tolerated. Appellant refers to the policy as having lapsed. There is no such thing as a lapsed paid-up policy. These policies may be transferred by contract, so that for nonpayment of the amount borrowed, with interest, the title may pass, as with any other property that may be pledged or mortgaged, with the right in the pledgee to become the purchaser, and, of course, when the pledgee does become the purchaser, the insurance may be canceled, but this is not a lapse." The court here distinguished *Palmer v. Mutual L. Ins. Co.* (1911) 114 Minn. 4, 130 N. W. 250, Ann. Cas. 1912B, 957, on the ground that the contract there purported, at the insurer's option, to transfer the title to the policy to the insurer in case of default; while in the case at bar the policy was merely placed as a pledge. J. T. W.

CHARLEY GORDON, Appt.,

v.

STATE OF MISSISSIPPI.

Mississippi Supreme Court (Division B)—December 12, 1921.

(— Miss. —, 90 So. 95.)

Criminal law — effect of passing indictment to files.

1. Passing an indictment to the files is in no sense an acquittal of the charge, and is not a bar to further prosecution of the indictment, and, with the consent of the court, an indictment which has been passed to the files may be withdrawn and reinstated for trial at any future term of the court.

[See note on this question beginning on page 1153.]

Headnotes by COOK, J.

Judgment — former conviction — intoxicating liquor — possessing and making.

2. A conviction for unlawfully possessing intoxicating liquors does not

bar a second prosecution of the defendant for feloniously making or distilling the same liquor.

[See 8 R. C. L. 148.]

APPEAL by defendant from a judgment of the Circuit Court for Forrest County (Hall, J.) convicting him of manufacturing intoxicating liquor. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Davis & Hill, for appellant:

Where there is one continuous transaction or act, the act constitutes only "one offense," for which there can be but one punishment.

1 Bishop, New Crim. Law, § 1060; Holles v. United States, 3 MacArth. 370, 36 Am. Rep. 106; State v. Mickel, 23 Utah, 507, 65 Pac. 484; State v. Mjelde, 29 Mont. 490, 75 Pac. 87; People v. Johnson, 81 Mich. 573, 45 N. W. 1119; State v. Larson, 85 Iowa, 659, 52 N. W. 539; Dalton v. State, 91 Miss. 162, 124 Am. St. Rep. 637, 44 So. 802; State v. Sampson, 157 Iowa, 257, 42 L.R.A.(N.S.) 967, 138 N. W. 473; State v. Warren, 77 Md. 121, 39 Am. St. Rep. 401, 23 Atl. 500; Furnace v. State, 153 Ind. 93, 54 N. E. 441; State v. Quintini, — Miss. —, 51 So. 276.

If the evidence which is necessary to support the second indictment is admissible under the former, is related to the same crime, and is sufficient, if believed by the jury, to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar.

16 C. J. § 445. (b), p. 265; Rocco v. State, 37 Miss. 357; 1 Bishop, New Crim. Law, § 1049, subd. 2; Henry v. State, 97 Miss. 787, 53 So. 397.

Messrs. Frank Roberson, Attorney General, and H. Cassedy Holden, Special Assistant Attorney General, for the State:

Defendant was rightfully convicted of manufacturing intoxicating liquor.

Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; Johnson v. State, 59 Miss. 543; Smith v. State, 67 Miss. 116, 7 So. 208; Ball v. State, 67 Miss. 358, 7 So. 353.

Cook, J., delivered the opinion of the court:

Appellant was convicted of manufacturing intoxicating liquor, and sentenced to the penitentiary for a period of three years, and from this

conviction and sentence prosecutes this appeal.

At the November, 1920, term of the circuit court of Forrest county, there were two charges pending against appellant, one for unlawfully and feloniously making intoxicating liquor, which had been preferred by indictment returned by the grand jury at that term, and one for unlawfully having intoxicating liquor in his possession, which last charge had been preferred by affidavit before a justice of the peace, and which was in the circuit court by appeal from a conviction in the justice court. When these cases were called in the circuit court, the defendant entered a plea of guilty to the misdemeanor. The felony charge was thereupon passed to the files by the district attorney, and the defendant, having paid the fine and costs imposed in the case in which he had entered a plea of guilty, was discharged.

At the April, 1921, term of the court, the district attorney filed a motion to withdraw from the files the indictment for making intoxicating liquors, and to redocket the same for trial. This motion was sustained, and defendant was put to trial on this indictment and convicted. Before the jury was impaneled, the defendant interposed two pleas of former jeopardy, one setting up that he had entered a plea of guilty to the charge of unlawfully having whisky in his possession under an agreement with the district attorney that the indictment upon which he was then arraigned would be passed to the files; that said indictment had been previously passed to the files, and that this constituted an acquittal of the

charge; the other plea setting up *autrefois* convict, in that both charges grew out of the same transaction and were predicated upon the same facts. Demurrers were interposed and sustained to each of these pleas.

The argument in support of the first plea proceeds upon a total misconception of the effect of passing an indictment to the files. The district attorney may be willing to pass an indictment to the files pending good behavior, or for other cause, when he would be unwilling to recommend a *nolle prosequi*, and it often happens that a defendant is willing to accept this arrangement as the best settlement available. It may be that the passage

**Criminal law—
effect of passing
indictment to
files.**

of an indictment to the files is usually the end of the matter, but it is in no sense an acquittal of the charge. It simply postpones the evil day, if the district attorney shall, in the future, elect to withdraw it and proceed with the trial.

Appellant complains that the district attorney has violated his agreement, and that for this reason a further prosecution of this indictment should not be permitted. We do not so understand the averments of the plea. The district attorney did not agree that the indictment would not be withdrawn in the future (if, indeed, he has any authority to make such an agreement), but the plea shows that he fully complied with the agreement. We think the demurrer to this plea was properly sustained.

The plea of *autrefois* convict avers, among other things, that officers raided the home of defendant and found therein a still and intoxicating liquors which had just been manufactured by the defendant, and that the liquors which defendant was charged with having in his possession were the identical liquors which he was charged with making; that the offense of unlawfully having intoxicating liquors in

his possession is a necessary element or ingredient of the offense of feloniously making the same liquors; that, if mistaken in the averment that the misdemeanor was a constituent part of the felony, then, since the two charges grow out of the same transaction, the evidence necessary to support the indictment for the felony was necessary to support, or would have been admissible to prove, the charge of unlawfully having the same liquors in his possession, to which charge he had previously entered a plea of guilty, and that for these reasons he cannot be prosecuted under the indictment for making the liquors.

The charge against this defendant of unlawfully having the liquor in his possession originated in the justice court, and upon appeal the circuit court had no other jurisdiction than such as the justice court had, and for this reason we think § 1412, Code of 1906 (§ 1167, Hemingway's Code), is a sufficient answer to appellant's contention. This section provides: "The acquittal or conviction of a person by a justice of the peace, on a charge of being guilty of a misdemeanor, shall not be a bar to a prosecution for a felony in the same matter; but thereafter, on indictment for the felony, if the accused be acquitted thereof, he shall not be convicted of the constituent misdemeanor; and, if convicted of the felony, the court may moderate the sentence so as not to punish for the constituent misdemeanor."

However, since the prosecution for this misdemeanor might have originated in the circuit court upon an indictment by the grand jury, we do not rest our decision solely upon this statute. We recognize the rule that, where an indictment contains a minor offense inclosed in a major, a conviction or acquittal of the minor bars the major, but we think the offenses here involved are separate and distinct. Under the indictment for either of these offenses the defendant could not have

been convicted of the other, and therefore, since there could have been no conviction of the major offense under the first indictment, a conviction under the first indictment does not bar a second prosecution for the major offense. This rule is announced in Wharton's Criminal Procedure, vol. 2, § 1396, where it is said: "Where, under the first indictment, there could have been no conviction of the major offense, then a conviction

or acquittal of the minor on the first indictment does not bar a second indictment for the major offense."

Again in the same volume, § 1407, Mr. Wharton says: "But so far as the strict rule of law is concerned, the proceedings on the first trial cannot bar a prosecution for an offense on which there could be no conviction on the first trial."

We conclude, therefore, that the demurrer to this second plea was properly sustained, and the cause is affirmed.

ANNOTATION.

Effect of passing indictment to files.

Right to redocket.

Cases considering the effect of passing an indictment to the files, or filing away an indictment, as it is sometimes called, are not numerous. The question appears to have arisen most frequently in connection with the right to redocket or reinstate the indictment for trial after an order filing it away has been made. That the right to redocket exists seems to be quite generally conceded, the courts holding that the making of an order filing away the indictment does not amount to a nolle prosequi or discontinuance of the case. Thus, in *Com. v. Dowdican* (1874) 115 Mass. 133, the court said: "It has long been a common practice in this commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Stat. 1865, chap. 223; 1869, chap. 415, § 60. Such an order is not equivalent to a final judgment, or to a nolle prosequi or discontinuance, by

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which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein."

In the reported case (*GORDON v. STATE*, ante, 1150) it is held that the passing of an indictment to the files does not constitute an acquittal or nolle prosequi of the charge, but simply postpones the day of trial if the prosecution elects in the future to reinstate the indictment.

In *Ashlock v. Com.* (1846) 7 B. Mon. (Ky.) 44, it appeared that after an indictment had been found against the defendant, without service of process on him, the court granted an order striking the case from the docket, with leave to reinstate by motion. Subsequently process issued on the indictment and was served on the defendant, the case was reinstated on the docket, and there was a trial, resulting in the conviction of the defendant. In considering the exception taken to the orders filing away and redocketing the case, the court said: "An order striking a suit from the docket, made on motion of the plaintiff, and without reservation or qualification, we should be inclined to re-

gard as a voluntary dismissal or discontinuance, and as placing the case, after the term when the order was made, beyond the power of the court. But here, the right to reinstate the case upon the docket being expressly reserved, the order, we think, should not be construed as a dismissal or discontinuance, but as a mere removal, or omission of the case upon the docket. If right in this construction of the order, the case was still in court, and the issuing and service of process before it was replaced upon the docket was not unauthorized or invalid. The order is, however, in our opinion, unusual, and we would not be understood as approving such a rule of practice, perceiving no necessity or sufficient reason for it, and it may have the effect to delude and entrap litigants."

In accord with the foregoing decision is a later case in the same jurisdiction (*Com. v. Bottoms* (1899) 105 Ky. 222, 48 S. W. 974), involving the construction of an order whereby several indictments were filed away, with leave to reinstate without notice, with the consent and on the promise of the defendant that he would not again commit a crime similar to that charged. Subsequently, however, a conviction for a similar offense was had, and the indictments in question were redocketed, and process was issued thereon against the defendant, who appeared and moved to strike the indictments from the docket, which motion was sustained. In reversing the judgment of the lower court, the court of appeals said: "When the defendant is before the court, and the case stands for trial, we are not aware of any law or rule of practice that would authorize the attorney for the commonwealth, on his own motion, to file the indictment away, on conditions, and hold the prosecution in *terrorem* over the defendant; and we do not approve of such practice. However, such was done in this case, and with the consent of appellee, and upon terms; and, it being shown that the terms had been violated by appellee, he should not complain if the attorney for the commonwealth prosecutes the

indictment to trial, as the agreed order recites he may do. Nor is there anything in the order itself, or its effect, that forbids such action by the commonwealth. The legal effect of such an order was simply a continuance indefinitely, and an exoneration of any bail for appearance, unless the contrary should appear in the order; and, upon reasonable notice being given to the accused, the case might stand for trial at any term of court. We think this might be done without showing a violation of the promise to abstain from further violations. We are of opinion that this order did not discontinue the prosecution, and that the Statute of Limitations does not apply as a bar by reason of the order." See to the same effect, *Jones v. Com.* (1903) 114 Ky. 599, 71 S. W. 643, wherein the propriety of an order filing away an indictment was discussed at length.

Where the defendant is not before the court, not having been apprehended, the filing away of an indictment does not amount to a *nolle prosequi*, and the indictment may be reinstated on the arrest of the defendant. *Gross v. Com.* (1904) 118 Ky. 907, 82 S. W. 618.

Effect to discharge bail.

It has been held in several cases in Kentucky that the passing of an indictment to the files, at a time when the accused is out on bail, discharges the sureties on the bail bond.

Thus, it was said in *Miller v. Com.* (1921) 192 Ky. 709, 234 S. W. 309: "To file away an indictment with leave to reinstate it does not have the effect to *nolle prosequi* the indictment, or to dismiss it, but the effect is to continue it indefinitely, and possibly for all time, and, if the defendant is upon bail, the sureties are discharged from liability upon the bond, because the state has, by its action in 'filing away' the indictment, made it useless for the sureties to deliver the defendant to the jailer, as he would be entitled to immediate release from custody, because the state could not hold a citizen in prison upon a charge which it had filed away and refused to try him

upon, or to give him an opportunity to be delivered according to law."

In *Hall v. Com.* (1895) 17 Ky. L. Rep. 231, 30 S. W. 877, the liability of the sureties on a recognizance for the amount of bail required for the appearance of the defendant was the question for decision, and the court said: "If it be true that the indictment in question was filed away, as claimed by appellant, then there was no prosecution pending in law at the June term; hence no order forfeiting the bond could be legally made, nor could any judgment be legally rendered upon said bond; and such judgment would be clearly erroneous, if not absolutely void. If, however, the judgment is not void, the filing away of the indictment would have the effect to release the surety in the bail bond; and that fact, if pleaded and proven by appellant, would have been a good defense."

In *Miller v. Com.* (Ky.) *supra*, a similar question was involved. The sureties contended that, as the indictment had been ordered filed away, with leave to reinstate on notice to the defendant, they were released from liability. The court upheld their contention, saying: "The order did not direct the indictment to be filed away with leave to reinstate it in words, but it was similar in effect to such an order, and must be held to have carried with it the same consequences. The indictment was never to be reinstated upon the docket for trial until after thirty days' notice

to the defendant, nor did the defendant have to appear in court to answer to it until he had received such notice, and whether or not such notice would ever be given was problematical. The indictment, in the meantime, remained in the same place, and in the same condition, as if it had been filed away. The consent of the sureties was not obtained for this proceeding, and it was had without their knowledge, so far as the record indicates, and they could not have contemplated, when executing the bond, that any such turn would ever take place in the prosecution, or that they would be required to assume the additional liability of seeing that their principal appeared to answer the indictment at the pleasure of the prosecution, and not at the times provided by law. It would have been useless for them to have arrested the principal and delivered him to the jailer, and thus automatically discharged themselves from liability on the bond in the ordinary way, because, the state having in effect filed the indictment away with leave to reinstate it, and declined to try the defendant until at an indefinite time, or probably never, it surely could not have held the defendant in jail until such time as the state should determine to proceed against the defendant, after having his agreement which prevented him from at any time demanding a trial until thirty days' notice should have been given him of the purpose of the state to bring him to trial."

L. F. C.

REVEREND C. G. GERLACH, Respt.,

v.

FRANK GRUETT, Appt.

Wisconsin Supreme Court — November 15, 1921.

(— Wis. —, 185 N. W. 195.)

Libel — effect of express malice on privilege.

1. Express malice will destroy the conditional privilege of one who, believing the truth of a publication, makes a libelous communication to proper persons upon a proper occasion.

[See note on this question beginning on page 1160.]

Evidence — libel — irrelevant testimony.

2. In an action for libel in charging a preacher with immorality, evidence is not admissible that during the war he insisted on preaching in the German language.

— morals of preacher.

3. In an action for libel for charging a preacher with immorality, evidence is not admissible that a stricter rule of morals was required of him than of persons in ordinary life.

Trial — submission of issues without evidence.

4. Issues as to truth of charges al-

leged to have constituted a libel should not be submitted to the jury where the evidence is too vague and inconclusive to sustain a finding that they were true.

[See 14 R. C. L. 786; 17 R. C. L. 428.]

New trial — option — rule for fixing damages.

5. In giving the option to plaintiff, who has recovered a verdict for damages for publication of a libel, to accept a less amount, or submit to new trial, the amount named should be as low as an impartial jury on the evidence would probably name.

[See 20 R. C. L. 315, 316.]

APPEAL by defendant from a judgment of the Circuit Court for Fond du Lac County (Fowler, J.) in favor of plaintiff in an action brought to recover damages for alleged publication of a libel. *Affirmed on condition.*

Statement by Vinje, J.:

Action for libel based upon three letters written by the defendant, a member of the church of which plaintiff was the minister, and addressed respectively to Reverend A. F. Augustin, Eau Claire, Wisconsin, Reverend O. Gammelin, Beaver Dam, Wisconsin, and Reverend A. Pilger, Ripon, Wisconsin, which letters were received and read by the respective persons to whom they were addressed. The letters were written in the German language and were translated as follows:

"Rosendale, Wis., Aug. 20, 1919.

"Esteemed Pastor:—In the synodical report on page twenty, I read that it is really pleasant that the pastor in Rosendale was justified from the charges resting against him. If the synod has no other justification than one of this character, then not very many of the dearly purchased souls of our Savior will enter into the haven (harbor) of the eternal home, for that very girl, which at the meeting at Rosendale was declared to be an honorable girl, and which Gerlach held in his arms, the one which Gerlach called to himself into the automobile, and said (to her), 'Come let us anger Gruett,' that girl now has, since the 7th day of August, a strapping boy; she has no husband

(man); and for the child, they cannot find the father or discover him. Perhaps the committee could help out again, the adage says, 'Tell me with whom you associate, and I will tell you who you are.' It transpired here, as the Scriptures say, 'For wheresoever the carcass is, there will the eagles be gathered together.' And such a girl the local pastor takes around, and the synod rejoices because he has been justified. I can tell, only tell you, there was a commotion and a row here, and it is still going on. If I would be in Gerlach's place, I would be gone over all hills. I only have to wonder that such men (people) dare to hang around (occupy) Lutheran pulpits. It cannot go on this way for very long any more, for the attendance at the services is constantly growing worse, and the members are getting less. It is no wonder that the judgments of God are being wreaked so heavily upon mankind. Yes, we have all reasons to sing with that poet, 'Awake, you spirit of the early witnesses, which stood upon the walls as faithful watchmen.' Just here there is something missing in the upright faithfulness. Faithful in actions, faithful in life, if it would be thus, all things would be well. I am surprised that the synod does not step in here, and

bring about a change of pastors. Always more witnesses are appearing here (stepping up) to testify that my claims are resting upon truth.

"Now, Mr. Pastor Augustin, I should think that this would suffice to cause you, as the president of the district, to do some serious thinking.

"With sincere greetings, signs

"Frank Gruett. [Signed.]"

"Rosendale, Wis., August 21, 1919.

"Mr. Reverend O. Gammelin,

Beaver Dam.

"Dear sir:—

"In the synodical report it is stated: We are pleased that the pastor at Rosendale was cleared from the charges resting against him. A sorry justification, for that girl, which was declared to be an honorable girl at the meeting of March 25th, the one which Gerlach embraced in an automobile, the one which Gerlach called into his automobile with the words, 'Come, let us anger Gruett,'—this very girl has since the 7th day of August a strapping youngster; she has no husband, and the boy has no father, neither can they find one for him; how easily could an (investigating) visiting commission help out again here. However, it is a disgrace and a sin that such men (people) are permitted to hang around (occupy) Lutheran pulpits. It is no wonder that the judgments of God are wreaked over humanity. Enough; I hope that this will suffice to cause you to do some very serious thinking.

"Greetings from

"F. Gruett. [Signed.]"

"Rosendale, Wis., August 21, 1919.

"Mr. Reverend Pilger,

"Ripon.

"Esteemed Pastor:—

"In the synodical report I read that we are pleased that the pastor in Rosendale was cleared from the charges resting against him. If the synod has no other justification than one of that character, then not very many of the dearly purchased souls of our Savior will enter into the

haven (harbor) of the eternal home; for that girl, which at that meeting here in Rosendale on March 25th was declared to be an honorable girl, the one which Gerlach embraced, the one which Gerlach called into the automobile, 'Come, let us anger Gruett,' this very girl now has since the 7th day of August a strapping boy. She has no husband (man), and the poor boy, it seems, has no father, neither can they find one. Perhaps a committee could help out again here. I do not want to write a great deal, the whole business is nauseating to me already, it is a disgrace and a sin that such men (people) are permitted to hang around (occupy) Lutheran pulpits. I once more would like to speak to you personally. When you were in Green Lake, I was there too; but at that time, I knew nothing about this row.

"With friendly greetings, signs

"F. Gruett. [Signed.]"

The answer put in issue the libels alleged in the complaint, and the jury returned a special verdict as follows:

"(1) Did the defendant write the letter to Reverend Augustin for the purpose of procuring a rehearing of the charges previously preferred against the plaintiff, believing the Reverend Augustin a proper officer of the synod through whom to procure such rehearing, and with an honest belief that the plaintiff was guilty of all the misconduct as a clergyman imputed to him by said letter? Answer: Yes.

"If to 1 you answer 'Yes,' answer 2.

"(2) Was the defendant actuated by malice in writing said letter? Answer: Yes.

"(3) What sum will compensate the plaintiff for the injury to his reputation, feelings, and his professional standing caused by the writing of the libelous matter in the letter to Reverend Augustin? Answer: Two thousand dollars.

"(4) Did the defendant write the letter to Reverend Gammelin for the

purpose of procuring a rehearing of the charges previously preferred against the plaintiff, believing the Reverend Gammelin a proper officer of the synod through whom to procure such rehearing, and with an honest belief that the plaintiff was guilty of all the misconduct as a clergyman imputed to him by said letter? Answer: Yes.

"If to 4 you answer 'Yes,' answer 5.

"(5) Was the defendant actuated by malice in writing said letter? Answer: Yes.

"(6) What sum will compensate the plaintiff for the injury to his reputation, feelings, and his professional standing caused by the writing of the libelous matter in the letter to Reverend Gammelin? Answer: One thousand five hundred dollars.

"(7) What sum will compensate the plaintiff for the injury to his reputation, feelings, and his professional standing caused by the writing of the libelous matter in the letter to Reverend Pilger? Answer: One thousand five hundred dollars."

The court gave plaintiff the option to take judgment for \$500 on each cause of action, or a new trial, because he was convinced that the jury "failed to give proper consideration to the limitation of the publication, and wrongfully charged up to defendant, as an element of damage in this case, the harm done and injury wrought by the previous proceedings and the public hearing respecting matters involved and the extended publication and wide notoriety consequent thereto."

Plaintiff early in the trial waived punitive damages and accepted judgment for \$1,500 and costs, from which judgment the defendant appealed.

Mr. T. L. Doyle, for appellant:

Where a writing may be taken as a general charge of misconduct, specific instances of misconduct are admissible in evidence to prove the truth of the charge.

Ingalls v. Morrissey, 154 Wis. 632, 143 N. W. 681, Ann. Cas. 1915D, 899;

Cook v. Gust, 155 Wis. 594, 145 N. W. 225.

The language of the letters should be interpreted by the jury as it was understood by the readers, taking into consideration the surrounding circumstances which were known to the readers.

25 Cyc. 357; Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724.

The court committed prejudicial error in refusing to receive evidence offered by the defendant.

Pfister v. Milwaukee Free Press Co. 139 Wis. 627, 121 N. W. 938.

Expenses of suit are improper elements of damage.

Hicks v. Foster, 13 Barb. 663; Halstead v. Nelson, 24 Hun, 395.

Damages for prospective suffering are not recoverable in a libel suit.

Bradley v. Cramer, 66 Wis. 297, 28 N. W. 372.

No damages for future injury can be allowed in libel and slander. A judgment for plaintiff is supposed to render other injury from defamation impossible.

Halstead v. Nelson, 24 Hun, 395.

It was error to fix the amount of plaintiff's compensatory damages at \$1,500, thereby invading the province of the jury, and fixing such damages in excess of the amount of compensatory damages suffered by the plaintiff.

Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; 17 R. C. L. 444; Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85, 147 N. W. 18; Morse v. Modern Woodmen, 166 Wis. 194, 164 N. W. 829, Ann. Cas. 1918D, 480; Secard v. Rhineland Lighting Co. 147 Wis. 614, 133 N. W. 45.

Vinje, J., delivered the opinion of the court:

It was suggested upon the oral argument that there was an inconsistency between answers to questions 1 and 2 and 4 and 5, because questions 1 and 4, as answered, included a finding that defendant was actuated by good-faith motives, not by malice, and hence contradicted the answers to questions 2 and 5, finding malice. In view of the instructions given and the wording of the questions, we think the answers to questions 1 and 4 found only that the purpose for which the letters were written, and the persons to

whom they were directed, were within the field of conditional privilege, and that the defendant believed the charges to be true, but that they did not find entire good faith, and absence of malice. One may believe charges to be true, be within the field of conditional privilege so far as purpose of communication and persons addressed are concerned, and yet be actuated by

Libel—effect of express malice on privilege.

express malice. If express malice be found, it destroys

the conditional privilege that would otherwise obtain. *Rude v. Nass*, 79 Wis. 328, 24 Am. St. Rep. 717, 48 N. W. 555; *Joseph v. Baars*, 142 Wis. 390, 135 Am. St. Rep. 1076, 125 N. W. 913; *Arnold v. Ingram*, 151 Wis. 458, 138 N. W. 111, Ann. Cas. 1914C, 976; *Williams v. Hicks Printing Co.* 159 Wis. 90, 150 N. W. 183. So we conclude there is no inconsistency between the answers to the specified questions.

We shall refer briefly to only a few assignments of errors because, for reasons to be stated, the case must go back for a new trial unless the plaintiff accepts the option granted by this court.

The court struck out a portion of defendant's answer which alleged, in substance, that during the war plaintiff refused to preach in the English language, though petitioned to do so by members of the parish, thus indicating, it is alleged, a lack

Evidence—libel—irrelevant testimony.

of patriotism. We fail to see how that was relevant to any

issue arising out of the alleged libel. Its only purpose could have been to prejudice the plaintiff in the eyes of the jury, and the court properly struck out that portion of the answer.

The court likewise properly refused to receive evidence as to the duties of a Lutheran minister to his congregation, to the effect that a stricter rule of morals was required than in ordinary

—morals of preacher.

life, because the conduct charged in the letters is adequately condemned

by the prevailing code of morals, as well as by the law.

The court also properly refused to submit questions eliciting the fact as to whether or not the matters charged in the letters were true, because the evidence was too vague and inconclusive to sustain a finding that they were true.

Trial—submission of issues without evidence.

We shall not examine the alleged erroneous portions of the charge relating to damages, because the verdict as to damages was set aside by the trial court, and we must set aside his assessment because he erred in making it. He gave an option to plaintiff to take \$500 compensatory damages for each letter written, stating that he did so because he considered "that a jury moved by proper considerations in this respect would hardly go above \$500 as damages for each of the letters, or \$1,500 in gross." In giving the option to the plaintiff he should have placed the amount as low as an impartial jury on the evidence would probably name, not as high as such jury would probably go.

New trial—option—rule for fixing damages.

The latter must be done when the option is given to the defendant. *Heimlich v. Tabor*, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10; *Beach v. Bird & W. Lumber Co.* 135 Wis. 550, 116 N. W. 245; *Katz v. Miller*, 148 Wis. 63, 133 N. W. 1091, Ann. Cas. 1913A, 1199; *West v. Bayfield Mill Co.* 149 Wis. 145, 135 N. W. 478; *Krawiecki v. Kieckhefer Box Co.* 151 Wis. 176, 138 N. W. 710; *Poler v. Mitchell*, 152 Wis. 583, 140 N. W. 330.

For the purpose of permitting this unfortunate litigation to end, we have concluded to give plaintiff the option to take judgment for \$200 as compensatory damages for each letter published, or \$600 in gross, or a new trial, such option to be exercised within thirty days from the date of the receipt by the Circuit Court of Fond du Lac County of the record from this court.

Ordered accordingly, with costs on this appeal to the defendant.

ANNOTATION.

May actual malice which will defeat conditional privilege in libel or slander coexist with belief in truth of imputation.*W. S. v. S. S. Supr. Ct., 1921*

The holding of the reported case (*GERLACH v. GRUETT*, ante, 1155), to the effect that within the law of libel one may believe charges made by him to be true, and yet be actuated by express malice sufficient to destroy a conditional privilege, is supported by what appears to be the only other authority directly in point on the proposition.

Thus, in *Tanner v. Stevenson* (1910) 138 Ky. 578, 30 L.R.A. (N.S.) 200, 128 S. W. 878, an action brought by an applicant for a state license to teach school, to recover against a county school superintendent for libel in charging her, in a letter to the state board of examiners, with lack of good moral character, it was held that, if actual malice which would defeat the qualified privilege of the superintendent prompted the publication of the charge, belief in its truth would not allow him to escape from the consequences of his act. The court said: "If the person making the publication is prompted by actual malice or ill will towards the persons concerning whom it is written or spoken, then the fact that it was believed to be true, or the fact that it was made in good faith, or the fact that it was made under circumstances that, except for this notice, would make it privileged, will not be allowed to save the person making the publication from the consequences of his act."

There are, however, two additional cases which seem to support the foregoing view, holding that where the imputation is made with a belief in its truth on a qualifiedly privileged occasion, it is necessary to prove actual malice in order to defeat a conditional privilege. In *Joseph v. Baars* (1910) 142 Wis. 390, 135 Am. St. Rep.

1076, 125 N. W. 913, the court said: "When the prima facie case of privilege has been thus made by proof that the communication was made in the course of public duty, from a sense of public duty, and with an honest belief in its truth, it becomes the duty of the plaintiff, as in other cases of communications conditionally privileged, to prove actual malice by some facts tending to prove a malicious or guilty motive."

In *Hemmens v. Nelson* (1893) 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342, it appeared that the defendant was principal and executive head of a charitable institution, and had power to employ and dismiss all employees. The plaintiff was one of the employees of the institution. The defendant's wife received through the mail an obscene and indecent letter which she turned over to the defendant, who compared the handwriting thereon with specimens of the plaintiff's handwriting, and arrived at the conclusion that the plaintiff had written the same. Subsequently, at a meeting of the executive committee of the institution, the defendant openly charged the plaintiff with sending the letter, as a result of which she was discharged. The court said: "If the defendant believed that the plaintiff was the person who sent the letter, it was his duty to communicate the fact to the executive committee and the president, all of whom had a corresponding duty with respect to everything that concerned the welfare of the institution; and his statements, under such circumstances, were confidential and privileged, until the plaintiff removed the privilege by proof, on her part, of actual, or, as it is sometimes called, express malice, or malice in fact." L. F. C.

AMERICAN INSURANCE UNION, Appt.,
v.
J. H. MANES.

Arkansas Supreme Court—October 31, 1921.

(— Ark. —, 234 S. W. 496.)

Insurance — right to question of insurable interest.

1. A corporation which has taken over the contracts of an insurance company, and agreed to perform them, cannot raise the objection that a policyholder has no insurable interest in the life of the insured.

[See note on this question beginning on page 1163.]

—insurable interest — life of father-in-law.

2. One has no insurable interest in the life of his father-in-law, upon

whom he is in no way dependent for support.

[See 14 R. C. L. 919.]

APPEAL by defendant from a judgment of the Circuit Court for Searcy County (Shinn, J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Basil Baker for appellant.

Mr. W. F. Reeves for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted on a life insurance policy or certificate of membership issued by the Home Protective Association, a domestic corporation, to Jesse Welborn, the plaintiff, J. H. Manes being named as beneficiary. Welborn lived nearly four years after the policy was issued, and all of the premiums or assessments were paid up to his death. During his lifetime the defendant, American Insurance Union, a foreign corporation, entered into a contract with the Home Protective Association, whereby it took over all the memberships of the latter association and assumed its obligations to its members, and issued to Welborn a certificate in the form of a rider to the original benefit certificate, certifying that the obligations of the original insurer were assumed by defendant.

Defendant denies liability on the ground that plaintiff, the specified beneficiary in the certificate, had no insurable interest in the life of Welborn, and that the certificate consti-

tuted a wager contract, unenforceable on grounds of public policy. This is the sole defense offered in the case. According to the evidence adduced, plaintiff was the son-in-law of Welborn at the time the latter became a member of the Home Protective Association, and was not dependent in any wise on Welborn. Welborn was solicited to join the association, and declined, but stated that he was willing for any of his children to take a policy on his life. Thereupon the agent of the Home Protective Association procured an application from Welborn, and plaintiff was present and signed Welborn's name to the application. It was agreed in advance between Welborn and plaintiff that the latter should pay the assessments and all other expenses necessary to obtain and maintain the membership. This evidence establishes the fact that the contract was, under our decisions,

Insurance—
insurable interest—life of
father-in-law.

a wager contract, and void in its inception. *Langford v. National Life & Acci. Ins. Co.* 116 Ark. 527, 173 S. W. 414, Ann. Cas. 1917A, 1081; *Cotton v. Mutual Aid Union*, 132

Ark. 458, 201 S. W. 124; Home Mut. Ben. Asso. v. Keller, 148 Ark. 361, 230 S. W. 10.

In *Langford v. National Life & Acci. Ins. Co.* supra, we held that "a person may take out insurance on his own life, and name anyone that he pleases as beneficiary," even though the beneficiary has no insurable interest at the time the policy is taken out; but that "an agreement between the assured and the beneficiary, having no insurable interest, . . . to the effect that the latter shall pay the premiums, and that the policy shall be taken out in his name," and "shall be assigned to the person having no insurable interest," will render the policy void as a wagering contract.

The above declaration of the law is applicable to the present policy in its inception.

However, it has been ruled by this court, in line with the weight of authority, that only the insurer can take advantage of the ineligibility of the beneficiary in such a certificate or policy of insurance. *Johnson v. Knights of Honor*, 53 Ark. 255, 8 L.R.A. 732, 13 S. W. 794; *Longer v. Carter*, 102 Ark. 74, 143 S. W. 575. Defendant is not the original insurer, but entered into a contract to perform the original contract of insurance entered into between Welborn and the Home Protective Association. This contract contains some of the elements of one for reinsurance, in which both the original beneficiary and the insurer are interested. The contract with defendant is, in other words, one to pay the amount of the policy according to its terms, and constitutes an absolute obligation on the part of defendant which precludes inquiry as to the validity of the original contract, which the original insurer alone could question. There is great diversity among the authorities on the various phases of liability or nonliability under a wager contract, and no case similar to the one at bar has been brought to our attention; but we think that the rule that only the insurer can take advantage

of the fact that the policy is invalid applies with full force to the defendant in the present case, who, having obligated himself to perform the contract, is in no attitude to take advantage of a defense which the original insurer alone could have asserted.

For these reasons the judgment was correct upon the undisputed facts, and the same will be affirmed. It is so ordered.

Hart, J., concurring:

I do not think that this case is controlled by the rule announced in *Home Mut. Ben. Asso. v. Keller*, 148 Ark. 361, 230 S. W. 10. There the policy did not show the relationship between the parties. Here it does. The difference is vital.

In the application Jesse Welborn, the insured, designated the relationship between himself and J. H. Manes, the beneficiary, as father-in-law and son-in-law. The company conducted a co-operative mutual life insurance business. By his application Welborn made a proposition to become a member of the association upon the distinct understanding that J. H. Manes should receive the insurance in the event of his death while a member. The application is a part of the policy. The association received the proposition, and it was accepted by the directors of the association, and a certificate of membership was given to Welborn. Thereafter the association accepted the dues for a period of more than four years until the death of Welborn.

There was no misrepresentation and no mistake. This is no case of waiver by an unauthorized agent. It was the act of the association itself, and it ought to be estopped to say that the acceptance was upon a condition utterly at variance with the proposition for membership, and one which would render the certificate wholly inoperative as regards the express intent of the insured. The association had a right to make a contract with Welborn to become

(— Ark. —, 234 S. W. 496.)

a member and to designate his son-in-law as the beneficiary, provided the latter had a pecuniary interest or expectation in his life. *Home Mut. Ben. Asso. v. Keller*, supra.

The act of the association, under the circumstances, must be held to have constituted an agreement between itself and Welborn that Manes had an insurable interest in his life, and, having received his

dues under this presumption, it cannot now introduce proof to show that Manes had no insurable interest in his life. *Smith v. People's Mut. Ben. Soc.* 64 Hun, 534, 19 N. Y. Supp. 432.

Therefore, I concur in the judgment.

Petition for rehearing denied November 28, 1921.

ANNOTATION.

Right of reinsurer to question the insurable interest or eligibility of beneficiary.

A search upon this subject has revealed no other cases, besides the reported case (*AMERICAN INS. UNION v. MANES*, ante, 1161), which holds that a reinsurer has no right to question the insurable interest or the eligibility of the beneficiary in a life insurance

policy or certificate of membership issued by a benefit society or association, but that the original insurer alone can take advantage of the lack of insurable interest or ineligibility of the beneficiary in such a certificate or policy of insurance. G. V. I.

STATE OF WASHINGTON, Respt.,

v.

FREDERICK S. WILES, Appt.

Washington Supreme Court (Dept. No. 1) — July 27, 1921.

(— Wash. —, 199 Pac. 749.)

License — to use highway — duty of mail contractor to secure.

One contracting to transport United States mail is not absolved from the duty of obtaining state licenses for motor trucks used in the business.

[See note on this question beginning on page 1169.]

APPEAL by defendant from a judgment of the Superior Court for King County (Frater, J.) convicting him of violating the Motor Vehicle License Law. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Elias A. Wright and Sam A. Wright, for appellant:

The state of Washington had no authority to exact the license tax from the defendant as a condition precedent to the operation of his motor vehicles in the carrying of the United States mails.

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Johnson v.*

Maryland, 254 U. S. 51, 65 L. ed. 126, 41 Sup. Ct. Rep. 16; *Osborne v. Bank of United States*, 9 Wheat. 867, 6 L. ed. 234.

Mr. Robert C. Saunders for the United States.

Messrs. Malcolm Douglas and Arthur Schramm, for respondent:

Even agents of the United States are amenable to the reasonable rules and regulations governing the use of the highways.

Com. v. Closson, 229 Mass. 329, L.R.A.1918C, 939, 118 N. E. 653; Ex parte Marshall, 75 Fla. 97, L.R.A. 1918C, 944, 77 So. 869.

The license fee sought to be collected is not a tax upon the business of carrying the mails, but upon the means chosen by defendant for executing his contract.

Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Lumberville Delaware Bridge Co. v. State Assessors, 55 N. J. L. 529, 25 L.R.A. 134, 26 Atl. 711; Commercial Electric Light & P. Co. v. Judson, 57 L.R.A. 79, note.

Bridges, J., delivered the opinion of the court:

Appellant was charged by information with unlawfully using and operating a motor truck on the public highways of the county of King, state of Washington, without first obtaining a license therefor, as required by the state laws. He was found guilty, and has appealed from a judgment imposing a fine.

The facts are simple and stipulated, and are as follows: Prior to his arrest appellant had entered into a written contract with the United States government, whereby, for certain considerations, he agreed to carry the United States mail in the city of Seattle, Washington, between the various depots, wharves, docks, postoffice, and substations therein. In carrying out his contract with the government, he used various motor trucks, including the one which he is accused of operating, without first having obtained a license. These trucks were used by the appellant only in the business of carrying the mail under his contract. They had painted on them the usual insignia of vehicles used for these purposes, including the words, "United States Mail." The terms of his contract required him to provide vehicles for the carriage of the mail, and to keep them properly equipped and in repair, and he was required also to furnish all necessary oil, gasoline, tires, upkeep, and drivers. The contract further provided that such trucks should be used only in the

business of carrying United States mail. At the time of his arrest, the appellant was in the exercise of the duties imposed upon him under his contract.

The 1915 Session Laws (Laws 1915, p. 385), as amended by chapter 46, Session Laws of 1919 (Laws 1919, p. 90), provide, among other things, that it shall be unlawful to operate automobiles and motor trucks on the public highways of the state without first having obtained a license therefor. The minimum license fee required of a motor truck is \$10 per annum, and the fee increases as the weight and capacity of the truck increase. The 1919 Act especially exempts "all motor vehicles owned by the United States government, and used exclusively in its service."

Appellant's argument is that the United States government has the constitutional right to carry its mails in any manner it may see fit, and without let or hindrance from any person or state; that in the use of his trucks he was in the performance of a governmental duty; that he was an instrumentality selected by the United States government for the purpose of carrying out and putting into effect its constitutional duty of carrying, delivering, and caring for the mail; that such a tax or license fee could not be lawfully imposed on the government itself, if it had owned the trucks and operated them in the performance of the work which appellant was doing, and that, since he is doing for the government what it might do for itself, to impose a tax on him would be in fact to impose it on the government, because any private person carrying the mail must require the government to pay him an additional amount equal to any such taxation as he might be required to pay. The principal cases cited by the appellant in support of his argument are the following: Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Williams v. Talladega, 226

U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; and *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 Sup. Ct. Rep. 16.

On the other hand, the respondent contends that the license fee is a tax imposed on the right to operate a motor truck on the public highways of the state, and is not a tax imposed on the right to carry the United States mail; that the state has sole control of its roads and highways, and that the agents of the United States are amenable to the reasonable rules and regulations governing the use of such highways; that the immunity of the Federal government from state taxation is not negotiable to the extent that it can transfer that immunity to every person who contracts with it to do any act for the furtherance of governmental business; that the mail contract between an individual and the Federal government does not render the former an essential governmental agent, and confer on him freedom from state control. In support of its argument respondent cites and relies upon the following, among other cases: *Com. v. Closson*, 229 Mass. 329, L.R.A.1918C, 939, 118 N. E. 653; *Ex parte Marshall*, 75 Fla. 97, L.R.A.1918C, 944, 77 So. 869; *Searight v. Stokes*, 8 How. 151, 11 L. ed. 537—to which may be added: *Dickey v. Maysville, W. P. & L. Turnp. Road Co.* 7 Dana, 113; *Western U. Teleg. Co. v. Richmond (C. C.)* 178 Fed. 310, id., 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449; *Fidelity & D. Co. v. Pennsylvania*, 240 U. S. 319, 60 L. ed. 664, 36 Sup. Ct. Rep. 298; *Lumberville Delaware Bridge Co. v. State Assessors*, 55 N. J. L. 529, 25 L.R.A. 134, 26 Atl. 711.

The single leading question involved in this case is an interesting one. Although the same question, based upon identical facts, must exist in nearly every state of the Union, we have not been cited to a single case which is directly in

point, nor has our independent search resulted in finding one.

We are of the opinion that the judgment appealed from must stand. It is doubtless true that the states may not directly tax the property of the Federal government, or the instrumentalities which it uses to discharge any of its constitutional functions, nor may a state, by taxation or otherwise, materially interfere with the due, expeditious, and orderly procedure of that government while in the exercise of its constitutional powers. When it acts within its powers it is supreme, and all the states are subordinate to it. Being supreme, it must maintain its supremacy in order that our form of government shall continue to be stable and lasting. It is on this broad principle, as we understand it, that the Federal Supreme Court has always held that a state may not tax the Federal government for its instrumentalities, or do aught which would directly interfere with its lawful operations, because, had the various states such powers, they might slowly, but surely, undermine and weaken its foundations, independence, and acknowledged supremacy. It was on these grounds and for these reasons that the United States Supreme Court held, in the epoch-making cases of *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, and *Osborn v. Bank of United States*, supra, that a state did not have power to directly tax the right of the United States Bank to do business in such states.

But the law of those cases is not applicable to the facts of this case. In those cases the bank was chartered by the United States, and controlled by congressional acts as to the manner of doing business. It was the direct issue and immediate instrumentality of the government. Its private property within the state might be taxed like any other property, but for the state to require it to pay a tax for the right to do business was equal to requiring the government itself to pay a

tax for the privilege of performing, within the borders of the state, functions authorized or imposed on it by the Federal Constitution. But the case at bar cannot come within the scope of spirit of those decisions. Here there is no effort to tax the business of carrying the mail. The appellant is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he the representative or agent of the government, or an integral part of it. As was said by the Federal Supreme Court in the case of *Fidelity & D. Co. v. Pennsylvania*, 240 U. S. 319, 60 L. ed. 664, 36 Sup. Ct. Rep. 298 (which case we will later notice in more detail): "But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."

A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state.

Nor are those cases out of the Supreme Court of the United States concerning taxation in interstate commerce in point. Such were the cases of *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, and *Williams v. Talladega*, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116. The state of Texas passed a law imposing taxes on every chartered telegraph company doing business in the state, and each such company was thereby required to pay a tax of 1 per cent for each full-rate message sent, and one half cent for each message the toll for which was less than full rate. The tele-

graph company was incorporated under the laws of the state of New York. Many years ago the Congress of the United States passed an act authorizing telegraph companies to place their poles and other apparatus on all government property, reservations and post roads, in consideration of which government messages should have certain preferences in transmission. The Texas act was held unconstitutional, in that it undertook to impose a direct tax on messages sent and received by and on behalf of the government, and on interstate messages. The *Williams Case*, *supra*, was of like general character. We think it will at once be observed that these cases are not controlling of the case at bar. In discussing a somewhat similar question in the case of *Johnson v. Maryland*, *supra*, cited by the appellant, the court said: "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states, as well as the general government, have an interest, and which would be wholly under the control of the states, but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself."

That case is probably more nearly in point here than any of the cases cited by appellant, or which we have found. Johnson was an employee of the Postoffice Department of the United States, and, while driving a government motor truck in the transportation of mail over certain highways in the state of Maryland, was arrested, convicted, and fined for driving such truck without having a personal license, as required by the laws of that state. The court stated the question involved to be "whether the state has power to require such an employee to obtain a license, by submitting to an examination concerning his competence and paying

\$3, before performing his official duty in obedience to superior command."

In determining the matter adversely to the state, the court said: "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed."

There is a wide and fundamental distinction between that case and the one at bar, in that, in that case, the government owned the truck, and the person required to pay the fee and obtain the license was its direct employee, engaged in the performance of his duties, while here the person required to pay the license fee was a simple contractor, a resident of the state, the owner and operator of the truck in question, and engaged in a work which was to be performed entirely within the state. There the tax was, in effect, directly against the government, while here it is directly on the individual, and affects the government only indirectly and incidentally.

In the recent case of *Fidelity & D. Co. v. Pennsylvania*, supra, it was held by the Federal Supreme Court that a surety company does not, by becoming, conformably to an act of Congress, surety on bonds required by the United States, become a Federal instrumentality, so as to be exempt from a state tax on the premiums received. Mr. Justice

McReynolds, speaking for the court in that case, said: "That the challenged tax 'is an exaction for the privilege of doing business' seems plain; . . . and undoubtedly a state may not directly and materially hinder exercise of constitutional powers of the United States by demanding, in opposition to the will of Congress, that a Federal instrumentality pay a tax for the privilege of performing its functions.

. . . But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies, and confer freedom from state control.

Moreover, whatever may be their status, if the pertinent statute discloses the intention of Congress that such corporations, contracting under it with the Federal government, shall not be exempt from state regulation and taxation, they must submit thereto."

If the bonding company in that case was subject to the laws of that state, the appellant in this case ought to be subject to the laws of this state.

In the case of *Com. v. Closson*, 229 Mass. 329, L.R.A.1918C, 939, 118 N. E. 653, it was held that one in charge of a vehicle transporting United States mail is not exempt from the operation of state statutes and municipal ordinances regulating traffic on the highways, although by Federal statutes the highways are post roads. In that case Closson was arrested for violating a state statute concerning the conduct and operation of motor vehicles on the public highways. He defended on the ground that, being employed as a mail carrier, using a vehicle for the delivery of mail, he was immune from prosecution and punishment under the statute. The court said: "The designated streets or ways are not, however, instrumentalities created by the general government, where 'exemption from state control is essential to the independent sovereign authority of the United States with-

in the sphere of their delegated powers.' . . . Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon the mail carriers to use the ways as they please, or necessarily, or impliedly, do away with the power of supervision and control inherent in the state."

The case of *Ex parte Marshall*, 75 Fla. 97, L.R.A.1918C, 944, 77 So. 869, is an instructive and interesting one. During the World War, a military encampment of United States soldiers was located near Jacksonville, Florida. The officer in charge of that camp made a contract with Marshall, authorizing him to transport by motor bus the soldiers from the camp to the city of Jacksonville, upon certain terms and conditions particularly set out. He was arrested for not complying with a certain state law imposing a license tax somewhat similar to that involved in this case. He defended on the ground that he was engaged in the business of the United States government, and was its constituted agent for the purpose of transporting soldiers. He cited practically the same cases cited by the appellant in this case. Concerning them the court said: "We are in accord with the holdings of all these cases, . . . but unfortunately for the petitioner, none of them fits the facts of the case in hand. In all of them a license tax was sought to be imposed by a state, county, or municipality, upon the right to do business either by a bank, a railroad company, or telegraph company that had been chartered, and had been granted its franchise and right to do business by the Congress of the United States, and in all of them it was held, in effect, that such a license tax was invalid because it was an unwarranted invasion of rights properly granted by the Federal government, and amounted virtually to an attempt to annul such Federal grant."

The judgment and sentence were affirmed.

But appellant further contends that to impose the license tax upon him would, in effect, be to impose it upon the Federal government in the transaction of its constitutional functions. This argument, however, proves entirely too much. The appellant admits, and under like circumstances all the courts have held, that the state has the right to levy a property tax on motor trucks owned by him and used in the transportation of the mail. In making his contract with the government he doubtless took into consideration this tax, and it would be in effect passed on to the government in identically the same way that he contends the license tax must be passed on to the government. We have in this state a statute which requires every person driving or operating a motor vehicle to obtain a driver's license before he will be permitted to operate such vehicle. If the state cannot compel appellant to pay the motor license tax, for the same reason it cannot compel him to license his drivers or himself as a driver. We also have a law in this state imposing a small tax on each gallon of gasoline sold. This tax is by the gasoline companies charged to the consumer, including the appellant, and he doubtless will, if he should renew his contract with the government, pass that tax also on to the government; and, if he be exempt from the motor tax, he is for the same reason exempt from the gasoline tax. Other like illustrations might be given.

While it is true, generally speaking, that a state may not, by its laws, hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the Federal government is founded and performs its duties. The rule

of reason must control in all such questions; otherwise the states will be greatly hampered in the conduct of their affairs, without any corresponding benefit flowing to the national government.

We are confident that the appellant is not, because of the facts of

this case, relieved from complying with the state statute imposing upon him the motor truck license fee.

License—to use highway—duty of mail contractor to secure.

The judgment is affirmed.

Parker, Ch. J., and Mackintosh, Fullerton, and Holcomb, JJ., concur.

ANNOTATION.

Applicability of state or municipal traffic or vehicle regulations to those engaged in handling United States mail.

As to immunity of public officer from criminal arrest, see annotation in 1 A.L.R. 1156.

Generally, as to criminal or penal responsibility of public officer or employee, for violating speed regulations, see annotation in 9 A.L.R. 367.

As to applicability of automobile regulations to public officials or employees, see annotation to *Balthasar v. Pacific Electric R. Co.* 19 A.L.R. —.

It will be observed that in the reported case (*STATE v. WILES*, ante, 1163) it was held that one contracting to transport United States mail was not absolved from the duty of obtaining state licenses for motor trucks used in the business, the court holding that such a person was not a direct instrumentality of the government, or a representative or integral part of it, but merely a personal contractor, doing certain work for it at a fixed compensation.

And it has been held that one in charge of a vehicle transporting United States mail is not exempt from the operation of state statutes and municipal ordinances requiring travelers to keep to the right-hand side of the way, and, in turning to the left on an intersecting street, to go beyond the center of the intersection, although by Federal statutes the highways are post roads. *Com. v. Closson* (1918) 229 Mass. 329, L.R.A. 1918C, 939, 118 N. E. 653. The court said: "The defendant does not contend that the rules and regulations of the respective commissioners of parks and of streets had not been duly promulgated, or were not in force at the time 18 A.L.R.—74.

stated in the complaints, or that he did not violate those rules which require the drivers of vehicles to keep to the right-hand side of the way, and when passing on his left to an intersecting street, he must, before turning, proceed to the right until beyond the center of the intersecting street. It is immaterial that he was not actuated by any criminal intent. In prosecutions for misdemeanors created by statute under the exercise of the police power, proof of a guilty mind or corrupt purpose is not essential to a conviction. *Com. v. New York C. & H. R. R. Co.* (1909) 202 Mass. 394, 23 L.R.A.(N.S.) 350, 132 Am. St. Rep. 507, 88 N. E. 764, 16 Ann. Cas. 587. But by the plea to the jurisdiction, requests for rulings, and exceptions to a portion of the instructions, his defense rests upon the ground that, being employed as a mail carrier using a vehicle for the delivery of mail, he is immune from prosecution and punishment. The designated streets or ways are not, however, instrumentalities created by the general government, where 'exemption from state control is essential to the independent sovereign authority of the United States within the sphere of their delegated powers.' If they were, the defendant has committed no offense. *Com. v. Clary* (1811) 8 Mass. 72; *Newcomb v. Rockport* (1903) 183 Mass. 76, 66 N. E. 587. While, undoubtedly, they are post roads under Act of Congress March 1, 1884, chap. 9, enacting that 'all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes' (23 Stat. at

L. 3, chap. 9, Comp. Stat. § 7457, 8 Fed. Stat. Anno. 2d ed. p. 188), and whoever knowingly and wilfully obstructs or retards 'the passage of the mail, or any carriage, . . . driver, or carrier, . . . ' is upon conviction subject to fine or imprisonment, or both, by U. S. Rev. Stat. § 3995, Act of March 4, 1909, chap. 321, § 201, 35 Stat. at L. 1127, Comp. Stat. § 10,371, 7 Fed. Stat. Anno. 2d ed. p. 777, yet the ways remain public ways, laid out and maintained by the commonwealth, which has the exclusive power not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. Nor do the facilities thereby afforded for transportation of the mails confer extraordinary rights upon mail carriers to use the ways as they please, or necessarily or impliedly do away with the power of supervision and control inherent in the state. The use of the streets by travelers of every description is not prohibited. It is only the mode of operation by drivers of vehicles which is regulated, and, being reasonable, because well adapted for the security and protection of all travelers, the rules are constitutional, and their violation is punishable as a criminal offense."

And in *Hall v. Com.* (1921) — Va. —, 105 S. E. 551, it was held that the provisions of the state automobile law, fixing a speed limit, must be obeyed by an employee of the United States while engaged in transporting United States mail in a truck owned by the government, pursuant to the direction of the Postmaster General, where the schedule for carrying the mail did not require the employee to violate the provisions of the state statute. The court here said: "It does not follow from the facts shown in evidence concerning the scheduled time at which the accused was required to reach Winchester, and from the fact that he reached that point seventeen minutes late, on the trip on which he exceeded the speed limit of the state statute while passing through the town of Leesburg en route from Washington via Leesburg to Winchester, that the direction of the Postmaster

General required the accused to violate the state statutory speed limits in order to reach Winchester on schedule time. The record does not show the scheduled time for leaving Washington, or for the arrival or the time of the actual arrival at Leesburg postoffice, or the distance from Washington to Leesburg postoffice, or from the latter postoffice to Winchester postoffice, along the post routes between those places. That is to say, the record in this case does not show that the speed-limit provisions of the state statute are at all in conflict with the aforesaid direction of the Postmaster General, or that they at all interfere with the performance by the accused of his duties as an employee of the Federal government. So far as the record before us discloses, the Federal statutes on the subject, and regulations thereunder, are in entire accord with the state statute aforesaid; no conflict appearing to exist between them. Such being the situation, we have no hesitancy in holding that the state statute in question is a valid exercise of the police power of the state, in so far as its speed-limit provisions are involved in this case, and should have been obeyed by the accused. The mere fact that the provisions of the state statute in question affect a Federal employee or instrumentality is immaterial; and certainly, where the statute does not attempt to control, and does not in its operation even incidentally interfere in any way with, the performance of duty of the Federal employee, it is valid." The court here distinguished the case from *Johnson v. Maryland* (U. S.) *infra*, on the ground that in that case there was an actual conflict between the state and Federal laws, but that in the case at bar there was no such conflict.

In *Johnson v. Maryland* (1920) 254 U. S. 51, 65 L. ed. 126, 41 Sup. Ct. Rep. 16, just referred to, it was held that one employed by the government to drive a government motor truck in the transportation of mail over a post road was immune from a state regulation requiring drivers to obtain a license by submitting to an examination con-

cerning their competency and paying a certain fee. The court said: "Of course, an employee of the United States does not secure a general immunity from the state law while acting in the course of his employment. That was decided long ago by Washington, J., in *United States v. Hart* (1817) Pet. C. C. 390, Fed. Cas. No. 15,316, 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Com. v. Closson* (1918) 229 Mass. 329, L.R.A.1918C, 939, 118 N. E. 653. This might stand on much the same footing as liability under the common law of a state to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States, acting under and in pursuance of the laws of the United States. *Re Neagle* (1890) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658. It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty, it must be presumed, has been performed." This case was distinguished in the reported case (*STATE v. WILES*, ante, 1163),

where the court stated that in the *Johnson Case* the government owned the truck, and the person required to pay the fee and obtain the license was its direct employee, engaged in the performance of its duties, while in the *WILES CASE* the person required to pay the license fee was a simple contractor, a resident of the state, the owner and operator of the truck in question, and engaged in work to be performed entirely within the state, and that the tax in the *Johnson Case* was, in effect, directly against the government, while in the *WILES CASE* it was directly on the individual and affected the government only indirectly.

Attention may also be called to *United States v. Hart* (Fed.) supra, where a constable, who was indicted for knowingly and wilfully retarding the passage of the mail, attempted to justify his conduct on the ground that the driver of the vehicle carrying the mail was violating an ordinance, subjecting every person to a fine who should drive at an immoderate rate in the city, or should drive a carriage on runners without bells on the horses. With respect to this defense, Washington, J., said: "If the ordinance of the city is in collision with the act of Congress, there can be no question but that the former must give way. The Constitution of the United States, and the laws made in pursuance thereof, are declared by the Constitution to be the supreme law of the land; and the judges, both of the Federal and state courts, are bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. But there is in truth no collision between this ordinance and the act of Congress on which this indictment is founded. If the mail carrier should violate the ordinance, the act of Congress does not shelter him from the penalty imposed by the ordinance. But the ordinance does not authorize any officer to stop the mail, and consequently he cannot justify his having done it, under that ordinance."

J. T. W.

MINNIE E. CASE et al.

v.

SUPREME TRIBE OF BEN HUR, Appt.

Nebraska Supreme Court—May 16, 1921.

(— Neb. —, 184 N. W. 75.)

Insurance — fraternal — change of by-laws.

1. When an insured in a fraternal benefit association agrees to be bound by future changes of the by-laws, the association may make amendments increasing the rates and changing the plan of assessments for the general good of the order, so long as such changes do not work an injustice between the individual members, are not discriminatory, and are reasonable.

[See note on this question beginning on page 1180.]

—presumption of reasonableness of change.

2. In the absence of averment or proof to the contrary, it will be presumed that an increase of rates or change of plan of assessments to increase revenues was reasonable as to the amount of increase in the charges, when it appears that the amended regulation was duly enacted.

—prohibitive rates — reasonableness.

3. Though the increase of assessments adopted by a fraternal association should be so high as to make it unprofitable and prohibitive to older members, that fact, standing alone, would not make the rate unreasonable, if the assessment is no more than experience has shown is necessary to properly meet the cost of covering such individual with insurance at his attained age.

[See 19 R. C. L. 1211, 1212; note in 11 A.L.R. 654.]

—classification — reasonableness.

4. Where such an association, by amendment of its by-laws, divides its members into two classes, placing all members belonging to the association prior to a certain date in one class, and all who have joined or should join after that date in another class, and provides that each class shall raise its own funds and pay its own losses, and that the former class is to continue without the aid of growth and the addition of young blood, and makes it necessary, where a member of the former class should desire to change and become a member of the latter class, that he surrender what rights he had in the funds of the former class and surrender that security fur-

nished by the mutual promises of members of that class, held, that the classification is discriminatory and unreasonable as against the members of the former class, and will not be upheld.

[See note in 11 A.L.R. 655.]

—changing contract — impairing vested rights.

5. Where a benefit certificate provided that, in case insured should reach seventy years of age and be disabled, he should receive disability benefits, and his policy then be considered paid up, an amendment to the by-laws, made prior to insured's reaching seventy years of age and becoming disabled, which required payment of assessments during the period of such disability, after the age of seventy, impairs no vested rights under the policy, and is not to be treated as a reduction in the amount of benefits provided by the policy.

[See 19 R. C. L. 1206, 1207.]

—signing statement — waiver of rights.

6. Where the insured, on the representation to him by the agent of the association that his policy was paid up, and that he would not be required to make any further payments, signed a statement presented to him by the agent, which contained in it a printed clause agreeing that insured would pay additional assessments during such period of disability, but where no consideration moved from the association to him for such agreement, and there were no elements of estoppel shown and none pleaded, held, insured had not waived his right to object to the discriminatory classifi-

(— Neb. —, 184 N. W. 75.)

cation of members, and was not bound by such signed statement; it being further shown that the amount he had paid to the association in the past was sufficient to cover all payments

due, or to become due, on his policy, in accordance with the association's rules as they existed prior to the establishment of rates upon the discriminatory basis complained of.

APPEAL by defendant from a judgment of the District Court for Lancaster County (Morning, J.) in favor of plaintiffs in an action brought to recover the balance alleged to be due on a benefit certificate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Garlow & Long for appellant.

Messrs. Burr & Brown, for appellees:

Both defendant and plaintiffs having moved for an instructed verdict, the case was never submitted to the jury, and the court did not need to, and presumably did not, consider any incompetent testimony.

Simons v. Fagan, 62 Neb. 287, 87 N. W. 21; Citizens' Ins. Co. v. Herpolsheimer, 77 Neb. 232, 109 N. W. 160; Palmer v. McFarlane, 78 Neb. 788, 111 N. W. 794.

Under a clause in a benefit certificate stipulating that the member will be bound by the laws then in force, or those which may thereafter be adopted, the member is not bound by subsequently passed laws which are unreasonable in their nature.

Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110; Wright v. Knights of Maccabees, 196 N. Y. 391, 81 L.R.A.(N.S.) 423, 134 Am. St. Rep. 888, 89 N. E. 1078; Wilcox v. Court of Honor, 134 Mo. App. 547, 114 S. W. 1155; Sisson v. Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297; Zimmermann v. Supreme Tent, K. M. 122 Mo. App. 591, 99 S. W. 817; O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070; Knights Templars' & M. Life Indemnity Co. v. Jarman, 44 C. C. A. 93, 104 Fed. 638; Modern Woodmen v. Wieland, 109 Ill. App. 340; Morton v. Supreme Council, R. L. 100 Mo. App. 76, 73 S. W. 259; Smith v. Supreme Lodge, K. P. 83 Mo. App. 512; Weber v. Supreme Tent, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; Olson v. Court of Honor, 8 L.R.A.(N.S.) 521, and note, 100 Minn. 117, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Monger v. New Era Asso. 156 Mich. 645, 24

L.R.A.(N.S.) 1027, 121 N. W. 823; Parish v. New York Produce Exch. 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977; Weller v. Equitable Aid Union, 92 Hun, 277, 36 N. Y. Supp. 734; Beach v. Supreme Tent, K. M. 74 App. Div. 527, 77 N. Y. Supp. 770, affirmed in 177 N. Y. 100, 69 N. E. 281; Bottjer v. Supreme Council, A. L. H. 37 Misc. 406, 75 N. Y. Supp. 805; Wuerfler v. Grand Grove, W. O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; Supreme Conclave, I. O. H. v. Rehan, 119 Md. 92, 46 L.R.A.(N.S.) 308, 85 Atl. 1035, Ann. Cas. 1914D, 58; Taylor v. Modern Woodmen, 72 Kan. 443, 5 L.R.A.(N.S.) 283, 83 Pac. 1099; Grand Lodge, A. O. U. W. v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064, 82 Pac. 583; Ayers v. Grand Lodge, A. O. U. W. 188 N. Y. 280, 80 N. E. 1020.

Flansburg, J., delivered the opinion of the court:

This is an action on a benefit certificate issued by the Supreme Tribe of Ben Hur, a foreign fraternal beneficiary association. The defendant contends that the policy had become forfeited by default of payment of the assessments. These assessments were levied by virtue of amendments to the by-laws made after the certificate sued on was issued, and plaintiffs claim the amended by-laws were unreasonable, impairing vested rights under the benefit certificate, and were therefore not binding on insured. At the close of the testimony the court directed a verdict for the plaintiffs. Defendant appeals.

The certificate sued on contained the usual provision that the insured would be bound by all the laws, rules, and regulations of the society thereafter enacted. It was in the amount of \$500, and was issued to John Case in 1901, when he was

fifty-four years of age. Plaintiffs were named as beneficiaries.

At the time this certificate was issued the by-laws of defendant association provided for the monthly payments of \$1 for insurance, the amount of the benefit being rated according to age, so that while members entering between the ages of eighteen and twenty-five received benefit certificates in the amount of \$1,500 for a monthly payment of \$1, members entering at fifty years of age received certificates of \$500 only. All members were also required to pay a per capita tax of 75 cents semiannually, together with lodge dues, or what were called "court dues," levied by the subordinate court.

The benefit certificate in question provided that, in the event of the insured becoming physically disabled from old age after reaching seventy years and making proof of such fact, he should receive one tenth of the face of the policy that year and a like sum each year thereafter until the whole benefit was paid or until the member should die, and it also, however, further provided "that such member shall continue to pay his or her court dues and per capita tax" though the monthly payments for insurance were not required from that time forward.

In May, 1908, the by-laws of this defendant association were amended in the manner of which plaintiffs complain, whereby all holders of benefit certificates issued prior to July 1, 1908, were put in what is called class A, and all holders of certificates issued after that time were put in class B. The two classes were kept distinct. Each, it was provided, should raise its own funds and pay its own losses. In case the monthly payments of class A members, as previously fixed, should be insufficient, additional payments would be required to be paid from time to time. The rates required to be paid by the class B members were determined by valuation upon the basis of tables of mortality, and the rate was to be fixed

according to the age attained by the member at his entrance.

It was further provided that any class A member could, at any time up to July 1, 1910, by surrendering his certificate and paying the rates fixed by the age of such member at such time, according to the schedule of rates adopted for class B members, become a member of class B without being required to pass medical examination, such examination, however, to be required in case he desired a disability clause in his certificate such as appears in the certificate here involved, and in that case it was necessary, before a transfer would be allowed, that he be found to be in good health, and not physically disabled at the time of the transfer. It was further provided by these amended rules that the disability benefit for members in either class A or class B would be allowed only upon the condition that, after such disabilities were proved and insured became entitled to the disability benefit, he would still continue not only to pay the per capita tax and court dues as theretofore provided, but would, in addition, continue to pay all monthly payments and assessments required. In order to change from class A to class B, in other words, it was necessary for the class A member to surrender his certificate and take a new one at a rate based upon his age at the time of the transfer, as if he were an entirely new applicant for insurance in the association, and, except in the instances as stated, he would not be required to pass a medical examination.

The insured, after these amendments were adopted, remained in class A and made all payments called for up to September 1, 1916. On July 12, 1916, he became seventy years of age, and on September 12, 1916, he applied for the old age disability benefit. His application was approved, and he was paid the first instalment of \$50. In this application, signed by insured, which was on a printed form furnished by the company, there was a printed state-

ment that insured agreed to continue to pay, in addition to the court dues and the per capita tax, the monthly insurance payments and assessments during the continuation of such policy and during the period when he was entitled to the disability benefits.

It is claimed by plaintiffs that insured did not know of this statement in the application. The officer of the defendant association, whose duty it was to help make out and receive such applications, testified, and her testimony stands on that issue, that she read the application to him and also that she told him it was her understanding that no further payments were required from him thereafter except the per capita tax and dues, and that his policy, so far as insurance payments were concerned, was fully paid up.

From the time that the association allowed insured the disability benefit in September, 1916, and paid him the \$50 instalment, he made no further insurance payments, as provided by the amended by-laws, or in accordance with the statement made in the application just above referred to. The per capita tax and court dues were tendered by insured, but the defendant refused to accept these, and demanded the regular monthly payments and assessments as fixed at that time, and so the matter stood from September, 1916, until the insured died in February, 1917; the association claiming that the insured's policy had lapsed by reason of his failure to pay the regular monthly payments and assessments for insurance from and after the time of the granting of the disability benefits to him.

The questions presented are: (1) Whether the classification under the amended by-laws was unreasonable and discriminatory so as to make invalid the increased assessments levied upon the insured in this case; (2) whether the provision that insured should continue to pay insurance rates, when, by the terms of his certificate, it was to be paid up in

case of disability at seventy, in effect reduced the benefits and thereby destroyed vested rights under the contract; and (3) whether insured had waived his rights to refuse to pay insurance rates after reaching seventy, by signing the agreement to pay such additional assessments when he signed his application for the disability benefit.

It is the rule in this state that, when an insured agrees to be bound by future changes of the by-laws, a fraternal association may make amendments increasing the rate and changing the plan of assessments for the general good

of the order, so long as such changes do not work an injustice between the individual members, are not discriminatory, and are reasonable. Insured, in the case before us, remained in the class of old members who had entered the association prior to 1908. The exact amount of increase in assessments levied against him the record does not disclose. There is no averment or proof that the assessments made were unreasonable in amount, or greater than sufficient to the proper operation of this division of the association as a separate entity, raising its own funds and paying its own losses. On the other hand, it does not appear that the rates fixed for the members of the new class were more than were necessary to the operation of that class, or larger than required to properly raise funds to prepare against and pay death claims as they should accrue. The rates in this class were based upon mortality tables and in accordance with the principle that each member should pay in proportion to the hazard of his own individual risk.

The next question is, therefore, whether the creation of the two divisions of members, each operating independently of the other, did in itself work an unjust discrimination as against the plaintiff. There is no vested right to a continuance of a plan of insurance which expe-

Insurance—
fraternal—
change of by-
laws.

rience might demonstrate would result disastrously to the society or its members. *Wright v. Minnesota Mut. L. Ins. Co.* 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549; *Polk v. Mutual Reserve Fund Life Asso.* 207 U. S. 310, 52 L. ed. 222, 28 Sup. Ct. Rep. 65. It is also true that, in the absence of averment or proof to

—presumption of
reasonableness
of change.

the contrary, it will be presumed that on increase of rates or change of plan of assessment to increase revenues was reasonable as to the amount of the increase in the charges, if the amended regulation was duly enacted by the association. *Supreme Council, C. K. A. v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Demings v. Supreme Lodge, K. P.* 131 N. Y. 522, 30 N. E. 572; *Supreme Lodge, K. H. v. Bieler*, 58 Ind. App. 550, 105 N. E. 244. It is unnecessary, therefore, to discuss the amount of assessments in this case, since there is no proof of the financial condition of the company and no evidence tending to show that the assessments were more than were reasonably necessary to carry out the objects of the order.

Considering the class B members as a separate division, the plan devised of requiring each member to pay a rate in conformity to the costs of insurance based on age is a reasonable regulation as among the members in that class. And it would further, as settled by the laws of this state, have been a reasonable regulation to have required all the members of this association at the time when the amended by-laws were enacted to have commenced anew and to have paid assessments based upon mortality tables, the amount of such rate to be determined by the age attained by the respective members at the date of such change in the rule of assessment. *Funk v. Stevens*, 102 Neb. 681, 11 A.L.R. 639, 169 N. W. 6; *Thomas v. Knights of Maccabees*, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804; *Hollingsworth v. Supreme Council, R. A.* 175 N. C. 615, 96 S. E. 81, Ann. Cas.

1918E, 401; *Supreme Lodge, K. P. v. Mims*, 241 U. S. 574, 60 L. ed. 1179, L.R.A.1916F, 919, 36 Sup. Ct. Rep. 702; *Reynolds v. Supreme Council, R. A.* 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776. Though the increase of the assessment provided by a fraternal association should be so high as to make it unprofitable and prohibitive to older members, that fact, standing alone, would not make the rate unreasonable, if the assessment is no more than experience has shown is necessary properly to meet the cost of covering such individual with insurance at his attained age. It may be here, and in fact in most, if not all, such fraternal companies, insurance has been furnished in the past at rates far below cost. The member has lived and had the value of his assessments in the protection given him, and, when it is found that each must pay in exact accord with the risk the company has assumed in carrying him, he cannot complain. As Judge Holmes said in *Supreme Lodge, K. P. v. Mims*, 241 U. S. 574, 60 L. ed. 1179, L.R.A.1916F, 919, 36 Sup. Ct. Rep. 702: "It is proper to remember that for many years the plaintiff has been insured, and although by what he is not likely to regard as bad fortune his beneficiary has not profited by it, she would have if he had died. As he happily has lived, he has to bear the burdens incident to the nature of the enterprise into which he went open-eyed."

—prohibitive
rates—reason-
ableness.

But when such increase in assessments is made it must progress upon a uniform plan. It must be remembered that the promises of this association are the mutual promises of all the members in it, individually and collectively, to one another. Each member also has the right to see that all new members shall equally assume such mutual obligations. The basis for rates must be just, and not discriminative. In this case all members of the order, prior to 1908, are severed from the asso-

ciation and become a distinct entity apart from it. It is manifest that to thus cut off the old members, undesirable risks, into a company by themselves and make them pay their own losses and raise their own funds without the aid of growth and the addition of young blood, since no new members can, under the amended by-laws, be placed in this division, would result in a separate division of membership; in fact, a distinct company in itself, which would have a constantly dwindling membership and a rapidly increasing assessment until the lone survivor would have to pay his own death claim. Such classification and division of members, destroying the mutuality of the promises of the members of the association as a whole, and requiring older members to be thrown out upon their resources and alone compelled to proceed without the accession of new members, which destroyed the very working power of the plan under which they were operating, has been held an effectual repudiation of the contract obligation owing them by the society, and has quite universally been held an unreasonable and unjust regulation as to them, and therefore void. *Wilson v. Supreme Conclave*, I. O. H. 174 N. C. 628, 94 S. E. 443; *Williams v. Supreme Conclave*, I. O. H. 172 N. C. 787, 90 S. E. 888; *Strauss v. Mutual Reserve Fund Life Asso.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352; *Tusant v. Grand Lodge*, A. O. U. W. 183 Iowa, 489, L.R.A.1918F, 452, 163 N. W. 690; *Parks v. Supreme Circle*, B. A. 83 N. J. Eq. 131, 89 Atl. 1042; *Benjamin v. Mutual Reserve Fund Life Asso.* 146 Cal. 34, 79 Pac. 517; *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457.

In the cases just cited the facts as to classification and assessment were in all instances very similar, and in some identical, with the method followed in the case at bar. In *Tusant v. Grand Lodge*, A. O. U. W. 183 Iowa, 489, L.R.A.1918F, 452, 163 N. W. 690, members join-

ing before a certain date were put in class A, and those joining after, in class B, each operating separately as if a distinct association, raising its own funds and paying its own losses. Class A was assessed on the old plan, by increasing amount of assessment, and was allowed no new members, and class B was assessed upon an insurance risk basis as determined by the age of the member. The court in that case said: "It is sufficient to say that it is of the very essence of mutual insurance and of the efficiency thereof that it shall grow, and that it shall continue to receive new and younger blood. . . . When these men joined the order, they joined themselves to a membership many of whom had already reached their expectancy. These plaintiffs began at once to pay death losses on such. When they paid such losses they had nothing to expect in return from those whose membership had ceased by death. Their only way of compensation was from those who should come after. They relied, and had a right to rely, for the security of their insurance, upon the new blood which was to come."

By this reasoning it is shown how the shutting off of new members into class A, operating under the old plan, in effect actually destroyed its working ability. Obviously, then, if this class were to be continued under the old plan, the shutting off of new members was in fact an actual destruction of their plan of operation. Defendant's answer to this is, however, that insured had the option of joining class B with the new members and taking insurance at his then-attained age. But, in order to do that, it was necessary that he part from the class in which he then was and surrender up all rights that he had therein. He was entitled to share in the funds of this class, and was entitled to have that fund, as well as the mutual promises of all the other members of that class, as his security, and these we do not believe he could be required to release without his consent. These, by go-

ing into class B, he would be required to lose. In class B he would begin again upon his then-attained age, losing the right to benefit or credit by reason of funds already accumulated in class A, and losing the added security that would be given him were he still allowed protection of such fund and mutual promises. In 1908, when the amendment divided the membership and allowed a transfer from class A to class B, no provision was made for any transfer of the funds. This, at that time, could only have been effected by a transfer of the entire class, and, of course, power of insured was limited to transferring his own membership only. In 1916, it is true, the by-laws were amended providing for the transfer of a pro rata portion of the funds of class A to the funds of class B, following the transfer of a member, but this amendment was enacted only a month before the insured reached the age of seventy, and so short a time before his proof of disability that he, no doubt, could not have passed the necessary physical examination were he to keep alive the old age disability clause of his contract, and, furthermore, a transfer of the pro rata portion of the fund was not all that plaintiff was entitled to; he was entitled to have that fund in its entirety continue for his security. As we view it, he was entitled to belong to the association as he had joined it and what it had grown to be, protected by the mutual promises of all, and not required to release any part of the funds accumulated under the previous plan of assessment.

It is unnecessary to discuss at length the cases above cited holding the classification discriminative. In all those cases the classification and method followed were the same as in the case at bar, with this exception, that in some of those cases no right of transfer was allowed by the older members to the new class, and in the others—the cases of *Wilson*, *Williams*, *Tusant*, and *Parks*—such transfer was allowed; but in some of those cases, at least, the rule was

stated that in the allowance of such transfer the old members were discriminated against, since they were required to rerate on their then-attained ages, and hence surrender rights that they had become entitled to by their long-time membership and contributions to the society. As an abstract principle of law, under our holding in *Funk v. Stevens*, 102 Neb. 681, 11 A.L.R. 639, 169 N. W. 6, and other cases cited, this last statement of principle is incorrect. But the distinction must be borne in mind that, when all members of the association are required to rerate, instead of causing a division of membership into classes, the beneficial interest of each individual member in the funds and assets of the society remains unaffected. The accumulated funds still remain as his security, and the mutual promises of all its members still afford him protection; while in the transfer of an old member from class A to class B he surrenders all interest and rights to security in the funds and promises of all class A members, and in fact joins a new company as a new member.

It seems to us that in the latter case cited it was those rights, required to be surrendered up, which the courts had principally in mind when they said that to require the old members to enter the class of new members destroyed what rights those members had theretofore attained. This must have been so in the North Carolina cases. In that jurisdiction it has been held in *Hollingsworth v. Supreme Council*, R. A. 175 N. C. 615, 96 S. E. 81, Ann. Cas. 1918E, 401, following the same principle as enunciated in the holding of our court in *Funk v. Stevens*, *supra*, that an amendment of the by-laws requiring all members to rerate according to their attained age on the basis of risk as based on mortality tables was a reasonable and valid regulation, and the court in that case, referring to the North Carolina cases, above cited, which hold the classification in question discriminatory, said: "There is another ground of distinction be-

(— Neb. —, 184 N. W. 75.)

tween the Strauss, Williams, and Wilson Cases, and the other cases cited in them, on the one hand, and our case on the other. In the former, there was not only a raising to a higher figure of the rates, but there also were classification and discrimination. That is, the old members were put in one class and the new members in another, and the losses (death benefits) in the old class were paid from the funds collected from that class, while the losses in the new class were paid from the funds collected from that class; but in this case it appears that all moneys collected from assessments are mingled or blended in one fund, and losses paid solely out of it. It is, therefore, a single or common fund for the payment of death benefits. In the one case there are classification and discrimination, while in the other, there is neither."

It therefore appears to us that the increased and added assessments upon the certificate of insured in this case, being based upon an unjust discrimination, were illegal and unenforceable. Insured, however, paid the increased assessments until in September, 1916, when, being seventy years of age and disabled on that account, he received his first instalment of disability benefit, and he refused from that time on up to the time of his death, a few months later, to pay the insurance assessments, contending that his policy was fully paid up, and, according to its terms and the rate of assessment fixed prior to the amendment complained of, such was the fact.

Plaintiffs contend further that, since the benefit certificate itself did not provide for payment of insurance assessments after disability was proved, an amendment of the by-laws requiring payment of the assessments during such period was in effect a reduction of the benefits and impaired vested rights of insured under the policy.

—classification—
reasonableness.

—changing contract—
impairing vested rights.

We think this position is untenable. The argument put forth by plaintiff that an increase of rates reduces benefits has been adopted in some states, but not in ours. It is true that an increase in rates diminishes the marginal return on the policy in the instances here presented, and in fact in every insurance contract. Our court, however, in accord with the generally accepted rule upon that subject, holds that reasonable increases in assessments do not impair vested rights in the nature of a direct reduction of the benefit to be derived from the policy. Had the insured reached the age of seventy and his policy been matured so that his rights thereunder had become vested before the by-laws were amended, a different question would have been presented; but here, in advance of any rights becoming vested, it was determined for what period of time assessments should be made. This alone we do not believe would invalidate the assessments, which, it was provided, should become due after the disability rights under the contract accrued.

We come, then, to the question of whether the insured had waived his right to attack the unwarranted increase in the amount of assessments, or the levy of the additional illegal assessments, here complained of. The payment of the increased assessments up to the time of his applying for disability benefit in September, 1916, would not prevent him from claiming subsequent assessments unlawful; there being no element of estoppel shown and none pleaded or urged in this action upon that ground. The record is silent upon facts pertaining to that question. It is true the printed application which was signed by insured recited an agreement to pay these illegal assessments from that time forward, but the officer of the company whose duty it was to collect assessments explained to him when he signed the application that the policy was then paid up and no further assessments could be required of him. When the next following in-

insurance payment became due, insured refused to pay it. He did not become in default as to payment of the per capita tax and court dues called for in his certificate.

His action in signing the statement in the face of the explanation of the company's agent, and his attitude from that time on, could not be construed as a waiver of his right to object to these assessments, since it was apparent to all parties that

~~—signing state-
ment—waiver of
rights.~~ no waiver was intended. No estoppel could be based upon this statement signed by him; the company did not change its position toward him; he had made every payment called for or due at the time this first instalment was delivered to him; neither party disputed his right to collect this \$50 payment; such payment could not be made to depend upon a promise by him that he would meet future in-

surance assessments as they became due; the association, in other words, paid him only what the policy in terms and what the law then bound it to do. The statement could not be considered a contract or agreement to pay a further assessment, since there was no consideration moving to insured from the company to support it. Though it be a fact that insured signed this statement that he would pay a future unenforceable assessment, that certainly would not bind him, unless the company had been misled or changed its position in some way, or unless the insured received some consideration for the promise. Neither of such facts appears in this case.

We therefore are of opinion that plaintiffs in this case are entitled to recover upon the policy, and that the judgment of the lower court should be affirmed.

Petition for rehearing denied.

ANNOTATION.

Right of mutual benefit association to raise rates.

(Supplementing annotation in 11 A.L.R. 644.)

It is stated in the annotation to *Funk v. Stevens*, 11 A.L.R. 639, that the question whether or not a mutual benefit society might be allowed to raise its rates had proved a most difficult question for the courts to answer. On the one hand, rates which would be adequate to pay for the insurance of the older members at their attained age would be nearly prohibitive and cause them to lose the benefit of the assessments paid during all the years that they had been members of the society. On the other hand, unless there could be an increase of rates, the societies would almost inevitably become insolvent. Under these circumstances, the courts have struggled to permit the societies to take such action as was necessary to preserve their solvency, and at the same time have tried to prevent a destruction of the contracts of the members. It may be suggested that

one element of the problem has not received the attention which it deserves. While it is a hardship to deprive a member of his contract at an advanced age by the establishment of prohibitive rates, it must be kept in mind that he has had the protection during all the years that his certificate has been in force, and that the protection during that time was all that he was paying for, as in the case of fire, liability, or other kinds of insurance. The only hardship comes in being unable to continue his protection on the same favorable basis which he has enjoyed in the past. As seen in the former annotation, there are many questions yet unsettled, but the general tendency is to permit reasonable changes in rates, especially if the member, in his contract, agreed to be bound by the subsequently enacted by-laws, which provision appears very generally in the mutual benefit contracts. The cases which have been decided since the former annotation

have added little to the general law upon the question. The reported case (*CASE v. SUPREME TRIBE*, B. H. ante, 1172) recognizes the rule that assessments may be increased when necessary if the member has agreed to be bound by future changes in by-laws, but holds in accordance with the prevailing rule, that a classification is not proper which will throw the older members into a class by themselves, and compel them to carry their own insurance or surrender all rights under the former insurance, and enter anew at the rate for their attained age.

In *Fowler v. Sovereign Camp*, W. W. (1921) — Neb. —, 183 N. W. 550, it was conceded on the authority of *Funk v. Stevens*, supra, that if the members have agreed to be bound by a change of by-laws, the rates may be raised as may be reasonably necessary, and that if the changes made are unreasonable or confiscatory, and operate unjustly or wrongfully to deprive the member of the benefits of the insurance contract, or place undue and unreasonable burdens on one class of members, from which others are excepted, such changes are void. The court said that the questions involved were largely ones of fact in the case before it. It was contended that the adoption of a rate adequate to carry the cost of insurance based on the attained age at the time the rates went into effect was discriminatory and unfair, although the accumulated emergency fund was to be applied to the relief of the older members. Also that the loading for expenses on a percentage basis rather than a per capita basis was unfair. The court examined both claims and held that unfairness was not made to appear, but suggested that if the rate proved to be too high, an assessment might be omitted from time to time.

Sawyer v. Sovereign Camp, W. W. (1920) 105 Neb. 395, 181 N. W. 191, involved the effect of a change of by-law so as to require payments of an increased assessment in case of adoption of a more hazardous employment.

Insured had agreed to comply with subsequently enacted by-laws, but it was contended that forfeiture of the insurance was not within the purview of a future by-law. The court says that it may be conceded that the universal principle of the courts is that no unreasonable or confiscatory by-law enacted by a fraternal beneficiary association is binding on a member. But it says the test of validity is reasonableness, when the purposes, powers, and duties of the society are considered in connection with the by-law challenged as interfering with vested rights. And the court held that the by-law before it was not unreasonable and might be enforced.

Where the contract does not fix any rate of assessment, but makes the continuance of the contract conditional upon payment of all assessments and dues that may be levied during the time the holder of the certificate shall remain a member of the order, such assessments may be levied as are necessary to pay matured claims in full and provide the necessary funds, even though it requires an increase of the assessments. The court says, Especially is this true if the society offers to permit the member to continue at the lower rate upon his consenting to a reduction of benefits. *Sealy v. Sovereign Camp*, W. W. (1921) — Ga. App. —, 107 S. E. 417.

In *Independent Order of Puritans v. Parker* (1921) — Tex. Civ. App. —, 228 S. W. 363, the society provided that the benefit should be the amount which the rate the insured was paying at time of death would purchase. The court applied the Texas statute, permitting the raising of rates, and held the provision limiting the recovery to the amount paid for by the assessments paid valid. But the provision was held to be inapplicable to the insured in the case, because proper notice of the necessity of paying a higher rate to keep the full amount of the policy in force was not given to assured. H. P. F.

FRANK H. SCHURMANN, Appt.,

v.

UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Ninth Circuit—May 3, 1920.

(264 Fed. 917.)

Aliens — cancelation for fraud — allegiance to foreign government.

1. The certificate of naturalization of a former German subject may be canceled for fraud if, during a war with that country, he shows by word and action that his sympathies are entirely on the side of that government, and attempts to further its cause, as against that of this country, so clearly as to indicate that he swore falsely when he obtained his certificate.

[See note on this question beginning on page 1185.]

—cancelation of naturalization certificate — jurisdiction.

2. The provisions of the Act of Congress of 1906, relating to cancelation of certificates of naturalization,

apply to all such certificates which may have been issued by any court exercising jurisdiction in naturalization proceedings.

APPEAL by defendant from a decree of the District Court of the United States for the territory of Hawaii (Vaughan, J.) canceling his certificate of naturalization in a suit for its cancelation for alleged fraud of defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

Messrs. C. H. McBride and S. Joseph Theisen, for appellant:

Proceedings for naturalization are conducted in courts of record, and the decree of naturalization is, in effect, a judgment of like dignity and bearing, like finality and conclusiveness, as any other judgment of a court of record having jurisdiction.

Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 897; *Stark v. Chesapeake Ins. Co.* 7 Cranch, 420, 3 L. ed. 391; *United States v. Aakervik*, 180 Fed. 137; *Ex parte Cregg*, 2 Curt. C. C. 98, Fed. Cas. No. 3,380; *Re McCoppin*, 5 Sawy. 630, Fed. Cas. No. 8,713; *Dolan v. United States*, 69 C. C. A. 274, 133 Fed. 440.

A judgment will not be set aside for perjury or misrepresentation in its procurement.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; *United States v. Gleeson*, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778; *Tinn v. United States Dist. Atty.* 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736.

There is no fraud charged in the bill.

United States v. Norsch, 42 Fed. 417; *United States v. Rockteschell*, 125 C. C. A. 532, 208 Fed. 530; 20 Cyc. 96; 9 Enc. Pl. Pr. 686.

Mr. T. H. Theisen also for appellant.
Mrs. Annette Abbott Adams and Mr. E. M. Leonard for the United States.

Hunt, Circuit Judge, delivered the opinion of the court:

Schurmann appeals from a decree canceling a certificate of naturalization issued to him by the superior court of Los Angeles county, California, on December 17, 1904. The complaint alleges that the certificate of citizenship was procured by fraud, in that, at the time Schurmann, a native of Germany, made the oath of allegiance, he falsely and fraudulently swore that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly to the Imperial German government and William II, German Emperor, whereas Schurmann

(264 Fed. 917.)

did not, at the time and place stated, absolutely and entirely abjure and renounce all allegiance and fidelity to every foreign state or sovereignty whatever, particularly to the Imperial German government and to William II., German Emperor, but did then and there fraudulently reserve and keep, in whole or in part, his allegiance and fidelity to the Imperial German government and to William II., German Emperor.

The suit is brought under the Act of Congress of June 29, 1906, chap. 3592, § 15, 34 Stat. at L. 596, 601, Comp. Stat. § 4374, 6 Fed. Stat. Anno. 2d ed. p. 987, by which it is made the duty of the United States district attorneys, "upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." The provisions of the section apply, not only to certificates of citizenship issued under the provisions of the act referred to, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws. After demurrer had been overruled, Schurmann answered, denying all the material allegations as to fraud and alleging loyalty. Testimony was introduced on behalf of the government and Schurmann, and the court directed cancellation of the certificate of citizenship. Schurmann appealed, and relies upon assignments presenting the question of the sufficiency of the evidence and the applicability of the statute to the facts proven.

Aliens—cancellation of naturalization certificate—jurisdiction.

In behalf of the United States there was abundant evidence that, before and after the declaration

of war between the United States and Germany, Schurmann frequently praised the attitude of the Germans, defended the sinking of the Lusitania, said that he wanted to get over to Germany to be a surgeon in the German hospitals, anything Germany did was justified by her right to be supreme, said that America was wrong in entering the war, and that it was impossible to defeat Germany, advised against "waste" of money in buying Liberty bonds, said he wanted to get into Mexico, and by many other remarks indicated beyond any possible doubt that his feelings were entirely on the side of Germany as against the United States, as well as the other countries at war with Germany. Included in the record was a book of 142 pages, written by Schurmann and published by him in August, 1916. The title is

"The War as Seen Through German Eyes." After reading the book, we

—cancellation for fraud—allegiance to foreign government.

may well approve of that portion of the opinion of the judge of the district court, who said: "The respondent admits it was propaganda, and that it was intended to create sentiment to prevent the United States from going to war with Germany. It is a bitter denunciation of all men and nations standing in the way of German success, and a laudation of all things German. It is full of falsehoods in regard to the origin, cause, and conduct of the war, and of false accusations against the allied nations and against the government and people of the United States and the President of the United States. . . .

In it respondent complains against the United States and the President, because of the sale of arms and munitions by citizens of the United States to Great Britain and her Allies, and complains against the President for 'killing' the resolutions offered in Congress to warn Americans to keep off the ships of the Allies, and he justifies and applauds the murdering of 114 Amer-

icans on board the *Lusitania*, when she was sunk in violation of law and in violation of the rights of every person on board. He accuses the owners of the *Lusitania* of being 'guilty of this terrible calamity,' because, as he charges, the vessel was laden with arms and ammunition, and they 'knew the submarines would lay for her;' and he denounces the United States government as guilty because it did not prevent anyone from sailing on the doomed ship, and he denounces 'the reckless passengers themselves, who disregarded the often-repeated and earnest warnings, not only published by the German authorities, but also sent by the German authorities to each of these passengers individually.' But for the murderers who committed the crime he sings a hymn of praise, and says he would do as they did, himself, if he were in command of a submarine and had the opportunity, and that he knows 'you' would do so, also."

After war between the United States and Germany was declared, Schurmann desired to continue to sell his book, but, fearful lest it might be unlawful so to do, asked the United States district attorney in Honolulu for an opinion whether the book could be lawfully sold. He was advised that it would be unlawful to circulate the book, but Schurmann was not satisfied, and wished the matter referred to the Attorney General of the United States. The question was so referred, and the Attorney General concurred in the judgment of the United States attorney.

We take the question at issue to be whether, in 1904, Schurmann obtained his certificate of citizenship illegally, or by false and fraudulent representations, as alleged; and, in arriving at decision of the question as stated, we are mindful that the courts should be very careful to avoid depriving one of citizenship upon evidence which, although proving lack of allegiance at the time of the investigation, may not, by relation, establish that there was

lack of true faith and allegiance at the time of the issuance of the certificate to the applicant. It may not be impossible for a man in perfect good faith to make renunciation of an allegiance to a foreign state, and swear true faith and allegiance to the constitution of a new country, and yet, after lapse of years, by reason of events which he could not have foreseen, honestly feel a change in his sense of obligation to the country of his adoption, and a returning genuine wish to surrender his acquired obligations in order to return to his original political status. Analogy is found in this: Many young Americans went to Canada in 1916, and before April, 1917, and, in order to fight for the cause of the allied countries against Germany, expatriated themselves through patriotic motive, and took oaths of allegiance to the King of England, and thereby became his subjects, and enlisted in his service; but after the United States entered the war with Germany, many of them obtained honorable discharge from the British service, and under the act of Congress (40 Stat. at L. pp. 340, 545, chaps. 68, 69, Comp. Stat. § 4352, subd. 12, Fed. Stat. Anno. Supp. 1918, p. 492) resumed their citizenship in the United States and served in the American Army.

Was the lower court justified in holding that Schurmann, by reason of his attitude and declarations and expressions during the years 1916 and 1917, before and after the United States was at war with Germany, swore falsely in 1904 when he declared that he absolutely and entirely renounced and abjured all allegiance and fidelity to the German government and Emperor. Under the circumstances of the case, the only way of arriving at what the fidelity and allegiance of Schurmann were in December, 1904, is by trying out his attitude of mind and heart in the later years of 1916 and 1917, when, under then-existing conditions, men were specially aroused to give utterance

to their real sentiments, and to avow loyalty to one or another of the belligerent nations. Prior to 1916 his life seems to have been without special event indicative of patriotic feeling. But it was in the crucial times of 1917 that the respondent failed in the fundamental obligation to his oath of true faith and allegiance in 1904. Not only did he conduct himself, prior to May and June, 1917, as already indicated, but after war was declared between the United States and Germany, upon being asked by an American whether it were possible that he would not defend the shores of the United States, respondent replied: "Well, Allen, I will tell you. I have sworn allegiance to your flag or country; but I am going to tell you this much, that I didn't swear away my birthright. . . . And this is the crisis where every German, whether he is a Socialist or not, this is the time it is up to him to defend the fatherland."

One who spoke in that way, and whose frequent expressions were so plainly against the United States and in favor of Germany, must have taken the oath of full faith and allegiance with a reserved determination, to be kept down, but

nurtured, until a momentous time might come. In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment. *United States v. Ness*, 245 U. S. 319, 62 L. ed. 321, 38 Sup. Ct. Rep. 118; *Luria v. United States*, 231 U. S. 9, 58 L. ed. 101, 34 Sup. Ct. Rep. 10; *Johannessen v. United States*, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613; *United States v. Ginsberg*, 243 U. S. 472, 61 L. ed. 853, 37 Sup. Ct. Rep. 422; *United States v. Spohrer* (C. C.) 175 Fed. 440; *United States v. Wursterbarth* (D. C.) 249 Fed. 908; *United States v. Swelgin* (D. C.) 254 Fed. 884; *Grahl v. United States* (C. C. A.) 261 Fed. 487; *United States v. Kramer* (C. C. A.) 262 Fed. 395.

Our conclusion is that the District Court was justified in canceling the certificate.

Affirmed.

Appeal dismissed by the Supreme Court of the United States, January 16, 1922 (U. S. Adv. Ops. 1921-22, p. 203) — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 185.

ANNOTATION.

Disloyalty or mental reservation as ground for cancelation of certificate of citizenship.

As to collateral attack on order admitting to citizenship, see annotation following *Oehlert v. Oehlert*, 6 A.L.R. 406.

By the Act of Congress of June 29, 1906 (34 Stat. at L. 596, chap. 3592, § 15, Comp. Stat. § 4374, 6 Fed. Stat. Anno. 2d ed. p. 987), it was expressly provided that certificates of citizenship might be canceled, either on the ground of "fraud," or on the ground that they were "illegally procured," which statute, it was declared, should apply not only to certificates of citizenship issued thereafter, but also to all such certificates of citizenship

18 A.L.R.—75.

which may have been issued theretofore. The question, then, which we have presented in the present annotation, is whether or not disloyalty amounts to fraud or illegality within the meaning of the statute. It may also be stated that fraud was a ground for revocation of a certificate of citizenship even before the Act of 1906, but there seem to have been no early decisions which involved the question of disloyalty as a ground for cancelation.

The authorities are unanimous to the effect that disloyalty, mental reservation when taking the required

oath of allegiance, or ulterior purpose in obtaining a certificate of citizenship, may constitute such fraud or illegality as will warrant the cancellation of a certificate and impeachment of the naturalization under the Act of 1906. *Luria v. United States* (1913) 231 U. S. 9, 58 L. ed. 101, 34 Sup. Ct. Rep. 10; *United States v. Kramer* (1919; C. C. A.) 262 Fed. 395; *SCHURMANN v. UNITED STATES* (reported herewith) ante, 1182; *United States v. Mansour* (1909) 170 Fed. 671, affirmed without opinion in (1912) 226 U. S. 604, 57 L. ed. 378, 33 Sup. Ct. Rep. 217; *United States v. Ellis* (1911) 185 Fed. 546; *United States v. Olsson* (1912) 196 Fed. 562, reversed pursuant to stipulation of the parties, and without opinion, in (1913) 119 C. C. A. 667, 201 Fed. 1022; *United States v. Wursterbarth* (1918) 249 Fed. 908; *United States v. Darmer* (1918) 249 Fed. 989; *United States v. Swelgin* (1918) 254 Fed. 884; *United States v. Stuppiello* (1919) 260 Fed. 483; *United States v. Herberger* (1921) 272 Fed. 278.

For example, it has been expressly held that acts and statements of a naturalized citizen, even though done or made subsequent to the naturalization proceedings, which show disbelief in the existing form of government and opposition to the provisions of the Constitution, or disloyalty to our government and continued adherence to his former sovereign, are sufficient to show that the papers were fraudulently obtained within the meaning of the Act of 1906. *United States v. Kramer* (1919; C. C. A.) 262 Fed. 395 (defendant repeatedly made disloyal remarks, saying that he would do all he could against the United States; that he favored Germany in the war, and would help her by sending all military information that he could get; that he intended to return to that country after the war, etc.); *SCHURMANN v. UNITED STATES* (reported herewith) ante, 1182 (holding that statements by a naturalized citizen of German birth, made during the World War, showing that his feelings and sympathies were entirely on the side of

Germany as against the United States, were sufficient to show that he must have taken the oath of full faith and allegiance to the United States with a reserved intent which rendered the obtaining of his papers fraudulent); *United States v. Herberger* (1921) 272 Fed. 278 (holding that letters written during the World War by a naturalized citizen of German birth to his sister in Germany, in which he criticized American war methods, used language indicating contempt for the American people, and said that if it had not been for America's friendship England would have long since been brought to her knees by hunger, and that "it is hoped that some day Germany may repay America like with like," etc., showed disloyalty sufficient to justify the reasonable conclusion that such state of feeling existed, although possibly not realized, at the time of the naturalization, the failure to disclose which at such time rendered it a legal fraud, sufficient, in the absence of a showing of change of heart after naturalization, to warrant cancellation of the naturalization order and certificate); *United States v. Olsson* (1912) 196 Fed. 562, reversed pursuant to stipulation of the parties, and without opinion, in (1913) 119 C. C. A. 667, 201 Fed. 1022 (defendant advocated elimination of the ballot and property rights, believing as a consequence that the existing political government would be abrogated, which belief defendant admittedly entertained prior to his naturalization); *United States v. Wursterbarth* (1918) 249 Fed. 908 (respondent, a native of Germany, stated that he would do nothing to help defeat Germany, that he did not want America to win the war, and that he was only temporarily in this country, etc.); *United States v. Darmer* (1918) 249 Fed. 989 (defendant, a native of Germany, during the World War, repeatedly made statements tending to show loyalty and allegiance to Germany rather than to the United States, sufficient to give rise—at least, when uncontradicted—to a presumption of continuity and duration of existence

reaching back to 1888, the year of his naturalization); *United States v. Swelgin* (1918) 254 Fed. 884 (defendant was opposed to constitutional government and was a member of the Industrial Workers of the World, which organization advocated anarchy and the overthrow of the government by any means available); *United States v. Stuppiello* (1919) 260 Fed. 483 (defendant was an anarchist when admitted to citizenship).

In the *Kramer Case*, in answering the contention that evidence of acts of disloyalty occurring after the defendant's admission to citizenship was not sufficient to show want of good faith and fraudulent intention at the time he was admitted, the court said: "The statute under the provisions of which defendant was admitted to citizenship provides that if a naturalized citizen returns to the country of his nativity, or goes to any other foreign country, and takes permanent residence therein, within five years after his certificate of citizenship is issued to him, it shall be prima facie evidence of lack of intention to become a permanent citizen at the time of filing his application for citizenship, in the absence of countervailing evidence. Section 15, Act June 29, 1906 (Comp. Stat. § 4874, 6 Fed. Stat. Anno. 2d ed. p. 987); *Luria v. United States*, 231 U. S. 9, 58 L. ed. 101, 34 Sup. Ct. Rep. 10 [set out and quoted *infra*]. Congress thereby clearly indicated that subsequent acts of a naturalized citizen would be sufficient evidence of his fraudulent intention at the time of his admission. If mere removal is sufficient evidence of fraud, why not subsequent acts of disloyalty, or statements indicating his want of allegiance? In the nature of things it is impossible for the government to make more than a cursory examination into the loyalty of the general character of the applicant for citizenship before admission, and the court must, of necessity, rely upon the good faith and truthfulness of the applicant when appearing before it and taking the oath of allegiance. In a criminal case, a man's intention may

be judged by his acts. A conspiracy to defraud is usually proven by showing what the defendants did after the date upon which the conspiracy is alleged to have been formed, and the jury may consider such evidence in opposition to the testimony of defendant on the question of intention, and render a verdict of guilty upon it. Why not the same rule in a suit to cancel a certificate of naturalization? American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith, without any mental reservation whatever, and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not, he is guilty of fraud in obtaining his certificate of citizenship. There can be no doubt that, had the defendant in this case been guilty of the utterances with which he is charged before his naturalization, and that fact had been known to the court, he would not have been admitted. The proof makes out a prima facie case of the disloyalty of the defendant, and shows his continuing allegiance to the German Emperor." And in *United States v. Wursterbarth* (Fed.) *supra*, the following argument was advanced by the court: "The respondent, although a citizen of this country, on three separate occasions (several months having intervened between each) since the outbreak of the war with Germany, gave vent to expressions which clearly indicate that he at this time bears an allegiance to the country of his origin, superior to that which he recognizes to this country. While his present state of mind is, of course, not the main fact in issue, yet, if at the time the certificate of citizenship was granted to him he retained the same allegiance to Germany as he now manifestly has, it is not contended, and, indeed, it would not seem to be debatable, that any other conclusion could be reached than that the certificate had been procured by fraud, because the provisions of the Naturalization Act, at the time the respondent's certificate was issued (§ 2165 of

the Revised Statutes), required that before he could be admitted to citizenship he should declare on oath that he would support the Constitution of the United States, and that he absolutely and entirely renounced and abjured all allegiance and fidelity to any foreign sovereignty. The question, therefore, on which the decision of this case depends, is whether it may be legitimately inferred as a fact, from his present state of mind, coupled with the circumstances to be hereinafter referred to, that he was of the same mind at the time he took the oath of allegiance and renunciation. . . . It must be borne in mind that the respondent did not express any dissatisfaction with the aims and purposes of this country in the present war, or with the reasons which had induced Congress to declare war, but that he boldly took the position that he would do nothing to injure the country of his birth, and did not wish the country to win the present war, because of the ties which bound him to Germany. As the years succeeding his naturalization passed, coupled with the fact that he continued to dwell in our midst, associate with our citizens, receive the benefits which this nation and its institutions have conferred upon him, acquire property here, and hold public office (as the proofs show that he did), it is natural to presume that his affection and feeling of loyalty and allegiance to this country would increase, and that any ties which bound him to the country from which he came would correspondingly decrease. If, therefore, under such circumstances, after thirty-five years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens. In-

deed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present. Whatever presumption might otherwise arise in his favor, from the apparent fact that during the intervening years he has lived as a good citizen of his country, is of no weight when it is considered that nothing has happened during that time to call forth a manifestation of his reserved allegiance, and that as soon as something did happen—i. e., the war between this country and Germany—he immediately manifested it." And in *United States v. Olsson* (1912) 196 Fed. 562, *supra*, the court said: "The people of this country ordained the Constitution of the United States to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, and thereby establish a national government, to endure permanently. The notion that citizens of this country may absolve themselves from allegiance to the Constitution of the United States, otherwise than by expatriation, is a dangerous heresy. The nation generously and cordially admits to its citizenship aliens having the qualifications prescribed by law, but, recognizing the principle of natural law called the law of self-preservation, it restricts the privilege of becoming naturalized to those whose sentiments are compatible with genuine allegiance to the existing government, as defined by the oath which they are required to take. Those who believe in and propagate crude theories hostile to the Constitution are barred. . . . He [the defendant] has no reverence for the Constitution of the United States, or intention to support and defend it against its enemies, and he is not well disposed toward the peace and tranquillity of the people. His propaganda is to create turmoil and to end in chaos. But, in order to secure a certificate of naturalization, he intentionally made representations to the court which necessarily deceived

the court, or his application for naturalization would have been denied. Therefore, by the petition which he was required to file and his testimony at the final hearing of his application, and by taking the oath which was administered to him in open court, he perpetrated a fraud upon the United States, and committed an offense for which he may be punished as provided by law." And again, in *United States v. Swelgin* (1918) 254 Fed. 884, supra, in commenting upon the beliefs and the purposes of the organization known as the "I. W. W.," in which defendant was an organizer and worker, as affecting the question of intent in taking the oath of allegiance to the United States, the court said: "It is really opposed to all forms of government. It advocates lawlessness, and constructs its own morals, which are not in accord with those of well-ordered society. Its adherents are antipatriotic. They own no allegiance to any organized government. And I am unable to understand by what right such of them as come from another country can claim that they are entitled to be admitted to citizenship under the stars and stripes. The very oath they take, avowing their allegiance to this government, is to them a worthless ceremony, for they do not intend to submit themselves to its Constitution, laws, rules, and regulations, or to defend it in time of insurrection, or against an aggression from abroad, or when it is at war with other nations. When, therefore, the defendant declared that he was attached to the principles of the Constitution of the United States, and was well disposed to the good order and happiness of the same, he made avowal of that which was not in his heart, and thereby deceived the court. And further, he was a disbeliever in, and opposed to, organized government, and he fraudulently misled the court as to that. So that the government's case is clear that defendant's certificate of naturalization was procured by fraud and deception, imposed upon the court which directed its is-

suance, and the annulment of the certificate must follow."

And the lack of an intention of becoming a permanent citizen at the time of the obtaining of citizenship papers has been held to constitute such fraud or illegality as will avoid a naturalization at the suit of the government. *Luria v. United States* (1913) 231 U. S. 9, 58 L. ed. 101, 34 Sup. Ct. Rep. 10 (holding that the certificate of citizenship of one who, shortly after the obtaining of such certificate, took up his permanent residence in a foreign country, should be canceled); *United States v. Ellis* (1911) 185 Fed. 546 (holding same). And on the question of the effect of lack of intention, see *United States v. Mansour* (1908) 170 Fed. 671, affirmed without opinion in (1912) 226 U. S. 604, 57 L. ed. 378, 33 Sup. Ct. Rep. 217. In the *Luria* Case the conclusion was based upon the theory that the provisions of the Naturalization Act plainly contemplate that the applicant, if admitted, should be a citizen in fact as well as in name, or, in other words, "it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past." In this case the court also said: "By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance, without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country, and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant. It involved a wrongful use of

a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful; for what is clearly implied is as much a part of a law as what is expressed." And in *United States v. Ellis* (Fed.) *supra*, the court said that, under the law as it was prior to 1906, "only those persons possessing the necessary qualifications and intending bona fide to become citizens could be naturalized, so that, if the defendant did not in good faith intend to become a permanent citizen, and made his oath with a mental reservation to that effect, he was guilty of fraud in procuring the decree," sufficient to warrant its cancelation under the Act of 1906. And these decisions were also influenced by the express provisions of § 15 of the Act of 1906, to the effect that if any naturalized citizen shall within five years "return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention" on the part of such person to become a permanent citizen of the United States at the time of filing his application for citizenship, and, "in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to

authorize the cancelation of his certificate of citizenship as fraudulent."

And that an ulterior motive in obtaining citizenship papers, such, for instance, as procuring them for the purpose of obtaining protection in a foreign country in which the applicant wishes to reside, constitutes a fraudulent or illegal purpose, see *United States v. Mansour* (Fed.) *supra*.

But it has been held that criticism by a naturalized citizen of German birth, of the "slam-bang" methods of Americans in connection with the war with Germany, is not "essentially disloyal," and even when considered with expressions of refusal to believe stories to the effect that German soldiers wantonly killed and mutilated women and children, which belief, it has been said, is not "necessarily dishonorable," does not show disloyalty sufficient to require cancelation of his certificate of citizenship. *United States v. Herberger* (1921) 272 Fed. 278.

However, as some of the cases indicate, and as was expressly held in *United States v. Herberger* (Fed.) *supra*, a showing of treason upon the part of a naturalized citizen is not essential to the cancelation of his naturalization order and certificate under the Act of 1906, for disloyalty.
G. J. C.

GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAIN-MEN, Appt.,

v.

FRANK S. CLARK.

Indiana Supreme Court — May 12, 1920.

(— Ind. —, 127 N. E. 280.)

Pleading — laws of sister state.

1. It is not sufficient to plead merely the effect of the laws of a sister state.

[See note on this question beginning on page 1197.]

—complaint on insurance policy — sufficiency.

2. A complaint on a life insurance

policy is not demurrable for failure to state an obligation between plaintiff and defendant.

— failure to attach policy.

3. A complaint on an insurance policy is not demurrable for failure to incorporate or attach the policy in or to it.

— failure to state time of payment of premiums.

4. Failure to state that all premiums were paid before due does not make a complaint on a life insurance policy demurrable.

Rescission — insurance policy. — necessity of prompt action.

5. One seeking to rescind a life insurance policy for fraud must do so within a reasonable time or with reasonable promptitude after knowledge of the facts relied upon for rescission, and must return or offer to return the consideration.

[See 14 R. C. L. 1019, 1020.]

Pleading — answer — action on insurance policy — breach of warranty.

6. An answer in an action on a life insurance policy, relying on breach of warranty, must show a return of or an offer to return, the premiums with-

in a reasonable time after discovery of the alleged breach.

Trial — reasonable time for avoiding insurance policy — question of law or fact.

7. In an action upon a life insurance policy where a breach of warranty is relied on, the reasonable time for return of premiums is ordinarily a question of fact, but where the facts are ascertained, undisputed or admitted, the question is one of law.

Insurance — to whom premiums must be tendered.

8. After the death of insured a tender of premiums for avoidance of the policy for breach of warranty or fraud must be made to the beneficiary.

Tender — payment into court — sufficiency.

9. A payment into court seventeen months after learning of breach of warranty in an application for life insurance, of the premiums paid, without tendering them to the beneficiary, who became entitled to them because of the death of the insured, is not within reasonable time, and is not sufficient.

APPEAL by defendant from a judgment of the Superior Court for Marion County (Clifford; J.) in favor of plaintiff in an action brought to recover the amount alleged to be due on a benefit insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. M. L. Clawson for appellant.

Messrs. Bailey & Young for appellee.

Willoughby, J., delivered the opinion of the court:

This was a suit brought by appellee against appellant to recover upon a beneficiary certificate or policy of insurance issued by appellant to the decedent and the insured, who was a brother of the appellee, in which suit the appellee recovered a judgment against the appellant in the sum of \$1,650, from which judgment appellant appeals, and alleges that the court erred in overruling appellant's demurrer to appellee's amended complaint, and that the court erred in sustaining the demurrer of appellee to appellant's amended second paragraph of answer to the amended complaint.

The complaint alleges that the de-

fendant, appellant, is a fraternal benefit association doing business under the laws of Ohio; that the policy was in the sum of \$1,500, and was payable to the appellee, Frank Sylvester Clark, upon the death of the insured, George Clark, pursuant to the application by assured. A copy of the application is filed with the complaint and made a part thereof, marked exhibit A. A copy of the policy is also filed and made a part of the complaint, and marked exhibit B. The complaint alleges that the premiums were paid, and that the insured and decedent had done all that was required of him under the terms of the contract of insurance; that the insured, George Clark, died on June 23, 1913; that all assessments and obligations on the part of the assured had been paid and satisfied before his death.

It further alleges that proof of death was made to the lodge of which deceased was a member; that the appellant, defendant in the suit below, refused to pay; and plaintiff alleges that on account of the unnecessary delay in the payment of said policy there is interest due on same from the date of decedent's death, amounting in all, principal and interest, to \$1,650.

Defendant filed a demurrer to the complaint, and the demurrer, omitting the caption and signature, is as follows:

"The defendant, Brotherhood of Railroad Trainmen, demurs to plaintiff's amended complaint herein, and for cause of demurrer says:

"(1) That said amended complaint does not state any obligation between plaintiff and defendant.

Pleading—
complaint on
insurance policy
—sufficiency.

"(2) That the basis of plaintiff's complaint is the insurance policy issued by defendant to plaintiff, and that it is not a part of said amended complaint, either in body thereof, or attached by exhibit thereto.

—failure to
attach policy.

"(3) That said amended complaint does not state that all payments by the insured prior to his death were made at or before the times required by said defendant in its said insurance application and policy. The amended complaint simply says that said payments were made prior to the insured's death."

—failure to state
time of payment
of premiums.

The complaint was good as against the objections urged, and no error was committed by the court by overruling it. See § 344, Burns's Anno. Stat. 1914; Conrad v. Hansen, 171 Ind. 43, 85 N. E. 710, and cases there cited; State v. Katzman, 161 Ind. 504, 69 N. E. 157; Oglebay v. Tippecanoe Loan & T. Co. 41 Ind. App. 481, 82 N. E. 494.

Appellant filed an answer in two paragraphs. The first paragraph was a general denial. The second paragraph, referred to as the second

amended paragraph, alleged fraudulent misrepresentations by decedent to procure the issuance of the policy sued on, and alleged that the applicant falsely stated that for the five years prior to January 9, 1913, the general condition of his health was good. After alleging that decedent knew of the condition of his health, and that it was bad, and that he had been an inmate of various sanitariums, and had been treated by a physician for myalgia and rheumatism within the last five years preceding his application, said defendant goes on to state that the policy was issued under the laws of the state of Ohio, and that the construction and interpretation of the laws of the state of Ohio were to the effect that said beneficiary certificate issued to plaintiff was null and void by reason of the said false and fraudulent representations in the application made by decedent, and a refund of premiums by defendant was unnecessary, but that on the 11th day of March, 1916, the said defendant paid to the clerk of the court, for the use and benefit of the plaintiff, the sum of \$23.50, being in full of all premiums, dues, fines, and assessments paid by decedent to the defendant, with interest at 6 per cent from the time of payment; that on September 28, 1914, defendant had knowledge that decedent had made said fraudulent misrepresentations in said application; that said decedent at the time of his death was in good standing with defendant organization, and had paid all fines, dues, and assessments and premiums required by said defendant under and by the terms of his application and certificate, and was not in arrears in any way, and that said decedent died on the 23d day of June, 1913. Appellant also alleges in said paragraph of answer that the decedent made certain misrepresentations as to his qualifications for membership in the appellant association, but does not allege any facts showing injury to appellant by reason of such misrepresentations.

To said paragraph of answer plaintiff demurred, for the reason that said paragraph does not state facts sufficient to constitute a cause of defense. This demurrer was sustained. The defendant excepted, and withdrew his first paragraph of answer, which was a general denial, and refused to plead further. The court then rendered judgment in favor of plaintiff in the sum of \$1,650, together with the costs of action.

It will be observed in this case that the appellant does not state whether or not the laws of Ohio upon which it relies were statutory. It does not state what the laws are;

—laws of sister state. but it states what, in its opinion, is the effect of those laws.

It is not sufficient in a pleading to state the effect of the laws of a sister state; but such laws must be pleaded as facts are pleaded, and must state what the laws are, and not what the effect of them may be. The amended second paragraph of answer is insufficient as pleading the laws of the state of Ohio. To plead a foreign law, either in complaint or answer, the law must be set out specifically and definitely, so that the court can construe the law as applicable to the facts pleaded in such complaint or answer. If such law is statutory, that part of the statute must be set out verbatim. *Lomb v. Pioneer Sav. & L. Asso.* 96 Ala. 430, 11 So. 154; *Thomas v. Grand Trunk R. Co.* 1 Penn. (Del.) 593, 42 Atl. 988. See also *Shaw v. Wood*, 8 Ind. 518; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; *Billingsley v. Dean*, 11 Ind. 831; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245, and cases cited; *Hempstead v. Reed*, 6 Conn. 480; *Walker v. Maxwell*, 1 Mass. 104; *Bierhaus v. Western U. Teleg. Co.* 8 Ind. App. 246, 34 N. E. 581. This paragraph of answer alleges that "at all times herein mentioned the said decedent at the time of his death was in good standing with defendant organization, and had paid all fines, dues, assessments, and premi-

ums required by said defendant under and by the terms of his application and the certificate sued on herein, and was not in arrears in any way."

Said paragraph of answer also alleges that "the decedent died on the 23d day of June, 1913; that on the 28th day of September, 1914, the defendant had knowledge and information as to all of the alleged false and untrue warranties, and thereafter, to wit, on the 1st day of March, 1915, finally disallowed plaintiff's claim, and that this action was filed June 29, 1915; that no tender either to the plaintiff or any person representing the decedent was made until March 11, 1916."

Under the law as laid down by numerous decisions in this state, a person seeking to rescind a contract of this kind for fraud must do so within a reasonable time, or with reasonable promptitude, after knowledge of the

facts relied upon for a rescission, and must return or offer

Rescission—
insurance policy
—necessity of
prompt action.

to return the consideration, and place the other party in statu quo, within a reasonable time after he knows, or should know, of the matter giving the right to rescind, and failure to do so affirms the contract. *American Cent. L. Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380, and cases there cited; *Supreme Tribe, B. H. v. Lennert*, 178 Ind. 122, 98 N. E. 115; *Commercial L. Ins. Co. v. Schroyer*, 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914A, 968.

In an action on an insurance policy, an answer setting out a breach of warranty and an avoidance of the policy must show a return, or an offer to return, the premium within a reasonable time

Pleading—
answer—action
on insurance
policy—breach
of warranty.

after the discovery of the alleged breach. *United States Health & Acci. Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *Horner v. Lowe*, 159 Ind. 406, 64 N. E. 218.

In such cases a reasonable time is

ordinarily a question of fact, but where the facts have been ascertained, or when they are undisputed or admitted, it becomes a question of law. *Pickel v. Phenix Ins. Co.* 119 Ind. 291, 21 N. E. 898.

In the instant case no tender was made until more than seventeen months had elapsed after the appellant had learned of the fraudulent acts of appellee, and no tender was made at any time to appellee, or any person authorized to act for him. But after the beginning of the suit, after the case had been called for trial, the defendant, appellant, asked and procured leave of the court to make an amendment to his answer, showing the payment of the amount of the premium, with interest thereon, into court. This was not a compliance with the law requiring the defendant, if he desires to rescind a contract on account of fraud, to put the plaintiff in statu quo. After the death of assured, a

Insurance—to whom premiums must be tendered.

tender of the premium in avoidance of the policy for breach of warranty, or for fraud, must be made to the beneficiary. *American Cent. L. Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380.

A tender of money, to be sufficient, must first be offered to the party entitled to receive it, or to someone authorized to receive it for

him, and, if refused, the money must then be paid into court for his use and benefit. *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. 771. The payment of the premium, with interest, into court, on the date and under the circumstances named in said second paragraph of answer, was not within a reasonable time, and was not a sufficient tender within the meaning of the law. No error was committed by the court in sustaining the demurrer to this paragraph of answer.

Tender—payment into court—sufficiency.

Appellant in its brief argues certain constitutional questions; but, in view of the conclusion reached in this case on the demurrer to said paragraph of answer, such questions do not arise, and need not be considered. *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63; *Cleveland, C. C. & St. L. R. Co. v. Hollowell*, 172 Ind. 466, 471, 88 N. E. 680; *White v. Sun Pub. Co.* 164 Ind. 426, 430, 73 N. E. 890; *Hunt v. State*, 186 Ind. 644, 648, 117 N. E. 856.

No error being shown in the record, the judgment is affirmed.

NOTE.

The manner of pleading a foreign statute is the subject of the annotation following *MOE v. SHAFFER*, post, 1197. See, specifically, subd. II. a, of that annotation, for the view that the statute must be set out in *hæc verba*.

NELS J. MOE, Respt.,

v.

OLIVER E. SHAFFER, Appt.

Minnesota Supreme Court—October 14, 1921.

(— Minn. —, 184 N. W. 785.)

Pleading — foreign statute — effect.

1. It is not necessary in pleading a statute of a foreign state to set it forth in *hæc verba*. It is sufficient if its terms are so pleaded that the court can determine its effect.

[See note on this question beginning on page 1197.]

Headnotes by LEES, C.

Judgment — absence of process — effect.

2. A judgment is not void for want of service of process, if entered upon a warrant of attorney expressly authorizing its entry without process.

[See 15 R. C. L. 651.]

Fraud — waiver — new agreement.

3. A party to a contract procured by fraud waives the fraud, if after discovering it he enters into a new agreement for the discharge of his obligation on different terms.

[See 12 R. C. L. 414.]

Judgment — foreign — defenses.

4. The only defenses to an action upon a judgment of a court of record of a sister state are want of jurisdiction, fraud, or payment. The presumption is that the court properly fixed the amount included in the judgment for attorneys' fees.

[See 15 R. C. L. 920, 921.]

Limitation of actions — operation in other state.

5. If no action could be maintained on a cause of action in the state where it arose, because of the bar of the Statute of Limitations, none can be maintained in the courts of this state, unless plaintiff has been a citizen thereof ever since the cause of action accrued.

[See 17 R. C. L. 947.]

Pleading — exceptions to Statute of Limitations.

6. When the Statute of Limitations is pleaded as a defense, if the facts bring the case within any of the exceptions to the statute, they must be set up by reply. Defendant's absence from the state is such an exception.

— statute not in effect.

7. If in fact a statute which is pleaded is not in effect, that part of the pleading may be stricken as sham.

APPEAL by defendant from an order of the District Court for Wilkin County (Flaherty, J.) sustaining a demurrer to his defense in an action on a judgment recovered against him, and assigned to plaintiff. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. Lewis E. Jones, for appellant:

If the judgment was barred by statute in Illinois it was barred here, it not appearing that plaintiff is a resident of the state of Minnesota, and it appearing from the amended answer that he is a resident of Illinois.

Gen. Stat. § 7709; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162; Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664; Fletcher v. Spaulding, 9 Minn. 64, Gil. 54; Beadles v. Fry, 15 Okla. 428, 2 L.R.A.(N.S.) 855, 82 Pac. 1041.

The judgment was void.

Gundlach v. Park, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302; Whitton v. Whitton, 64 Ill. App. 53; Farquhar v. Dehaven, 70 W. Va. 738, 40 L.R.A.(N.S.) 956, 75 S. E. 65, Ann. Cas. 1914A, 640; First Nat. Bank v. White, 220 Mo. 717, 132 Am. St. Rep. 612, 120 S. W. 36, 16 Ann. Cas. 889; Raymor v. Michigan Trust Co. 165 Mich. 259, 130 N. W. 594; Irose v. Balla, 181 Ind. 491, 104 N. E. 851; Hutson v. Wood, 263 Ill. 376, 105 N. E. 343, Ann. Cas. 1915C, 587; Funk v. Hossack, 115 Ill. App. 340; Simco v. Mankowitz, 184 Ill. App. 506.

Mr. George D. Smith for respondent.

Lees, C., filed the following opinion:

November 19, 1910, L. W. Brew-

er, as trustee in bankruptcy of the estate of J. E. Edmunds Company, recovered a judgment against the defendant in the circuit court of La Salle county, a court of record of the state of Illinois. The judgment was founded on a promissory note executed by defendant to J. E. Edmunds, containing authority to any attorney of a court of record to appear in such court, in term time or vacation, and confess judgment without process in favor of the holder of the note for the amount unpaid thereon, "with costs and ——— dollars attorneys' fees." There was a partial payment of the judgment as the result of an execution issued thereon, and thereafter, and in February, 1911, Brewer assigned the judgment to plaintiff, who brought an action upon it in the district court of Wilkin county in February, 1920.

The defendant answered, setting up the following defenses: (1) That the judgment was void for the reason that he was not served with process and did not appear in the circuit court of La Salle county;

(2) that the note was given in part payment for a stock of goods purchased from Edmunds by the defendant, and that in making the sale Edmunds had practised a fraud upon him in certain respects set out in the answer; (3) that the judgment as entered included an attorney's fee of \$400, which was not authorized by the terms of the warrant of attorney; (4) that the statutes of Illinois provide that no action can be maintained on any judgment entered by confession or by virtue of a warrant of attorney or power contained in any promissory note after the expiration of seven years from the rendition of the judgment, unless the judgment has been renewed by a writ of scire facias or an original suit instituted thereon within said period of seven years; that said judgment had not been so renewed, and was of no force or effect in the state of Illinois after November 18, 1917; and that any right of action thereon became barred by the Statute of Limitations of said state on said date.

Plaintiff demurred to each of these defenses separately and collectively, on the ground that they did not state facts sufficient to constitute a defense, and failed, when taken separately or as a whole, to state any equities in defendant's favor. The demurrer was sustained, and defendant appealed.

1. The first defense was not good, for the reason that the warrant of attorney expressly authorized the entry of judgment without process.

Judgment—absence of process—effect.

2. The second defense was not good for the reason that defendant alleged that after the note came into Brewer's hands, defendant informed him of the fraud Edmunds had perpetrated upon him, whereupon Brewer agreed that, if defendant would assist him in discovering assets which Edmunds was believed to be concealing from his creditors, he (Brewer) would accept a certain sum in full payment of the note. It was not alleged that defendant had

paid the amount agreed upon or assisted Brewer in uncovering Edmunds's hidden assets. This brings the case within the rule approved by this court that, after discovering the deceit, "the party deceived . . . must stand towards the other party at arm's length, must comply with the terms of the contract on his part, must not ask favors of the other party or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it. If he does so he waives the fraud." *Humphrey v. Sievers*, 137 Minn. 373, 163 N. W. 737; *Tysdal v. Bergh*, 142 Minn. 288, 172 N. W. 130.

Fraud—waiver—new agreement.

3. The third defense was not good. It is elementary that the judgment of a court of record of a sister state is entitled to full faith and credit in this state, and is not open to collateral attack. The only defenses that can be made to an action upon it in the courts of this state

Judgment—foreign—defenses.

are want of jurisdiction, fraud, or payment. *Cone v. Hooper*, 18 Minn. 531, Gil. 476; *Alden v. W. J. Dyer & Bro.* 92 Minn. 134, 99 N. W. 784; *Tillinghast v. United States Sav. & L. Co.* 99 Minn. 62, 108 N. W. 472; *Gundlach v. Park*, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302. The presumption is that the amount for which the judgment was entered was correct. *Hersey v. Walsh*, 38 Minn. 521, 8 Am. St. Rep. 689, 38 N. W. 613. It will be presumed that the court fixed the amount of attorneys' fees, since it is not alleged and will not be presumed that the judgment was not entered by the court in term, instead of in vacation. *Gundlach v. Park*, *supra*.

4. The fourth defense is good, if sufficiently pleaded. If no action on the judgment could be maintained in Illinois after November 18, 1917, none could be maintained in this state after that date. Gen. Stat. 1913, §

Limitation of actions—operation in other state.

(— Minn. —, 184 N. W. 785.)

7709; Luce v. Clark, 49 Minn. 356, 51 N. W. 1162.

There may be a statute in Illinois similar to Gen. Stat. 1913, § 7708, whereby the running of the Statute of Limitations is suspended during the absence of the debtor from the state; but, if so, it is nowhere set out in the pleadings, and, in any event, would not apply to an action on a judgment. Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450. Defendant having pleaded the Statute

Pleading—exceptions to Statute of Limitations.

of Limitations as a defense, if the facts bring the case with-

in any exceptions to the statute in force in Illinois, they must be set up by reply. Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276; Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734; Riley v. Mankato Loan & T. Co. 133 Minn. 289, 158 N. W. 391. If absence from the state is an exception, it must be so pleaded by the plaintiff. West v. Hennessey, 58 Minn. 133, 59 N. W. 984.

It is urged that in pleading the Illinois statute it should have been set out in full, or at least so much of it as is material to the defense. A statement to that effect is found in Becht v. Harris, 4 Minn. 504, Gil. 394. In Hoyt v. McNeil, 13 Minn. 390, Gil. 362, it was said that the "terms" of a foreign statute must be set forth, so that the court may determine whether the effect claimed for it is legitimate. This was repeated in Myers v. Chicago,

St. P. M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694, and is in accordance with the general rule that, in pleading the statute of a foreign state, it is not necessary to set it forth in *hæc verba*, and that it is sufficient to state the ~~foreign statute~~ ^{effect} substance of those portions of the statute that are relied on. 36 Cyc. 1241. Becht v. Harris, *supra*, in so far as it intimates that the rule is otherwise, is disapproved. It is also urged that in J. L. Bieder Co. v. Rose, 138 Minn. 121, 164 N. W. 586, this court had before it the Illinois Statute of Limitations, and expressly held an action on a judgment might be brought at any time within twenty years of the date of its rendition. In that case the judgment was not one by confession, and if there is a statute such as defendant pleads here, it would have not been applicable.

Finally, it is urged that in fact there is no such statute in effect. If ~~statute not in effect~~ this be true, plaintiffs may move to strike this defense from the answer as sham. Gen. Stat. 1913, § 7762.

In so far as the demurrer goes to the defense of the Statute of Limitations, it should have been overruled, and sustained only as to the other defenses pleaded. The order sustaining it as to all the defenses pleaded must therefore be, and it is hereby, reversed.

Petition for rehearing denied.

ANNOTATION.

Manner of pleading foreign statute.

- I. Pleading statute by reference, 1198.
- II. Pleading language of statute:
 - a. View that statute must be set out in *hæc verba*, 1198.
 - b. View that statute need not be set out in *hæc verba*:
 1. In general, 1199.
 2. Necessity for definiteness and certainty, 1201.

II. b.—continued.

3. Statute of Descent and Distribution, 1202.
4. Statute relating to procedure, 1202.
5. Statute relating to bills and notes, 1203.
6. Statute relating to usury, 1203.

II. b.—continued.

7. Statute relating to contracts, 1203.

I. Pleading statute by reference.

In the few cases wherein the question has arisen, unaffected by statute, it has been held without dissent that it is not sufficient to plead a foreign statute by a mere reference to the title and date of passage thereof (*Carey v. Cincinnati & C. R. Co.* (1857) 5 Iowa, 357; *Becht v. Harris* (1860) 4 Minn. 504, Gil. 394); or by a mere mention of the volume or chapter or section number thereof (*Atlantic Coast Line R. Co. v. Barton* (1914) 14 Ga. 160, 80 S. E. 530; *McDonald v. Bankers Life Asso.* (1899) 154 Mo. 618, 55 S. W. 999; *State Nat. Bank v. Levy* (1910) 141 Mo. App. 288, 125 S. W. 542).

Thus, in *Carey v. Cincinnati & C. R. Co.* (Iowa) supra, the court said: "Our courts do not take judicial notice of the statutes of another state. And if a party relies upon such statutes he must set them out, plead them as he does any other fact, and it will not do to refer to them by their title and date of approval, nor by stating what, in the opinion and judgment of the pleader, are their general provisions and requirements."

Similarly, in *Becht v. Harris* (1860) 4 Minn. 504, Gil. 394, a pleading was held to be insufficient which alleged merely that a certain company was "a foreign corporation, duly incorporated and organized under and by the laws of the state of Illinois, and pursuant to an act of the legislature of said state, entitled 'An Act to Provide for the Incorporation of Transportation Companies,' passed and approved June 23, A. D. 1852."

In *State Nat. Bank v. Levy* (1910) 141 Mo. App. 288, 125 S. W. 542, the court said: "The laws of a sister state must be alleged and proved as any other issue of fact, and the rule of pleading is that such laws are not sufficiently stated if they are referred to in the petition only by the number of the section or chapter."

So, in *McDonald v. Bankers Life Asso.* (1899) 154 Mo. 618, 55 S. W. 999, it was held that it is not sufficient to

II. b.—continued.

8. Statute of Limitations, 1204.

9. Miscellaneous statutes, 1204.

plead a foreign statute merely by reference to the chapter number.

Likewise, in *Atlantic Coast Line R. Co. v. Barton* (1914) 14 Ga. App. 160, 80 S. E. 530, 4 N. C. C. A. 998, it was said: "To plead a foreign law it is not enough to refer merely to the volume in which the law is contained. The law should be set out, so that the court may, on inspection of the pleadings, determine whether or not the plaintiff has drawn a correct conclusion as to the construction and effect of the law."

In Wisconsin it is provided by statute (Rev. Stat. § 2676) as follows: "In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. In like manner the statutes, acts, and resolves of the Congress of the United States, and of the legislature of any state or territory of the United States, published by authority of the respective governments thereof, may be pleaded." In *Central Trust Co. v. Burton* (1889) 74 Wis. 329, 43 N. W. 141, wherein this statute was referred to, it was held that, although the statute of another state might have been pleaded sufficiently by referring merely to its title and date of passage in accordance with the provisions of the statute quoted, it was not improper to plead the substance of the foreign statute.

II. Pleading language of statute.

a. View that statute must be set out *in hæc verba*.

In some jurisdictions it is held that, in pleading a foreign statute, its terms, to the extent relied on, must be set out in *hæc verba*. *Wilson v. Clark* (1858) 11 Ind. 385; *Tyler v. Kent* (1876) 52 Ind. 583; *Milligan v. State* (1882) 86 Ind. 553; *GRAND LODGE, B. R. T. v. CLARK* (reported herewith) ante, 1190; *Bank of Commerce v. Fuqua* (1891) 11 Mont. 285, 14 L.R.A. 588, 23 Am. St. Rep. 461, 23 Pac. 291; *Lowry v. Moore* (1897) 16 Wash. 476,

58 Am. St. Rep. 49, 48 Pac. 238; Lipsett v. Dettering (1917) 94 Wash. 629, 162 Pac. 1007. See also Mendenhall v. Gately (1862) 18 Ind. 149; Swank v. Hufnagle (1887) 111 Ind. 453, 12 N. E. 303, 13 N. E. 105.

Thus, in *GRAND LODGE, B. R. T. v. CLARK* (reported herewith) ante, 1190, it was held that it is not sufficient to plead merely the effect of the laws of a sister state, the court saying: "To plead a foreign law, either in complaint or answer, the law must be set out specifically and definitely, so that the court can construe the law as applicable to the facts pleaded in such complaint or answer. If such law is statutory, that part of the statute must be set out verbatim."

So, in *Wilson v. Clark* (1858) 11 Ind. 385, it was said: "If the law of another state be relied on that law must be fully recited in the pleading, that the court may judge of its effect, and be able to give a construction to it."

To like effect is *Milligan v. State* (1882) 86 Ind. 553, wherein it was held that a foreign statute, when relied on, must be pleaded according to its tenor, so as to enable the court to construe or interpret it.

In *Tyler v. Kent* (1876) 52 Ind. 583, it was held that a foreign statute must be set out, when relied on to support a cause of action, by filing a copy thereof with the complaint.

The rule was affirmed in *Lowry v. Moore* (1897) 16 Wash. 476, 58 Am. St. Rep. 49, 48 Pac. 238, wherein the court said: "The objection urged by respondent to the sufficiency of the pleading is that the statute law of the state of Kentucky is not set forth in terms in the answer, and that in this respect the pleader has merely given his own conclusion or interpretation of the statute, and of the interpretation which the courts of that state have placed upon it. We think the demurrer was properly sustained. We think that, in the absence of statutory provisions to the contrary, the settled rule is that where a party relies upon the statute of a sister state, he must plead it as he would any other fact, not by stating what in the opinion of

the pleader is its effect, but the statute itself should be set forth."

Similarly, in *Bank of Commerce v. Fuqua* (1891) 11 Mont. 285, 14 L.R.A. 588, 28 Am. St. Rep. 461, 28 Pac. 291, the court, in granting a motion to eliminate from the answer an averment that "by the laws of the said state of Kentucky" a certain contract was illegal and void, held that the laws relied on should have been set forth in terms.

b. View that statute need not be set out in hæc verba.

1. In general.

In a majority of jurisdictions, however, it is held that, in pleading a foreign statute, it need not be set out in hæc verba, but that an averment of its substance and effect is sufficient.

Alabama.—*Forsyth v. Preer* (1878) 62 Ala. 443; *Cubbedge v. Napier* (1878) 62 Ala. 518. See also *Lomb v. Pioneer Sav. & L. Co.* (1891) 96 Ala. 430, 11 So. 154.

Arkansas.—*St. Louis, I. M. & S. R. Co. v. Haist* (1903) 71 Ark. 258, 100 Am. St. Rep. 65, 72 S. W. 893.

Illinois.—*Louisville, N. A. & C. R. Co. v. Shires* (1884) 108 Ill. 617. See also *Consolidated Tank Line Co. v. Collier* (1893) 148 Ill. 259, 39 Am. St. Rep. 181, 35 N. E. 756. Compare *Stockham v. Simmons* (1896) 67 Ill. App. 83.

Iowa.—*Bean v. Briggs* (1857) 4 Iowa, 464. See also *Carey v. Cincinnati & C. R. Co.* (1857) 5 Iowa, 857.

Kansas.—*Showalter v. Rickert* (1902) 64 Kan. 82, 67 Pac. 454.

Kentucky.—*Roots v. Merriwether* (1871) 8 Bush, 397; *Montgomery v. Consolidated Boat Store Co.* (1903) 115 Ky. 156, 103 Am. St. Rep. 302, 72 S. W. 816. See also *Temple v. Brittan* (1889) 11 Ky. L. Rep. 467, 12 S. W. 306; *Thacker v. Norfolk & W. R. Co.* (1915) 162 Ky. 337, 172 S. W. 658.

Minnesota.—*MOE v. SHAFFER* (reported herewith) ante, 1194. Compare *Becht v. Harris* (1860) 4 Minn. 504, Gil. 394; *Hoyt v. McNeil* (1868) 13 Minn. 390, Gil. 362; *Myers v. Chicago, St. P. M. & O. R. Co.* (1869) 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694.

Missouri.—*McDonald v. Bankers*

Life Asso. (1899) 154 Mo. 618, 55 S. W. 999; *Gibson v. Chicago G. W. R. Co.* (1910) 225 Mo. 473, 125 S. W. 453; *State Nat. Bank v. Levy* (1910) 141 Mo. App. 288, 125 S. W. 542; *Bondurant v. Brotherhood of American Yeomen* (1917) — Mo. App. —, 199 S. W. 424. Compare *Swing v. Karges Furniture Co.* (1910) 150 Mo. App. 574, 131 S. W. 153.

New Jersey.—*Salt Lake City Nat. Bank v. Hendrickson* (1878) 40 N. J. L. 52.

New York.—*Berney v. Drexel* (1884) 33 Hun, 34; *Schluter v. Bowery Sav. Bank* (1889) 117 N. Y. 125, 5 L.R.A. 541, 15 Am. St. Rep. 494, 22 N. E. 572; *Rothschild v. Rio Grande Western R. Co.* (1890) 26 Abb. N. C. 312; *O'Reilly, S. & F. Co. v. Greene* (1896) 18 Misc. 423, 75 N. Y. S. R. 1416, 41 N. Y. Supp. 1056; *Congregational Unitarian Soc. v. Hale* (1898) 29 App. Div. 396, 27 N. Y. Civ. Proc. Rep. 303, 51 N. Y. Supp. 704; *Caras v. Thalmann* (1910) 138 App. Div. 297, 123 N. Y. Supp. 97; *Swing v. Wanamaker* (1910) 139 App. Div. 627, 124 N. Y. Supp. 231; *Sultan of Turkey v. Tiryakian* (1915) 213 N. Y. 429, 108 N. E. 72, affirming order in (1914) 162 App. Div. 613, 147 N. Y. Supp. 978. See also *Holmes v. Broughton* (1833) 10 Wend. 75, 25 Am. Dec. 536; *Colcord v. Banco de Tamau-lipas* (1917) 181 App. Div. 295, 168 N. Y. Supp. 710.

Vermont.—*Wellman v. Mead* (1919) 93 Vt. 322, 107 Atl. 396.

England. — *M'Leod v. Schultze* (1844) 1 Dowl. & L. 614, 13 L. J. Exch. N. S. 321. See also *Benham v. Morn-ington* (1846) 4 Dowl. & L. 213, 3 C. B. 133, 136 Eng. Reprint, 54, 15 L. J. C. P. N. S. 221, 10 Jur. 618.

Thus, in *Louisville, N. A. & C. R. Co. v. Shires* (Ill.) supra, it was held that it is not necessary that a foreign statute should be set out in *hæc verba*, where its substance and legal effect are pleaded clearly and concisely.

So, in *St. Louis, I. M. & S. R. Co. v. Haist* (Ark.) supra, the court said with reference to pleading the law of a foreign state in the complaint: "It was not necessary that it should set out the Louisiana statute in *hæc verba* in pleading the statute. To set out the

substance and effect of the statute was sufficient."

In *Montgomery v. Consolidated Boat Store Co.* (1903) 115 Ky. 156, 103 Am. St. Rep. 302, 72 S. W. 816, the court in considering a pleading which alleged the jurisdiction of a court of another state, said: "It is alleged that the court was one of general equity and common-law jurisdiction. The general averment of a fact of this character is sufficient. It would be needless prolixity to require the statute of Ohio to be set out in *hæc verba*. It may be pleaded according to its effect. As the foreign law must be proved as any other fact, it may also be pleaded as any other fact."

In *Rothschild v. Rio Grande Western R. Co.* (1890) 26 Abb. N. C. (N. Y.) 312, it was held that, as the law of a foreign statute is a fact to be pleaded like any other fact, it is not necessary to plead evidence of such fact, embodied in the statute of the foreign state, but the fact that a given proposition is the law must be stated.

In *Bean v. Briggs* (Iowa) supra, it was held that it is not sufficient for a party to aver that his right to recover is warranted by the law or statute of another state, or that the plaintiff cannot recover by reason of the provisions of a foreign statute; but he must plead the particular statute relied on, and set it out, as he would any other fact in the case, that the court may be able to judge whether the proceeding is warranted, or the defense tenable, under such law. See also *Carey v. Cincinnati & C. R. Co.* (Iowa) supra.

In *Salt Lake City Nat. Bank v. Hendrickson* (N. J.) supra, the court said: "In pleading a foreign statute, it must be set forth in substance, so that the court may see that the right or liability, which depends exclusively on a statutory enactment, arises by force of such statutory provision. The averment, 'pursuant to the statute,' without setting forth the substance of the statute, is insufficient."

It has been held to be necessary for one desiring to defeat a recovery on the ground that the action is founded on common-law principles, and cannot

be maintained in the state where it arose on the facts stated in the petition because of statutory prohibition, to plead the law of the other state in such a manner that it will appear from the pleadings that a recovery cannot be had. *Thacker v. Norfolk & W. R. Co.* (1915) 162 Ky. 337, 172 S. W. 658.

In *Forsyth v. Preer* (1878) 62 Ala. 443, the court said: "The general rule of pleading in equity, and at common law, is that when a party claims a right, whether as ground of relief, or as a matter of defense, under a foreign law, he must, by appropriate pleading, set out the law, so that the court can see the right claimed falls within it."

It was observed by way of dictum in *Louisville, N. A. & C. R. Co. v. Shires* (1884) 108 Ill. 617, that when a foreign statute is the basis of an action, and not merely called in question collaterally as evidence in the case, more strictness in pleading is required.

In Minnesota it is held in *MOE v. SHAFER* (reported herewith) ante, 1194, that, in pleading the statute of a foreign state, it is not necessary that it should be set forth in *hæc verba*, but that it is sufficient to state the substance of those portions of the statute that are relied on. Formerly, in *Becht v. Harris* (1860) 4 Minn. 504, Gil. 394, it was held in that state that, in pleading a foreign statute, the statute itself, or so much of it as was material to the case, should be set forth in full by the party complaining or defending under it. So, in *Hoyt v. McNeil* (1868) 13 Minn. 390, Gil. 362, it was said: "Where a party relies upon the law of a foreign state, such law must be pleaded, and, so far as it is relied on, its terms must be set forth, that the court may determine whether the effect claimed for the law is legitimate." To like effect is *Myers v. Chicago, St. M. & O. R. Co.* (1897) 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694.

In Missouri, also, it is apparently the rule that in pleading a foreign statute it need not be set out in *hæc verba*.

Thus, in *State Nat. Bank v. Levy* (1910) 141 Mo. App. 288, 125 S. W. 542, it was held that, al-
18 A.L.R.—76.

though it is insufficient to plead the law of a sister state by reference only to section or chapter number, this does not mean that the statute must be copied in the pleading, but that "the substance, or tenor and effect of the law," must be pleaded.

And in *McDonald v. Bankers Life Assn.* (1900) 154 Mo. 618, 55 S. W. 999, it was held that to plead properly the laws of another state, their "terms, tenor, and effect" should be set out. So, in *Bondurant v. Brotherhood of American Yeomen* (1917) — Mo. App. —, 199 S. W. 424, it was held that a mere reference to the laws of another state as filed with the pleadings as exhibits is not sufficient. In *Gibson v. Chicago G. W. R. Co.* (1910) 225 Mo. 473, 125 S. W. 453, the court said: "Where a foreign statute, or the statute of another state, is relied upon as giving, conferring, or constituting a cause of action, it must be substantially stated with such distinctness that the court may judge its effect." In *Swing v. Karges Furniture Co.* (1910) 150 Mo. App. 574, 131 S. W. 153, the court said: "It is elementary that where a foreign statute, or the statute of another state, is relied upon as conferring or constituting a cause of action, or conferring the right to sue, it must be substantially stated with such distinctness that the court may understand and determine its effect." But the court added: "It is . . . essential, when asserting a right in the courts of this state, said to have accrued or to be derived from the laws of a foreign state, that such laws should be pleaded in *hæc verba*, or substantially, at least, to the end that the court may see and determine for itself what authority and what rights they purport to confer."

2. Necessity for definiteness and certainty.

Since a foreign law is regarded as a matter of fact, it is uniformly held that it should be pleaded, so far as relied on, with such clearness and certainty, and at such length, as will enable the court to judge of the meaning and effect to be given to it.

"The law of another state . . .

is nothing but a fact, and must be pleaded, as any other fact, with sufficient distinctness, that the court, upon a statement of facts, may judge of what is the effect of the law." *Roots v. Merriwether* (1871) 8 Bush (Ky.) 397.

In *Wellman v. Mead* (1919) 93 Vt. 322, 107 Atl. 396, the court said: "A complaint counting upon a statute of another state should set forth the statute and facts so specifically that the court can see that the plaintiff has a right of action against the defendant."

In *Cubbedge v. Napier* (1878) 62 Ala. 518, it was said with reference to pleading the usury statute of another state: "If the usury consists in the violation of the law of a state other than that in which the enforcement of the contract is sought, the law is matter of fact, which must be pleaded with the certainty that any extrinsic fact must be pleaded, which is essential to a right of action, or to constitute a defense. The pleader may be well satisfied of his construction of the foreign law, and may assert it as the law itself; that is not his province. The law must be substantially stated."

In *Benham v. Mornington* (1846) 4 Dowl. & L. 213, 3 C. B. 133, 136 Eng. Reprint, 54, 15 L. J. C. P. N. S. 221, 10 Jur. 618, an averment "that, by reason of the premises, the said supposed writing obligatory, by the law of the said Kingdom of France, never was, nor is, obligatory or binding on the defendant," was held bad on the ground that it averred the said law of France only by inference, and was not, therefore, sufficiently certain.

In *Showalter v. Rickert* (1902) 64 Kan. 82, 67 Pac. 454, it was held merely that when pleading a foreign statute it is sufficient to plead the substance thereof.

3. Statute of Descent and Distribution.

In *Berney v. Drexel* (1884) 33 Hun (N. Y.) 34, an allegation that, "under and by virtue of the laws of France, where the testator had his domicil, the title to all the personal property of which said testator was possessed at the time of his decease vested immediately thereafter in the plaintiffs,

other than the widow," was held not to be a pleading of a legal proposition or conclusion, but a statement of fact under which the plaintiffs might prove the laws of France.

So, in *Sultan of Turkey v. Tiryakian* (1915) 213 N. Y. 429, 108 N. E. 72, affirming order in (1914) 162 App. Div. 613, 147 N. Y. Supp. 978, it was held that an allegation in a complaint to the effect that by the law of Turkey it was provided, with reference to the estates of decedents, that title should vest in the Sultan of Turkey, amounted to a statement of the legal effect of the law, and was therefore sufficient.

Similarly, a pleading alleging that "by the laws of said commonwealth [Massachusetts], the plaintiff is now, and always has been, competent to take and hold said legacy, and to sue for and recover the same, . . . [and] it was, and still is, the law of said commonwealth that incorporated and unincorporated religious societies may appoint trustees, not exceeding five in number, to hold and manage bequests for their benefit," has been held to be sufficient to authorize proof of the law of Massachusetts. *Congregational Unitarian Soc. v. Hale* (1898) 29 App. Div. 396, 27 N. Y. Civ. Proc. Rep. 303, 51 N. Y. Supp. 704.

But in *Temple v. Brittan* (1889) 11 Ky. L. Rep. 467, 12 S. W. 306, wherein it was alleged merely that under the statutes of descent and distribution of a foreign state the estate of an intestate passed to certain sole heirs, the allegation was held not to be equivalent to a statement of fact, but to be a mere conclusion or interpretation of the law by the pleader.

4. Statute relating to procedure.

In *O'Reilly, S. & F. Co. v. Greene* (1896) 18 Misc. 423, 75 N. Y. S. R. 1416, 41 N. Y. Supp. 1056, an averment that, "under and pursuant to" the laws of West Virginia, suits may be brought in the name of a corporation, under the circumstances disclosed in the case at bar, was held to be sufficient.

In *M'Leod v. Schultze* (1844) 1 Dowl. & L. (Eng.) 614, 13 L. J. Exch. N. S. 321, a plea was held to be sufficient, without setting forth the foreign

law, which averred that a certain sum due on a policy of insurance was duly "fenced and arrested" according to the law of Scotland, at the suit of a third person for a debt due him, until sufficient caution should be found in the books and session, that the same should be forthcoming to such third person; that thereupon the sum became and was, according to the law of Scotland, in custody of the law, and subject to the order of the court of session; that such proceedings were had, and the third person obtained final judgment; so that the assignees of a bankrupt were precluded and wholly barred, by the law of Scotland, from suing for the said sum.

But in *Holmes v. Broughton* (1833) 10 Wend. (N. Y.) 75, 25 Am. Dec. 536, a general averment to the effect that certain proceedings were had, "according to the laws of the state of Vermont, and fully authorized thereby," was held to be insufficient.

And in *Wellman v. Mead* (1919) 93 Vt. 322, 107 Atl. 396, an allegation in a complaint that, "under and by virtue of the laws of the commonwealth of Massachusetts, an action has accrued to the plaintiff to have and recover his damages herein stated, which cause of action is prosecuted in accordance with the laws of the state of Vermont," was held to be insufficient.

5. Statute relating to bills and notes.

In *Caras v. Thalmann* (1910) 138 App. Div. 297, 123 N. Y. Supp. 97, an action to recover on a bill of exchange, drawn in two parts, payable in France, wherein it appeared that one part of the bill had been paid, it was held that an allegation in the complaint to the effect that, under certain provisions of the French Code of Commerce, a person who pays a bill of exchange at maturity and without opposition is presumed to be validly discharged, was sufficient as an allegation of the law of France that payment of one part of the bill was a valid payment and discharged the drawee.

But, in *Colcord v. Banco de Tamauilipas* (1918) 131 App. Div. 295, 163 N. Y. Supp. 710, the court said, with reference to the statute law of Mexico,

governing the negotiation of drafts: "That law is so inartificially pleaded that it is not made applicable to the state of facts set forth. It is said that 'in and by the law of Mexico it was then and there provided' that the drawee must accept or refuse acceptance at a certain time, but whether this law was in effect when the transactions in question occurred does not appear. It is also alleged that 'it is also' the law of Mexico that, if the drawee allows a day to pass without returning the draft, he will be liable. But this allegation is also vague as to time, and it does not clearly show that the law was to the effect quoted when the transactions between the parties were had. For all these reasons, the demurrer to the second cause of action should also have been sustained."

In *Forsyth v. Preer* (1878) 62 Ala. 443, an allegation in the answer, to the effect that the plaintiff storekeepers, in default of having their weights and measures inspected and tested, were "prohibited from collecting any account, note, or other writing, the consideration of which is any commodity sold by their weight and measure, by the laws of the state of Georgia," was held to be insufficient.

And in *Roots v. Merriwether* (1871) 8 Bush (Ky.) 397, it was held that an allegation in an amended petition, to the effect that "by the law of Illinois" the defendant was indebted to the plaintiff in the amount of a certain note, was insufficient.

6. Statute relating to usury.

An averment that, by the law of a foreign state, the rate of interest was fixed at 7 per cent, and that "the effect of the law was to annul and render void all contracts for usury," has been held to be a mere statement of the conclusions of the pleader, and therefore insufficient. *Cubbedge v. Napier* (1878) 62 Ala. 518.

7. Statute relating to contracts.

In *Lomb v. Pioneer Sav. & L. Co.* (1891) 96 Ala. 430, 11 So. 154, an averment that "according to the laws of Minnesota" a certain mortgage contract was legal and valid was held to be insufficient.

Likewise, in *Bean v. Briggs* (1857) 4 Iowa, 464, it was held that it was not sufficient for a defendant to plead in his answer that the plaintiff could not recover on a contract of indorsement on a certificate of deposit by reason of the statute of another state, but he must plead the particular statute relied on, and set it out, as he would any other fact in the case.

8. Statute of Limitations.

In *Showalter v. Rickert* (1902) 64 Kan. 82, 67 Pac. 454, an allegation to the effect that a pretended cause of action was fully barred by the provisions of a foreign statute limiting the time within which to bring action for the recovery of money on contract, express or implied, not in writing, to two years after the cause of action arose, was held to be good.

9. Miscellaneous statutes.

In *Consolidated Tank Line Co. v. Collier* (1893) 148 Ill. 259, 39 Am. St. Rep. 181, 35 N. E. 756, an averment that certain instruments in writing were "duly acknowledged and delivered, in accordance with the laws of Iowa," was held to be a sufficient pleading of the sufficiency of the

acknowledgment under the laws of Iowa.

In *Louisville, N. A. & C. R. Co. v. Shires* (1884) 108 Ill. 617, an averment that, under the laws of a foreign state, a municipality was duly incorporated and possessed full power to regulate by ordinance the operation of trains, cars, and engines on railroads within its limits, was held to be sufficient.

In *Swing v. Wanamaker* (1910) 139 App. Div. 627, 124 N. Y. Supp. 231, an averment that certain contracts of insurance were void by reason of the failure of the insurance company to comply with the laws of a foreign state obligatory on insurance companies of other states seeking to transact business in that state was held to be sufficient.

But in *Rothschild v. Rio Grande Western R. Co.* (1890) 26 Abb. N. C. (N. Y.) 312, an allegation to the effect that, under the laws of another state, certain debts against several companies and corporations consolidating into a new corporation respectively attached against the new corporation and became enforceable against it to the same extent as if the debts had been incurred or contracted by it, was held to be bad on demurrer. L. F. C.

CHARLES L. GAY, Respt.,

v.

LAVINA STATE BANK, Appt.

Montana Supreme Court — December 5, 1921.

(— Mont. —, 202 Pac. 753.)

Broker — insurance — liability for failure to secure policy.

1. A broker taking money to secure insurance, who unjustifiably fails to secure the same, or to make an effort to do so, becomes liable, in case of loss, to pay as much of the same as would have been covered by the policy had it been secured.

[See note on this question beginning on page 1214.]

Appeal — theory of trial — binding effect.

2. The theory upon which a case is tried with the acquiescence of the parties is binding upon them upon appeal.

[See 2 R. C. L. 183.]

Insurance — broker — definition.

3. A bank engaged in receiving applications for insurance without employment from any special company, and placing the insurance in any company selected by the assured or itself, is an insurance broker.

[See 14 R. C. L. 868.]

APPEAL by defendant from a judgment of the District Court for Musselshell County (Jones, J.) in favor of plaintiff, and from an order overruling a motion for new trial, in an action brought to recover damages for breach of a contract to procure a policy of insurance applied for by plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. V. D. Dusenbery, for appellant:

Even if a contract to procure insurance had been alleged in the complaint and proven on the trial, the action could not be maintained, for the reason that the defendant was acting as agent for the Hartford Fire Insurance Company, a disclosed principal, and the principal alone would be liable.

22 Cyc. 1427-1432; 14 R. C. L. pp. 875, 876; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; Steele v. German Ins. Co. 93 Mich. 81, 18 L.R.A. 85, 53 N. W. 514; Home Ins. Co. v. Strange, 70 Ind. App. 49, 123 N. E. 127; 2 C. J. 712; J. C. Smith & W. Co. v. Prussian Nat. Ins. Co. 68 N. J. L. 674, 54 Atl. 458; British American Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147; Rockford Ins. Co. v. Winfield, 57 Kan. 576, 47 Pac. 511; Mooney v. Merriam, 77 Kan. 305, 94 Pac. 263; Ramspeck v. Pattillo, 104 Ga. 772, 42 L.R.A. 197, 69 Am. St. Rep. 197, 30 S. E. 962; British Ins. Co. v. Lambert, 26 Or. 199, 37 Pac. 909; Pflester v. Missouri State L. Ins. Co. 85 Kan. 97, 116 Pac. 245; Blake v. Farmers' Mut. Lightning Protected F. Ins. Co. 194 Mich. 589, 161 N. W. 890; Criswell v. Riley, 5 Ind. App. 496, 30 N. E. 1101; Wallace v. Hartford F. Ins. Co. 31 Idaho, 481, 174 Pac. 1009.

The verdict should be set aside for the reason that, even if there was an agreement to procure insurance made between the plaintiff and the defendant, the evidence fails to show any breach of the agreement.

British America Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147.

Messrs. Dillavou & Moore and W. W. Mercer, for respondent:

Defendant was liable for failure to procure the insurance.

22 Cyc. p. 1448; Tanenbaum v. Rosenthal, 44 App. Div. 431, 60 N. Y. Supp. 1092; Rezac v. Zima, 96 Kan. 752, 153 Pac. 500, Ann. Cas. 1918B, 1085; Wallace v. Weaver, 47 Mont. 437, 133 Pac. 1099.

The defense that the contract from which the claim sued for arises is illegal must be specifically pleaded.

State Sav. Bank v. Albertson, 39

Mont. 414, 102 Pac. 692; Owens v. Davenport, 39 Mont. 555, 28 L.R.A. (N.S.) 996, 104 Pac. 682.

The general rule that an agent cannot act for both parties does not apply where the interests of the two principals are not conflicting, and loyalty by the agent to one of them is not a breach of his duty to the other, as where the agent exercises no discretion in the matter, but acts merely to bring the parties together.

2 C. J. 713; German Ins. Co. v. Independent School Dist. 25 C. C. A. 492, 49 U. S. App. 271, 80 Fed. 366; Todd v. German American Ins. Co. 2 Ga. App. 789, 59 S. E. 94; Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

A party may not adopt a theory on appeal which was not relied upon in the trial court, and insist upon a new trial because of the same.

Dempster v. Oregon Short Line R. Co. 37 Mont. 335, 96 Pac. 717; Cohen v. Clark, 44 Mont. 151, 119 Pac. 775; Farwell v. Farwell, 47 Mont. 574, 133 Pac. 958, Ann. Cas. 1915C, 78; Raiche v. Morrison, 47 Mont. 127, 130 Pac. 1074; Aikens v. Frank, 21 Mont. 192, 53 Pac. 538.

In an action against an agent to recover damages for a breach of contract to insure the principal's property, the measure of damages, in case of the destruction of the property, is the value thereof, up to the amount for which it was agreed that insurance should be procured.

Morris v. Summerl, 2 Wash. C. C. 203, Fed. Cas. No. 9,837; Alabama Red Cedar Co. v. Tennessee Valley Bank, 200 Ala. 622, 76 So. 980; Criswell v. Riley, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901; Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726; Rezac v. Zima, Ann. Cas. 1918B, 1040, note.

Galen, J., delivered the opinion of the court:

In this case it appears that the defendant, at all of the times mentioned, was a banking corporation organized under the laws of the state of Montana, conducting a

banking business at Lavina, Montana. In connection with its business, it was engaged in the writing of hail insurance for the Hartford Fire Insurance Company of Hartford, Connecticut, and other companies, for the accommodation of customers. A. C. Bayers, who was vice president of the defendant bank, was the local insurance agent of the Hartford Insurance Company at Lavina, but the insurance business was conducted by the bank, and the profits derived therefrom went to the bank, although done in the name of A. C. Bayers, agent. Applications for such insurance were received by any of the officers or agents of the bank, and this method of handling the business was known to and approved by the insurance company. The plaintiff, a farmer owning crops growing in the vicinity of Lavina, on June 1st, 1918, visited the defendant bank, and there interviewed William Bargain, one of its bookkeepers, then in charge of the bank, concerning hail insurance covering such crops, and a small overdraft due the bank. Bargain accepted for the bank plaintiff's promissory note for the sum of \$20, to cover the plaintiff's overdraft, amounting to \$9.13, and credited the balance of the \$20 note to plaintiff's account. At plaintiff's request, Bargain filled out an application for hail insurance, and plaintiff signed the same, such application being made out upon the form provided by the Hartford Fire Insurance Company, and reciting in part as follows: That Charles L. Gay of Broadview postoffice, in the county of Yellowstone, state of Montana, makes application to the Hartford Fire Insurance Company of Hartford, Connecticut, for insurance upon growing crops, consisting of 65 acres of wheat at \$10 per acre, amount \$650, and 35 acres of alfalfa at not to exceed \$10 per acre, amount \$350, against damage by hail for the year 1918, to the amount of \$1,000, to be covered by such insurance from the date of the signing of the application to Sep-

tember 15, 1918, at noon, standard time; it being declared in the application that the total number of acres for which insurance was applied for was 100, and that the applicant was a tenant of the land described, and that the application was made with the specific reference to the "policy stipulations and agreements" attached to the application, and the statements and representations made in the application. The plaintiff executed his promissory note for \$100, covering the amount of the insurance premium, and delivered it to Bargain which note is dated at Lavina, Montana, June 1, 1918, payable November 1st after date, to the order of Lavina State Bank, Lavina, Montana. The plaintiff's crops were destroyed by hail on August 20, 1918, and this action was brought by the plaintiff on September 10, 1918, to recover the sum of \$1,000 damages on account of the loss of such crops. The action is for breach of contract due to defendant's failure to procure the policy of insurance applied for by the plaintiff.

In defense it was contended, and proof was introduced at the trial to show, that the application for the insurance, and the promissory note covering the premium received, were received and accepted upon the express understanding and condition that the transaction should meet with the approval of P. A. Teichroew, cashier of the bank, and that until such time the insurance would not be put in force; that, upon the return of Mr. Teichroew to the bank a few days later, he refused to accept the note unless it was secured, and that thereupon Mr. Bargain wrote a letter and mailed it to the plaintiff at Broadview, advising that security was required for the insurance premium note before his application would be accepted. Bargain testified that on August 20, 1918, after the destruction of plaintiff's crops by hail, the plaintiff talked with him at Lavina over long-distance telephone from

Broadview, and admitted receiving Bargain's letter, but said he thought it could be fixed up later. The plaintiff denied that the note was given or accepted conditionally; denied receipt of the letter from Bargain, or any knowledge that the insurance was not in full force and effect until after the hailstorm and telephonic communication had with the defendant bank. The premium note and application for the policy of hail insurance were returned to the plaintiff a day or two subsequent to the hailstorm, having been theretofore pigeon-holed in the bank. The case was tried in the district court of Musselshell county, with a jury, and resulted in a verdict and judgment in plaintiff's favor for the sum of \$675. The appeal is from the judgment and order overruling defendant's motion for a new trial.

Several alleged errors are assigned as reason for reversal, but in our view but one question is necessary for consideration for complete disposition of the case, presented by motion for a directed verdict, and made defendant's first specification of error; that is, whether the defendant bank may be held in damages for its failure to procure for plaintiff a policy of insurance protecting him from loss or damage to his crops in consequence of hail. As to whether it was an executory or executed contract for insurance constituted a question of fact for the jury, and upon the controverted evidence the jury resolved the issue in favor of the plaintiff. We are bound by the jury's findings in this regard, so that we have before us the application for insurance and promissory note for premium, both executed by the plaintiff and accepted by the bank, and question arises as to the bank's liability to respond in damages for plaintiff's loss, in consequence of the defendant's failure to secure the crop insurance applied for.

The complaint alleges that the contract for breach of which the

damages are sought is one by which "the defendant undertook and agreed to insure" the growing crops described; but no contention was made by the defendant in its answer or at the trial that the contract was anything more than one to procure insurance on plaintiff's crops. The trial proceeded throughout on the latter theory, evidence being admitted in support thereof without objection, and we will accept the same without further inquiry. The theory upon which

Appeal—theory of trial—binding effect.

with the acquiescence of the parties, is binding upon them here. *Talbott v. Butte City Water Co.* 29 Mont. 17, 73 Pac. 1111; *Hendrickson v. Wallace*, 29 Mont. 507, 75 Pac. 355; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775; *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Nilson v. Kalispell*, 47 Mont. 416, 132 Pac. 1133; *Farwell v. Farwell*, 47 Mont. 574, 133 Pac. 958, Ann. Cas. 1915C, 78; *Wallace v. Weaver*, 47 Mont. 437, 133 Pac. 1099; *Mosher v. Sutton's New Theater Co.* 48 Mont. 137, 137 Pac. 534; *Roberts v. Sinnott*, 55 Mont. 369, 177 Pac. 252; *Babcock v. Engel*, 58 Mont. 597, 194 Pac. 137; *Hoskins v. Scottish Union & Nat. Ins. Co.* 59 Mont. 50, 195 Pac. 837. No question was raised by the pleadings or otherwise as to whether the contract of the defendant bank was ultra vires, so that subject is passed without consideration, and no opinion is expressed thereon.

The action is one founded on contract rather than tort, and, from the facts stated, it appears that the defendant bank was acting as an insurance broker rather than as an insurance agent. It was applied to by the plaintiff for hail insurance, and it accepted and received an application for such insurance with the Hartford Fire Insurance Company, whose agent at Lavina was A. C. Bayers, vice president

of the defendant bank. It was in position to accept and receive applications for hail insurance with other companies, but, as no company was specially designated by the

**Insurance—
broker—definition.**

plaintiff, his application was by the defendant bank made to the Hartford Fire Insurance Company. This clearly brings the defendant within the definition of an insurance broker, as follows: "An insurance broker is one who acts as a middleman between the assured and the insurer, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with a company selected by the assured, or, in the absence of any selection by him, then with a company selected by such broker." 14 R. C. L. 868; 9 C. J. 509.

Every broker is in a sense an agent, but every agent is not a broker. The chief feature which distinguishes a broker from other classes of agents is that he is an intermediary, or middleman, and, in accepting applications for insurance, acts in a certain sense as the agent of both parties to the transaction. Another distinction is that the idea of exclusiveness enters into an employment of agency, while in respect to a broker there is a holding out of oneself generally for employment in securing insurance. 9 C. J. 510, 511.

"An agent who takes his principal's money under an express agreement to procure insurance, and unjustifiably fails to secure the same or make an effort in that direction,

Broker—insurance—liability for failure to secure policy.

thereby assumes the risk and becomes liable, in case of loss, to pay as much of the same as would have been covered by the insurance policy for which his principal had paid, provided the same had been procured as directed." Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726.

In the case of Rezac v. Zima, 96 Kan. 752, 153 Pac. 500, Ann. Cas.

1918B, 1035, Mr. Chief Justice Johnston, speaking for the court, stated the correct rule as follows: "Brokers are equally liable where they undertake to procure insurance and utterly neglect to obtain any insurance, or fail to carry out material provisions of their agreement, and a loss results. In such a case they are liable for as much as would have been covered by the insurance which they agreed to procure"—citing Milliken v. Woodward, 64 N. J. L. 444, 45 Atl. 796; Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726; Sawyer v. Mayhew, 51 Me. 398; Diamond v. Duncan, — Tex. Civ. App. —, 138 S. W. 429; Mallery v. Frye, 21 App. D. C. 105; Criswell v. Riley, 5 Ind. App. 496, 503, 30 N. E. 1101, 32 N. E. 814; Backus v. Ames, 79 Minn. 145, 81 N. W. 766; Kaw Brick Co. v. Hogsett, 73 Mo. App. 432; note in 38 L.R.A.(N.S.) 631.

And, as between the insured and his own agent or broker, authorized by him to procure insurance, there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust reposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance, and fails to do so, he is liable to his principal for the damage suffered by reason of the want of such insurance. The liability of the agent with respect to the loss is that which would have fallen upon the company had the insurance been effected as contemplated. Negligence on the part of the agent, defeating in whole or in part the insurance which he is directed to secure, will render him liable to his principal for the resulting loss. 22 Cyc. 1448, 1449.

The only case which has been called to our attention, presenting facts almost identical with the case before us, is that of Mayhew v. Glazier, 68 Colo. 350, 189 Pac. 843, wherein Mr. Justice Allen, for the court, used language, from which we quote with approval as

particularly applicable to the case before us, as follows: "It may be assumed that the plaintiff understood that Mayhew was an agent for an insurance company, but that fact tends to prove, rather than to disprove, the existence of an agreement, such as that alleged in the complaint, between the plaintiff and the defendant Mayhew in his individual capacity. If the plaintiff believed that Mayhew was an insurance agent, he would naturally believe that such agent could cause a policy to be issued, and, if desiring insurance, might give to such agent an application for insurance. Such was the situation between the plaintiff and the defendant Mayhew. The plaintiff desired hail insurance, effective at the earliest possible moment. He gave the defendant his promissory note, payable to the defendant himself, as payment for the premium, with the understanding that the defendant would cause a policy to be issued without any delay. . . . The contract sued upon, alleged to have been made between the plaintiff and the defendant Mayhew, did not conflict with any duty Mayhew owed to the insurance company. Mayhew was the agent of the insurance company for the purpose of soliciting applications for hail insurance, but had no authority to issue policies. . . . The contract made between the plaintiff and the defendant Mayhew was not against the interests of the insurance company. It did not call for the issuance of a policy different from the policies usually issued. It did not deprive the company of any premium due it. Mayhew took the note of plaintiff to himself. . . . Whatever duty he owed to the company, it did not preclude him from acting as the agent for the insured in the matter of causing a policy to be issued, and in the matter of immediately forwarding plaintiff's application for insurance to the company, or to some agent authorized to receive and approve such application. This case falls within the rule, stated in

22 Cyc. 1445, that 'the same person may act for different purposes as agent of the different parties to the contract, so that for one purpose he may be the agent of the insured, although as to the procuring of the insurance he also represents the company.' As above indicated, we find that the alleged contract, upon which the plaintiff brought this action, was one made by the defendant Mayhew in his individual capacity, and not as an agent of the insurance company, and that such contract is valid."

From the record presented on this appeal, the defendant cannot escape liability, and the judgment and order are affirmed.

Brantly, Ch. J., specially concurring:

Upon the theory that the defendant in this case, a banking corporation, could lawfully conduct an insurance business, there is no objection to be made to the conclusion reached by my associates. Since, however, the defendant is a banking corporation, and, in my opinion is presumptively not authorized by its charter to enter into contracts, either of insurance or to procure insurance, the contract upon which recovery is upheld in this case is *prima facie* invalid. This question seems not to have been agitated in the trial court, nor has it been presented by appellant in this court. I, therefore, concur in the affirmation of the judgment and order, but in doing so desire not to be understood as assenting to any implication that may be drawn from the opinion to the contrary, in any case in which the question may hereafter be presented.

NOTE.

The liability of broker or agent for failure to procure or keep up insurance is considered in the annotation following *ELAM v. SMITHDEAL REALTY & INS. CO.* post, 1214.

I. R. ELAM, Appt.,
v.
SMITHDEAL REALTY & INSURANCE COMPANY.

North Carolina Supreme Court—December 7, 1921.

(— N. C. —, 109 S. E. 632.)

Insurance — liability of broker for failure to secure policy.

1. Where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and, within the amount of the proposed policy, he may be held liable for the loss properly attributable to his negligent default.

[See note on this question beginning on page 1214.]

Evidence — parol of negotiations for insurance policy — action against broker.

2. The rule that a policy of insurance, when issued, is considered as expressing the contract between the parties so as to shut off evidence of prior parol assurances in contravention of the written policy, has no application in a suit against the broker for failure to furnish the policy contracted for.

Contract — consideration — agreement to secure insurance policy.

3. The trust and confidence imposed in a broker employed to secure insurance on property afford a sufficient consideration for his undertaking to carry out the instructions given.

— promise to take policy as consideration.

4. The promise by a property owner to take a policy of insurance for the securing of which he employs a broker is a sufficient consideration for the broker's undertaking to carry out his instructions with respect to the policy.

— breach — duty to minimize loss.

5. In case of breach of contract which is definite and entire, or of tort committed, the injured person must do whatever reasonable care and business prudence require to minimize the loss.

[See 8 R. C. L. 442.]

Trial — question for jury — effect of failure to read policy.

6. Whether or not the failure of the

owner of an automobile to read the policy insuring the car is responsible for loss, due to its failure to cover a risk from which loss results, is a question for the jury, where the policy was delivered to a third person for him, and kept in the latter's safe, while on several occasions the broker, in his presence, referred to the policy as covering the desired risk.

Election of remedies — contract or tort — breach of duty by agent.

7. The principal may ordinarily elect to sue for breach of contract or in tort for failure of his agent to perform a duty involved in the agency contract.

[See 9 R. C. L. 966.]

Principal and agent — breach of duty — action for negligence — effect of employer's negligence.

8. In an action against a broker for breach of contract to secure a specified form of insurance on his employer's property, negligence of the owner contributing to the loss will not defeat the action in toto.

Damages — breach of contract to secure insurance policy — nominal.

9. Nominal damages only can be recovered for breach by a broker of his undertaking to secure a specified form of insurance on his employer's property, where the employer contributed to the loss by negligent failure to ascertain the defect in the policy delivered to him.

APPEAL by plaintiff from a judgment of the Superior Court for Forsyth County (Webb, J.) granting a nonsuit in an action brought to recover damages for breach of a contract to procure a policy of insurance protecting plaintiff's automobile against damage by collision. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Parrish & Deal, for appellant:

An insurance agent or broker who undertakes to obtain insurance of a specified kind, who subsequently informs the insured that he has obtained such insurance, upon which statement the insured relies, but who fails to obtain it, to the injury of the insured, is liable for such failure.

Ann. Cas. 1918B, 1035, and note; *Rezac v. Zima*, 96 Kan. 752, 153 Pac. 500; *Travelers' Ins. Co. v. Thorne*, 38 L.R.A.(N.S.) 631, and note, 103 C. C. A. 436, 180 Fed. 82; *Wallace v. Hartford F. Ins. Co.* 31 Idaho, 481, 174 Pac. 1009.

The same person may act as agent for both the insurer and insured, so long as the interests of the two principals are not incompatible.

Bond v. National F. Ins. Co. 83 W. Va. 105, 97 S. E. 692; *American F. Ins. Co. v. King Lumber & Mfg. Co.* 74 Fla. 130, 77 So. 168; *Taylor v. Liverpool & L. & G. Ins. Co.* 68 Pa. Super. Ct. 302.

No acquiescence or waiver by plaintiff of his rights against the defendant arose out of the delivery of the policies to him and their acceptance.

25 Cyc. 727; *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; *Jones v. Gilbert*, 93 Ga. 605, 20 S. E. 48; *Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375.

Messrs. Holton & Holton, Swink & Hutchins, and O. O. Efrid for appellee.

Hoke, J., delivered the opinion of the court:

There was evidence on the part of plaintiff tending to show that on or about March 31, 1919, the plaintiff entered into a contract with defendant company, doing business, among other things, as insurance agents and brokers, to procure a policy of \$5,000 on the car of defendant, affording protection against damage by fire, or collision, or other kind of accident; that shortly thereafter the said agent came to plaintiff, who was at the time presently engaged at his business in a tobacco warehouse, and told witness he had obtained the policy desired and had left same for plaintiff at

the garage with the proprietor, who had put the policy in the latter's safe; plaintiff, with a view of then paying the premium, asked for the amount, and was told by the agent, an officer, and one of the owners of the defendant company, that plaintiff had sixty days in which to pay the premium, and it appeared that the premium was paid after the accident, and after suit was instituted against defendant; that within a week from this time, or near that, plaintiff's car, in a collision, sustained damages to the amount of \$1,000, and, on application or preparation through the same agent for adjustment with the insurance company which had issued the policy, it was ascertained that the policy did not extend to or cover such damages. There was evidence to the effect, further, that during the time the policy remained in the safe and before the injury, when plaintiff's car had a near accident, but sustained no pecuniary damage, the agent had assured plaintiff that in any event plaintiff was protected, as the policy he had procured covered risks of that kind, and that on another occasion, when the owner of another car was about to procure insurance against accident and collision through defendant, plaintiff being present, the agent, referring to plaintiff, said he had a policy of the kind on the car owned by him, and also that when plaintiff reported the loss, and it was found on examination that the risk was not covered, the same agent, Mr. Smithdeal, expressed his regret, saying: "Mr. Elam I misrepresented this to you, and I am just as sorry as you are. I thought you were insured."

Upon this statement of the facts chiefly pertinent to the inquiry we are of opinion that the judgment of nonsuit should be set aside, and the cause submitted to the jury. It is very generally held that, where an insurance agent or broker undertakes to procure a policy of insurance for another, affording pro-

tection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty

Insurance—liability of broker for failure to secure policy.

he has assumed, and, within the amount of the proposed policy, he may be held liable for the loss properly attributable to his negligent default. *Rezac v. Zima*, 96 Kan. 752, 153 Pac. 500, reported also in *Ann. Cas.* 1918B, 1035; *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. 312; *Backus v. Ames*, 79 Minn. 145, 81 N. W. 766; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Evan L. Reed Mfg. Co. v. Wurts*, 187 Ill. App. 379; *Fellowes v. Gordon*, 8 B. Mon. 415; *Mechem, Agency*, § 1258.

In resistance to the application of the principle to the facts of the present record, we are cited to a number of authorities to the effect that a policy of insurance, when issued, is considered as expressing the contract between the parties and has the effect of shutting off prior or contemporaneous parol inducements and assurances in contravention of the written policy. The position, in proper instances, is very generally recognized, and has been approved in many cases in this jurisdiction. *Clements v. Life Ins. Co.* 155 N. C. 61, 62, 70 S. E. 1076; *Floars v. Aetna L. Ins. Co.* 144 N. C. 232, 11 L.R.A.(N.S.) 357, 56 S. E. 915. But in the instant case the action is not one against the insurance company, in which plaintiff is seeking to hold it liable for an obligation not contained in the written policy, but plaintiff sues the agent and broker for negligent failure to perform

Evidence—parol of negotiations for insurance policy—action against broker.

a duty he had undertaken and assumed as agent, by which plaintiff has suffered the loss complained of, and in our opinion the authorities cited are not apposite to the question presented on the record.

It is further insisted for defendant that no cause of action is dis-

closed, because there is no consideration given for defendant's promise, but the better-considered decisions on the subject are to the effect that, while the agent or broker in question was not obligated to assume the duty of procuring the policy, when he did so, the law imposed upon him the duty of performance in the exercise of ordinary care, and as a matter of contract it is said in some of the cases on the subject that the trust and confidence reposed in him as agent afforded a sufficient consideration for the undertaking and carrying out the instructions given. *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814. And in *Evan L. Reed Mfg. Co. v. Wurts*, 187 Ill. App. 386, Presiding Justice Baume, delivering the opinion, quotes with approval from 1 Joyce on Insurance, § 687, as follows: "If a person voluntarily, without consideration, and without expectation of remuneration or reward, agrees to procure an insurance, and actually takes steps in the matter, he is responsible for misfeasance, and if he proceeds to effect a policy, and is so negligent and unskilled that no benefit is derived therefrom, he is liable, although he was not bound to undertake the performance."

Contract—consideration—agreement to secure insurance policy.

And it would seem that the promise to take the policy would suffice as a consideration. Again, it is contended that defendant may not be held liable for this loss because of his own negligent default in not ascertaining the contents of the policy, and having taken out a policy which would have afforded him the protection he desired. It is an established principle with us, subject to some qualifications not pertinent to this inquiry, that in case of breach of contract which is definite and entire, or tort committed, it is incumbent upon the injured party to do

—promise to take policy as consideration.

—breach—duty to minimize loss.

what reasonable care and business

(— N. O. —, 109 S. E. 632.)

prudence require to minimize the loss, and for damages thereafter occurring, and incident to his own breach of duty, no recovery should be allowed, the same being regarded as too remote (*Yowmans v. Hendersonville*, 175 N. C. 574-579, 96 S. E. 45; *Hocutt v. Western U. Teleg. Co.* 147 N. C. 193, 60 S. E. 980; *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 143 N. C. 54, 55 S. E. 422; 8 R. C. L. 442); and it is also held with us, in accord with principles very generally prevailing, that where a person of mature years, of sound mind, who can read or write, signs or accepts a deed or formal contract affecting his pecuniary interest, it is his duty to read it, and knowledge of the contents will be imputed to him in case he has negligently failed to do so. But this is subject to the qualification that nothing has been said or done to mislead him, or to put a man of reasonable business prudence off his guard in the matter. *Clements v. Life Ins. Co.* supra; *Floars v. Aetna L. Ins. Co.* 144 N. C. 233, 11 L.R.A. (N.S.) 357, 56 S. E. 915—the latter citing among the authorities *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246.

In the present case, as it now appears, there are facts in evidence tending to show that plaintiff had the policy in his possession for some little time before the collision, and from reading it he could have ascertained that it did not afford any protection in case of collision. There are facts further to the effect that the policy was not delivered to him personally, but at a time when he was busily engaged in a tobacco warehouse, and same was left for him with the proprietor of the garage where his car was kept, and that several times while the policy was so placed, and before the collision, things were said and done by the agent giving assurance that the policy gave the protection contracted for; and, on application of the principles stated, we are of

opinion that the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out one sufficient to protect him.

Trial—question for jury—effect of failure to read policy.

It is ordinarily true that for breaches of duty involved in the contract of agency the principal may sue, either for breach of contract for faithfulness, or in tort for a breach of duty imposed by the same. 31 Cyc. 1609. Where, in a case of this kind, the action is for tort, and there is a negligent default on the part of plaintiff contributing to the injury, this would have the effect of defeating the action. But where the action is brought for breach of contract, and that is established, contributory negligence is not allowed to defeat the action in toto, but the negligence of the claimant contributing to the injury is to be properly considered on the issue as to damages. *Hale, Damages*, p. 68.

Election of remedies—contract or tort—breach of duty by agent.

Principal and agent—breach of duty—action for negligence—effect of employer's negligence.

In the present case plaintiff has elected to sue for breach of contract of agency causing the damages complained of, and, if this should be established, the cause will be further considered on the question of damages, and, if it is made to appear on the facts as they may be accepted by the jury that the failure to have an adequate policy affording protection is due to plaintiff's own negligent default in not ascertaining the defect in the policy held by him, and procuring another, in that event the damages would be nominal.

Damages—breach of contract to secure insurance policy—nominal.

This will be certified that the judgment of nonsuit be set aside, and the cause tried by the jury on appropriate issues.

Reversed.

ANNOTATION.

Liability of broker or agent for failure to procure or keep up insurance.

- I. General rule, 1214.
- II. Liability of agent on failure to transmit premium, 1218.
- III. Measure of damages, 1219.

I. General rule.

It may be laid down as a general rule that a broker or agent who, with a view to compensation for his services, undertakes to procure insurance on the property of another, and who fails to do so, will be held liable for any damage resulting therefrom.

United States. — *Manny v. Dunlap* (1869) *Woolw.* 372, *Fed. Cas.* No. 9,047; *Morris v. Summerl* (1808) 2 *Wash. C. C.* 203, *Fed. Cas.* No. 9,837; *Fries-Breslin Co. v. Bergen* (1909) 168 *Fed.* 360, affirmed in (1910) 99 *C. C. A.* 384, 176 *Fed.* 76, which has writ of certiorari denied in (1910) 215 *U. S.* 609, 54 *L. ed.* 347, 30 *Sup. Ct. Rep.* 410.

Colorado. — *Mayhew v. Glazier* (1920) 68 *Colo.* 350, 189 *Pac.* 843.

Georgia. — *Thomas v. Funkhouser* (1893) 91 *Ga.* 478, 18 *S. E.* 312.

Idaho. — *Wallace v. Hartford F. Ins. Co.* (1918) 31 *Idaho*, 481, 174 *Pac.* 1009.

Illinois. — *Evan L. Reed Mfg. Co. v. Wurts* (1914) 187 *Ill. App.* 378. See also *Rochis v. Milascewicz* (1918) 211 *Ill. App.* 262.

Kansas. — *Rezac v. Zima* (1915) 96 *Kan.* 752, 153 *Pac.* 500, *Ann. Cas.* 1918B, 1035.

Massachusetts. — See *Cass v. Lord* (1920) 236 *Mass.* 430, 128 *N. E.* 716.

Minnesota. — *Everett v. O'Leary* (1903) 90 *Minn.* 154, 95 *N. W.* 901; *Russell v. O'Connor* (1912) 120 *Minn.* 66, 139 *N. W.* 148.

Missouri. — *Kaw Brick Co. v. Hogsett* (1898) 73 *Mo. App.* 432.

Montana. — See *GAY v. LAVINA STATE BANK* (reported herewith) ante, 1204.

New Hampshire. — *Ela v. French* (1841) 11 *N. H.* 356.

North Carolina. — See *ELAM v. SMITHDEAL REALTY & INS. CO.* (reported herewith) ante, 1210.

Pennsylvania. — See *French v. Reed* (1813) 6 *Binn.* 308.

South Dakota. — *Lindsay v. Pettigrew* (1894) 5 *S. D.* 500, 59 *N. W.* 726.

Texas. — See *Diamond v. Duncan* (1915) 107 *Tex.* 256, 172 *S. W.* 1100, affirming (1911) — *Tex. Civ. App.* —, 138 *S. W.* 429, rehearing denied in (1915) 107 *Tex.* 260, 177 *S. W.* 955.

Wisconsin. — *Gegare v. Fox River Land & Loan Co.* (1913) 152 *Wis.* 548, 140 *N. W.* 305.

Canada. — *Rudd Paper Box Co. v. Rice* (1912) 20 *Ont. Week. Rep.* 979, 3 *Ont. Week. N.* 534, 3 *D. L. R.* 253.

"An agent who takes his principal's money under an express agreement to procure insurance, and unjustifiably fails to secure the same or make an effort in that direction, thereby assumes the risk and becomes liable, in case of loss, to pay as much of the same as would have been covered by the insurance policy for which his principal had paid, provided the same had been procured as directed." *Lindsay v. Pettigrew* (*S. D.*) *supra*.

Mayhew v. Glazier (*Colo.*) *supra*, was an action for breach of contract brought by the plaintiff in an endeavor to recover damages for the loss of a portion of his crop of beans as a result of a hailstorm. It was alleged in the complaint that the defendant had agreed to cause a policy of hail insurance to be issued by a certain company on 80 acres of beans owned by the plaintiff, and that he had accepted the plaintiff's promissory note in payment of the premium; that he had, however, neglected to forward the application, and that the beans were uninsured at the time of the hailstorm by which they were partially destroyed. It was held that a cause of action was stated. It was objected by the defendant that no agent can be bound by a contract which he makes for a disclosed principal, but it was said by the court that in the case of the present agreement the defendant was not acting as the agent of the insurance company; that the plaintiff relied on the defendant personally to effect the insurance. It

was further objected that an agent cannot make a valid contract where, in the same transaction, he acts as agent for both the insurer and the insured. But it was held that this rule was inapplicable in the case at bar, since the alleged contract did not conflict in any way with any duty owed by the defendant to the insurance company. The court held that there was no error in denying the defendant's motion for nonsuit and his later request for a directed verdict.

If an agent is in the habit of effecting insurance for his correspondent, and is directed to procure such insurance, but neglects to do so, he will be answerable for the losses as insurer, and is entitled to a premium as such. *Morris v. Summerl* (1808) 2 Wash. C. C. 203, Fed. Cas. No. 9,837.

So, an agent will be liable if he neglects to renew a policy which has expired if he is the agent of the insured to keep the premises insured. *Thomas v. Funkhouser* (Ga.) *supra*. And see *Diamond v. Duncan* (Tex.) *supra*.

"If an agent neglects to procure insurance, or does not follow instructions when obligated so to do, or if the policy obtained is void or materially defective through the agent's fault, or if the principal suffers damage by reason of any mistake or act of omission or commission of the agent which constitutes a breach of duty to his principal, he is liable to his principal for any loss he may have sustained thereby." *Evan L. Reed Mfg. Co. v. Wurts* (Ill.) *supra*. See to the same effect, *Rudd Paper Box Co. v. Rice* (Ont.) *supra*.

The responsibility of an agent to his principal for a failure to procure insurance goes no further than to require that the agent shall carry out the instructions given him and faithfully discharge the trust reposed in him. If he is instructed to procure specific insurance, he must do so, and, if there is a general undertaking to keep the property of the principal insured, the agent is liable if he neglects to renew the insurance on the property. *Fries-Breslin Co. v. Bergen* (Fed.) *supra*.

Where insurance agents undertook

to place a person's insurance and to keep it up to the sum of \$7,000, it was held in *Kaw Brick Co. v. Hogsett* (1898) 73 Mo. App. 432, that the employment was a continuing one, the court saying: "It was a single engagement, not two contracts or agreements—the one to place and the other to maintain,—as it seems to be treated by defendant's learned counsel. And when defendants entered upon the performance thereof, as they did in placing the insurance and subsequently taking out two other policies in lieu of two canceled, then they must be held for every act of negligence or misfeasance, attributable to their conduct, which brought damage to the plaintiff." The court further said: "It can hardly be denied that the testimony in this case tends to prove that defendants agreed with plaintiff not only to place said \$7,000 insurance on plaintiff's property, but as well to keep the same insured to that amount in good solvent companies. It was an employment for a definite service for an indefinite period of time. And if there was a contractual duty imposed on defendants to place and keep said insurance on plaintiff's property, then it is clear that this duty was negligently omitted, and that plaintiff by reason thereof suffered loss. But for the defense it is contended that if there was such a promise it was unsupported by any valuable consideration, and cannot, therefore, serve as the basis of an action for damages. Conceding that defendant's agreement to place and keep \$7,000 insurance on plaintiff's property was, at the time it was made, without consideration moving from the plaintiff, and yet plaintiff may recover if defendants, notwithstanding the absence of a consideration, entered upon and in part performed their agreement. *Mechem*, in his work on Agency, § 478, thus expresses the rule with reference to these gratuitous promises: 'If in such a case the agent refuses to enter upon and perform the service at all, if his default consists in the mere not doing of a thing which he had promised to perform, and it be not a case where the law imposes upon him the duty to perform it, the fact that the per-

the promise of performance was entirely without consideration—will furnish a complete defense to a claim for damages on account of such default. This is upon the familiar ground that the nonperformance of a gratuitous executory contract constitutes no cause of action. But where, on the other hand, the agent has undertaken or entered upon the performance of the service, although it be gratuitous, it then becomes his duty to conform to the instructions given. If he were not willing to do so, he should have declined to serve; but having assumed the performance of the service, the trust and confidence reposed furnish a sufficient consideration for the undertaking to obey instructions, and a failure to do so will subject him to liability for the loss or damage occasioned thereby."

In *ELAM v. SMITHDEAL REALTY & INS. Co.* (reported herewith) ante, 1210, it was shown that the plaintiff had commissioned the defendant to procure for him certain insurance on his motor car, protecting him from damage thereto by fire or collision. Insurance was obtained by the defendant on the car, but, following a collision in which damages were sustained by the automobile, it was discovered that there was no protection furnished against accidents of such nature, although the representative of the defendant had given the plaintiff assurances to the contrary. The court, upholding the principle of the general rule stated above, holds that the judgment of nonsuit should be set aside, and the cause submitted to the jury on appropriate issues. Objection was made that there was no consideration given for the defendant's promise, but the court considers that the broker, having assumed the office of procuring the policy, had imposed on him by law the duty of performance in the exercise of ordinary care, and it is pointed out that, in some cases on the subject, the trust and confidence reposed in one as agent constitute a sufficient consideration for the undertaking and carrying out of the instruc-

tion. In *Wallace v. Hartford F. Ins. Co.* (1918) 31 Idaho, 481, 174 Pac. 1009, it was sought to recover damages for a loss by fire to the plaintiff's store. It appeared that the plaintiff had agreed to allow the codefendant, Strickfadden, the insurance company's agent, to insure the plaintiff's store in the defendant company, and had given him instructions to that effect, relying on him to procure the policy. The defendant, Strickfadden, failed to perform his agreement, and, eight days after the time the insurance was to commence, the store was, to a great extent, destroyed by fire. Speaking of the defendant, Strickfadden, the court said: "His conduct in procuring respondent not to renew his expiring policy, coupled with his failure, because of his negligence, to keep that promise, whereby respondent lost his property without the protection a policy of insurance would have afforded him, was a tort." And it was held that he was personally liable for his acts and omissions resulting in the plaintiff's damage.

In *Russell v. O'Connor* (1912) 120 Minn. 66, 139 N. W. 148, it appeared that the defendant, an insurance agent, received instructions from the owner of property to procure insurance on a certain building, of the details of which he had knowledge by virtue of prior insurance transactions between the parties, and that he undertook to insure the property by saying: "I will attend to that right away." It was held that he undertook to use reasonable diligence to get the property insured and take all steps

property by insurance, then to notify the plaintiff of his inability so to do. And whether the defendant fulfilled his obligations as to the exercise of reasonable diligence to get the property insured, and as to notifying the plaintiff of his inability so to do, were held to be questions of fact for the jury. See also *Gardner v. Hermann* (1911) 116 Minn. 161, 133 N. W. 558.

Where one undertakes to effect insurance in accordance with instructions, he impliedly undertakes to give notice to the owner in the event of his failure to procure such insurance. *Callander v. Oelrichs* (1838) 5 Bing. N. C. 58, 132 Eng. Reprint, 1026. And see *Gardner v. Hermann* (Minn.) *supra*. The duty of the agent to give his principal notice of his inability to procure insurance does not arise until after the lapse of a reasonable time in which to make due efforts to place the insurance. *Backus v. Ames* (1900) 79 Minn. 145, 81 N. W. 766.

Orgel v. Goldsmith (1920) 192 App. Div. 49, 182 N. Y. Supp. 147, was an action to recover damages for an alleged breach of duty on the part of the defendants, in failing to procure a policy of insurance for the plaintiff, or to notify him of their inability to do so. It seems a policy had been issued at the instance of the defendants, but had been canceled without their knowledge for the nonpayment of the premium, the plaintiff failing to respond to the insurance company's demand therefor. The defendants later received the premium in cash, and, as it appears, made futile attempts to secure insurance for the plaintiff elsewhere, keeping him informed of that fact, and finally advising the plaintiff to seek insurance through other brokers. Following a loss by fire, the plaintiff recovered a judgment in the courts below, which was reversed on appeal as being against the weight of the evidence.

Where an agent exercises due diligence and good faith in his effort to procure insurance as he is directed, he will not be liable if the property is destroyed before he has time to

the question whether a delay in procuring insurance is unreasonable is for the jury. *Rainer v. Schulte* (1907) 133 Wis. 130, 113 N. W. 396.

In *Rochis v. Milascewicz* (1918) 211 Ill. App. 262, it appeared that the plaintiff had obtained a judgment against the defendant, an insurance broker, in an action for a breach of contract to procure insurance. It was held that the payment of the premium was not necessary to the validity of a contract by an insurance broker to procure insurance, so as to defeat an action for the breach of such contract, especially where the payment was waived; nor could it be considered negligence barring recovery that the plaintiff waited four weeks after he had been assured by the defendant that the insurance had been sent for, but had not arrived, before seeking insurance elsewhere.

An agent will, of course, be liable to the owner of property, where he delivers to him a paper purporting to be a policy issued by an insurance company which has no existence in fact. *Vann v. Downing* (1891) 28 W. N. C. (Pa.) 259.

An agent will not be liable for his failure to procure insurance which would have been void if he had procured it in accordance with the directions of his principal. *Alsop v. Coit* (1815) 12 Mass. 40.

Before an agent can be held liable for a failure to procure insurance, there must be a valid contract to insure, and a breach thereof. A mere offer on the part of an agent to insure the owner's property will not mature into a complete and effectual contract until it is accepted by the person to whom it is made, and notice of acceptance, either actual or constructive, is given to the agent. *Prescott v. Jones* (1898) 69 N. H. 305, 41 Atl. 352. In that case it appeared that the defendants, as insurance agents, had insured the plaintiff's property in a certain insurance company until February 1, 1897; that on January 23, 1897, they notified the plaintiff that they would renew the

pany and delivering them to the insured. In order to relieve himself from liability, he must, if charged by his contract with that duty, pay over the premiums to the company, and on failure to do so he will be held liable to the insured for the loss occasioned thereby. *Antiseptic Bedding Co. v. Gurofski* (1914) 33 Ont. L. Rep. 319, 8 Ont. Week. N. 92, 21 D. L. R. 483, modified in 7 Ont. Week. N. 95.

In *Criswell v. Riley* (1892) 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814, it appeared that the plaintiff applied to his broker for insurance, which the latter undertook and agreed to procure, and, pursuant to the undertaking and agreement, he delivered to the plaintiff a certain duly executed policy, on the receipt of which the plaintiff paid to the agent the full amount of the premium. The agent failed to transmit the premium to the insurance company, or to any person authorized to receive the money for the company, such a payment being a condition precedent to the company's liability. Thereafter the property covered by the supposed insurance policy was destroyed by fire, and the plaintiff, learning for the first time that the premium had not been paid over to the company, brought suit against the agent for the loss sustained. This court, in affirming a recovery, said: "If the appellant was the agent of appellee in procuring for him the insurance, in the delivery of the policy, and collecting the premium, and through his negligence failed to pay the premium received from the appellee, by reason of which the policy was forfeited or void, then the appellant was liable for the damages sustained by the fire, by the appellee, for the amount of the loss not exceeding the amount of the insurance, and the insurance company was exempt from liability. The evidence tends to establish . . . that the appellant was the agent of the appellee in the procurement of said insurance, the payment of the premium to the insurance company after having received

therefrom, that the appellant was in no sense the agent of the insurance company; that it was through his fault and negligence in not paying over the premium to said company that the policy of insurance he undertook and agreed to procure for the appellee could not be enforced against said insurance company; and that, under the evidence in the case, the appellant became liable to the appellee for the damages found by the court." See also *Marrian v. Robbins* (1905) 102 App. Div. 214, 92 N. Y. Supp. 654.

But under a similar state of facts it was held in *Haight v. Kremer* (1872) 9 Phila. (Pa.) 50, that the agent was not liable to the insured, who compromised with the insurer for less than the amount insured for, for the difference between the amount paid and the face of the policy. The court rested its decision on the ground that the payment of a certain sum by the company, and its acceptance by the plaintiff, operated as a waiver of the objection that the premium had not been paid, and a ratification of the policy as a valid contract of insurance.

III. Measure of damages.

The measure of the liability of a broker for his failure to procure insurance is the amount that would have been due under the insurance policy, provided it had been obtained.

United States.—*Morris v. Summerl* (1808) 2 Wash. C. C. 203, Fed. Cas. No. 9,887.

Alabama.—*Alabama Red Cedar Co. v. Tennessee Valley Bank* (1917) 200 Ala. 622, 76 So. 980.

Colorado. — *Mayhew v. Glazier* (1920) 68 Colo. 350, 189 Pac. 843.

District of Columbia.—See *Emery v. Lord* (1907) 29 App. D. C. 589.

Indiana.—*Chriswell v. Riley* (1892) 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814.

Kansas.—*Rezac v. Zima* (1915) 96 Kan. 752, 158 Pac. 500, Ann. Cas. 1918B, 1035.

Minnesota. — *Everett v. O'Leary* (1903) 90 Minn. 154, 95 N. W. 901. |

CLATSOP COUNTY EX REL. AUGUST HILDEBRAND, Doing Business
under the Firm Name and Style of Hildebrand & Company, Respt.,

v.

F. C. FELDSCHAU

and

UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.

Oregon Supreme Court (Dept. No. 2) — July 30, 1921.

(— Or. —, 199 Pac. 953.)

Bonds — contractors — broader than statutory requirement — effect.

1. The mere fact that a bond required by a county from a contractor for road improvement imposes a greater liability than that required by statute does not render the provisions in excess of such statutory requirement void.

[See note on this question beginning on page 1227.]

Contract — consideration — award of contract for public work.

2. The award of a contract for public work is sufficient consideration to support a promise by the contractor and his surety to pay debts incurred in connection with the performance of the work.

[See 22 R. C. L. 630.]

Parties — right to sue on contractor's bond.

3. Persons furnishing supplies to a contractor for public work may sue on the bond taken by the public authorities and conditioned to pay for such

supplies, although they are not parties to the contract and the consideration does not move directly from them.

[See 22 R. C. L. 632.]

Bond — liability for supplies for laborers' camp.

4. The surety on the bond of a contractor for public work which requires payment of all just debts, dues, and demands incurred in the performance of the work which is in excess of the statutory requirements for such bonds, is liable for equipment and supplies furnished for a laborers' camp established by the contractor.

APPEAL by defendant guaranty company from a judgment of the Circuit Court for Clatsop County (Eakin, J.) in favor of plaintiff in an action brought to recover on a public improvement bond for material alleged to have been furnished in the performance of work for the plaintiff county.

Affirmed.

Statement by Bean, J.:

This is an action brought on a public improvement bond, for materials furnished in the performance of road work for Clatsop county. The cause was tried by the court without the intervention of a jury. Findings of fact were made, and a judgment rendered in favor of plaintiff. The defendant United States Fidelity & Guaranty Company prosecuted an appeal directed against the judgment on two of the several causes of action included in the complaint. The claimants whose judgments are contested are

August Hildebrand and Judd Brothers.

The defendant F. C. Feldschau, on February 13, 1917, entered into a written contract with Clatsop county to improve a portion of the Lewis and Clark county road. This contract contained, among other things, provisions for a bond, which was exacted as part of the contract from the contractor by Clatsop county. The bond was executed by F. C. Feldschau, as principal, and the United States Fidelity & Guaranty Company, as surety, in the penal sum of \$10,311. The bond, in

ance of the contract by the principal, contained the stipulation that the principal "shall pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such laborers, mechanics, or subcontractors with materials, supplies, or provisions for carrying on such work, and all just debts, dues, and demands incurred in the performance of such work, and shall in all respects faithfully perform said contract according to law, then this obligation shall be void; otherwise, to remain in full force and effect."

Messrs. Dey, Hampson, & Nelson, for appellant:

The defendant surety company is not liable under the bond to pay for materials supplied in the performance of the work.

Baker City Mercantile Co. v. Idaho Cement Pipe Co. 67 Or. 372, 136 Pac. 23; Carson v. Shelton, 128 Ky. 248, 15 L.R.A.(N.S.) 509, 107 S. W. 793; Columbia County v. Consolidated Constr. Co. 83 Or. 251, 163 Pac. 438; Dudley v. Toledo, A. A. & N. M. R. Co. 65 Mich. 655, 32 N. W. 884; Luttrell v. Knoxville, L. F. & J. R. Co. 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565; Multnomah County v. United States Fidelity & G. Co. 87 Or. 198, L.R.A.1918C, 685, 170 Pac. 525; National Surety Co. v. United States, L.R.A.1917A, 336, 143 C. C. A. 99, 228 Fed. 577; Perrault v. Shaw, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724; Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 116 Am. St. Rep. 746, 80 N. E. 177, 9 Ann. Cas. 305; Stewart v. Spalding, 71 Or. 310, 141 Pac. 1127; United States use of Sica v. Kimpland, 93 Fed. 403; United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 474.

Mr. C. J. Young also for appellant.

Mr. Edward C. Judd, for respondent:

A board of county commissioners authorized by statute to contract for the performance of a public improvement has the authority to require the contractor to exact a bond containing broader provisions than that required by the statutes, and if such bond is required and furnished, then the third parties for whose benefit it is provided

cordance with the terms thereof.

Puget Sound State Bank v. Gallucci, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767; Knapp v. Swaney, 56 Mich. 345, 56 Am. Rep. 397, 23 N. W. 162; Title Guaranty & S. Co. v. State, 61 Ind. App. 268, 109 N. E. 237, 111 N. E. 19; Elliott, Roads & Streets, 3d ed. 646; Smith v. Bowman, 32 Utah, 33, 9 L.R.A.(N.S.) 889, 88 Pac. 687; Denver v. Hindry, 40 Colo. 42, 11 L.R.A.(N.S.) 1028, 90 Pac. 1028.

The items in the claims were necessary items to be and were used in the construction work provided for in the contract.

Baker City Mercantile Co. v. Idaho Cement Pipe Co. 67 Or. 372, 136 Pac. 23.

Bean, J., delivered the opinion of the court:

Section 2991, Or. Laws, requires a contractor on public work, entering into a formal contract with a county, to execute the usual penal bond with good and sufficient sureties, with the additional obligations "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts," and provides that persons furnishing such labor and materials shall have a right of action against the contractor and his sureties. It will be noticed that, in addition to the requirements of the statute prescribing the conditions of the bond, the instrument in question contains the provision for the payment of "all just debts, dues, and demands incurred in the performance of such work." Pursuant to the contract, Feldschau, about March 15, 1917, entered into the performance of the work, and conducted the same until the latter part of September, 1917. The road, which by the terms of the contract was to be improved, was not situated near any town or village, and in order that he could carry on the work it was necessary to maintain suitable living quarters and accommodations for a large number of laborers who were employed on the work. In or-

tain a camp, where the necessities of life for the employees could be obtained and the men could be housed.

The question involved is stated in the brief of counsel for appellant as follows: "The bond has a dual aspect,—i. e., for the faithful performance of the work and the payment for labor and material; but there is involved here only the statutory provision that the contractor 'shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts.' The bond is broad in its terms, but is, of course, to be construed in the light of the statute, pursuant to which it was exacted. . . . The surety company, which is appellant here, does not question the correctness of any of the charges, or that these mercantile houses made the sales claimed. It rests its case solely upon the fact that the articles for which claim is asserted are not in any proper sense comprehended under the term 'materials' used in the statute."

In other words, the contention of the appellant is that the part of the bond which is in addition to the one compelled by the statute is of no force, and that the county was not authorized to require such an additional stipulation in the bond. We are not aware that this question, under our present statute, has been passed upon by this court.

The materials and supplies which were furnished by Hildebrand & Company consisted of camp equipment and utensils, such as were used in a camp in construction work of this kind, which were only meant to be used and to last during the period of improvement. The material and supplies furnished by Judd Brothers consisted of men's wearing apparel, bedding, overalls, underwear, and socks, which were purchased by Feldschau and furnished to his em-

ployees. The trial court found that the number of items furnished by the relator to Feldschau consisted of knives, forks, cooking utensils, and dishes, amounting to \$85.75, which were not used up in the prosecution of the work, should be deducted from the claim. The trial court, among other things, found:

"That during the prosecution of said work, and between the 1st day of March, A. D. 1917, and the 1st day of June, A. D. 1917, the relator, August Hildebrand, at the request of F. C. Feldschau, sold and delivered to such defendant a large quantity of supplies and camp equipment, which were reasonably worth the sum of \$428.92, and for which the said defendant, F. C. Feldschau, agreed to pay to the relator, August Hildebrand, the sum of \$428.92. . . .

"Regarding relator's further and second cause of action against defendants, the court finds that during the prosecution of said work, and between the 12th day of March, A. D. 1917, and the 4th day of July, A. D. 1917, that Edward C. Judd and George F. Judd, copartners doing business under the firm name and style of Judd Brothers, bargained, sold, and delivered to defendant F. C. Feldschau goods, wares, and merchandise, consisting of men's wearing apparel, overalls, gloves, mittens, blankets, comforters, and other things necessary for workmen, at the agreed and stipulated price of \$179.45, and that said goods, wares, and merchandise so sold and delivered by the said Judd Brothers to the said F. C. Feldschau were used by the said F. C. Feldschau in carrying on the work of said contract, and were exchanged by the said F. C. Feldschau with his laborers for wages."

As we understand the record, it is not questioned but that the amounts in controversy were just debts and demands incurred in the performance of the work. Many of the supplies would not be considered as "labor or materials," within the

additional provision referred to contained in the bond is invalid, plaintiff cannot recover for the same in this action.

It is unquestioned that Feldschau voluntarily entered into a contract with Clatsop county. The county was authorized to make such contract. The surety company in the ordinary course of business, and it may be fairly assumed for compensation, voluntarily obligated itself as sponsor for Feldschau in the faithful performance of the contract, and the performance of all of the conditions incorporated in the bond. The parties were competent to enter into the undertaking. The bond was not repugnant to the letter or policy of

**Bonds—
contractors—
broader than
statutory
requirement—
effect.**

the law, but was strictly in accordance with the policy of the law in this state to provide for the payment of labor and supplies and expenses in the construction of

at common law, if it is entered into voluntarily by competent parties for a valid consideration, and is not repugnant to the letter or policy of the law; and such a bond, other than an official bond, is enforceable according to its conditions, although they are more onerous than would have been required if a statutory bond had been given for the same purpose. This rule has been applied to bonds given to the United States."

In observing the precedents in other states we find that the case of Puget Sound State Bank v. Gallucci, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767, was an action upon contracts and bonds similar to those in the present case. The bank loaned money to the contractor for the purpose of paying for labor performed and materials used in the improvement. By the contracts and bonds in that case the contractor and his surety undertook to pay all "just debts, dues, and demands in-

It was there held that the surety on the bond was liable for the money so loaned by the bank, pursuant to an arrangement therefor, to enable the contractor to pay for labor and supplies.

The case of *Title Guaranty & S. Co. v. State*, 61 Ind. App. 268, 109 N. E. 237, was an action on a bond given to secure the performance of a contract for the construction of a free gravel road. The statute of that state provided for a bond conditioned, among other things, for the benefit of third persons, that the contractor should pay for any labor or material therefor that shall have been furnished either to him or to any subcontractor, agent, or superintendent under him. The bond given, as shown by the opinion, was conditioned, among other things, that the contractors "shall promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished, and for the boarding of laborers thereon." Mr. Justice Caldwell, speaking for the court, said, as shown on page 282 of 61 Ind. App.: "It is thus apparent that the bond here is conditioned more broadly than required by said section, in that it contains the provision respecting the payment of all debts incurred and all claims for boarding laborers. There is, however, no statute that prohibits a board of county commissioners from taking or requiring a bond thus broadly conditioned." This opinion was adhered to upon rehearing. See 61 Ind. App. 291, 111 N. E. 19.

In *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562, a bond taken by a township trustee to secure labor and material on a contract for building a schoolhouse was held to be a valid obligation, although not provided for by the statute, and one suing to recover for material and labor was held entitled to maintain an action thereon. The court said: "That one has a right to maintain an action upon a contract made with

by appellee's learned counsel."

In the case of *Union Sheet Metal Works v. Dodge*, 129 Cal. 390, 62 Pac. 41, a contractor on a schoolhouse gave a bond to the district that he would pay all his subcontractors, laborers, and materialmen. A materialman brought suit on this bond. It was held that, although there was no statutory provision for such bond, it inured to the benefit of plaintiff, who could sue upon it; and the defendant was estopped from claiming that it was not the kind of bond required by law.

In *St. Louis use of Glencoe Lime & Cement Co. v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 848, it was held that a city could require from a contractor a bond to protect materialmen and laborers, although this bond was not provided for by charter. This bond authorized a suit by a materialman in the name of the city, for his use. It was held that, under the power granted to repair streets, the implied power existed to exact such a bond.

In *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625, a city required a contractor on a well to give a bond to protect labor and material. It was held that a materialman could maintain an action on this bond, although the charter or statute did not provide for such bond.

In *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837, a state board was held authorized to require a contractor on a public building to contract to protect labor and material. A materialman was held entitled to sue on a bond for the faithful performance of the contract. The cases of *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806, *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531, *Philadelphia use of Webster v. Harry C. Nichols Co.* 214 Pa. 265, 63 Atl. 886, *American Surety Co. v. Raeder*, 15 Ohio C. C. 47, 8 Ohio C. D. 684, *Philadelphia v. Stewart*, 195 Pa. 309, 45 Atl. 1056, and *State ex rel. Palmer v. Webster*,

the same principle.

In *Knapp v. Swaney*, 56 Mich. 349, 56 Am. Rep. 397, 23 N. W. 162, the plain language of Mr. Chief Justice Cooley, in discussing this principle, is so convincing that we quote it at the risk of being lengthy. In that case it appears that the board of county commissioners contracted for the erection of a courthouse. One of the provisions of the contract was to the effect that before any partial payment should be made there should be no "legal or lawful claims against the contractor, in any manner, from any source whatever, for work or materials furnished on said work and buildings." The question was: "Are the contractors under the contract, or the relators, as their assignees, entitled to payment while there are outstanding claims for materials or labor?"

The argument on this point, shortly stated, was that the board of supervisors as a corporation, or a quasi corporation, possesses only certain powers expressly mentioned and defined by law, and that among these is no power to interpose between employers or purchasers and the persons with whom they deal, for the purpose of compelling the performance of contract obligations which such employers or purchasers have assumed. Chief Justice Cooley said: "A corporation, when constructing a public building or other public work, is chargeable with moral duty, as an individual would be, to see that it is so constructed that people may not be injured in coming near to or making use of it in a proper manner. In some cases they may not be legally responsible for failure to perform this duty; but where the moral obligation exists, it cannot be said that any provision for its performance, not improper in itself, is ultra vires. A county may go to great pains and great expense to make its courthouse unquestionably safe, that individual citizens

to stipulate, in the contract for the building, that the contractors, when calling for payment, shall show that they are performing their obligations to those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people. We cannot think such is the case. We are of opinion that there was nothing ultra vires in this condition, and that the relators are bound by it."

Coming back home, we find the same principle was maintained in an able opinion by Mr. Justice Wolverton in the case of *Hamilton v. Gambell*, 31 Or. 328, 48 Pac. 433. It was held that the Portland City Charter, § 118, requiring a bond with certain conditions, is not a limitation on the manner in which contracts may be drawn, but is a proviso that no contract shall be made without that kind of bond; that the regulation of the ordinance was a reasonable one, intended to comply with the moral duty, resting alike on public corporations and private persons, to see that those who perform services for them, whether directly or indirectly, are paid. "The great weight of authority," reads the note in 11 L.R.A.(N.S.) p. 1028, "sustains the power of a municipality to make such contracts, even though they are not expressly authorized by the legislature." The precedents cited on behalf of appellant, all of which we have examined, mostly refer to cases involving liens. Such cases are of little assistance in considering the question involving contracts and bonds like those in the instant case.

Our statute enjoins upon the state of Oregon, or any municipality, county, or school district, in entering into a contract for the construction of any public work, to require the usual penal bond with sureties, with the additional obligations that the contractor shall promptly make payments to all persons supplying

tractor shall fail to pay for such work and materials, and the officers of the state of Oregon, or any such municipality, county, or school district within the state, shall fail or neglect to require the execution of such bond, then the state of Oregon and the officers authorizing such contract, or the municipality, county, or school district, and the officers authorizing such contract, as the case may be, shall be jointly liable for such labor and materials. These provisions of our statute do not limit the authority of officials of a county in making a contract for public work. They do not prevent county officials from providing in such contract, and in a bond securing the performance thereof, for the payment of all persons who shall supply "such laborers, mechanics, or subcontractors with materials, supplies, or provisions for carrying on such work, and all just debts, dues, and demands incurred in the performance of such work." Such provi-

see that its citizens and others who furnish laborers and subcontractors with materials and supplies, and extend credit to a contractor to assist in the performance of the public work, are protected. Such provisions tend to promote efficiency in the construction of the roads of a county. They are in the interest of justice and equity, and are not ultra vires. They do not in any way contravene any statute or public policy of this state.

The plain provisions in the bond in suit are binding and enforceable against Feldschau, ^{Bond—liability for supplies for laborers' camp.} the contractor, and his surety, the appellant.

It follows that the judgment of the Circuit Court should be affirmed. It is so ordered.

Burnett, Ch. J., and Johns and Brown, JJ., concur.

Petition for rehearing denied September 20, 1921.

ANNOTATION.

Validity of condition in bond of contractor for public work which is beyond requirements of statute or ordinance with respect to claims of third persons.

- I. Scope of note, 1227.
- II. General rule, 1227.
- III. Application of rule, 1228.

I. Scope of note.

This note discusses the effect of making a bond by the contractor for a public work, which is required by statute to provide for payment of the claims of third persons, broader in its terms than the statute requires. It excludes cases wherein the conditions in excess of the statutory requirements are for the protection of the municipality. Likewise it excludes cases which involve the question whether a condition in a public contract or bond for the protection of subcontractors, laborers, or materialmen is valid although there is no

statutory authority for the inclusion of any provision on that subject.

II. General rule.

Where a statute or ordinance requires that the contractor for a public improvement shall give a bond conditioned for the payment of labor and materials, the bond may be conditioned more broadly than the statute requires, and if a bond so conditioned is voluntarily given in consideration of the contract, its extrastatutory provisions may be enforced as a valid common-law obligation.

United States.—See *Stephenson v. Monmouth Min. & Mfg. Co.* (1897) 28 C. C. A. 292, 54 U. S. App. 499, 84 Fed. 114.

Indiana.—*Title Guaranty & S. Co.*

N. E. 19, *admiralty on rehearing* (1910) 61 Ind. App. 268, 109 N. E. 237.

Missouri. — *Hilton v. Universal Constr. Co.* (1920) 202 Mo. App. 672, 216 S. W. 1034. See also *School Dist. v. Aetna Acci. & Liability Co.* (1921) — Mo. App. —, 234 S. W. 1017.

Oregon. — See the reported case (*CLATSOP COUNTY EX REL. HILDEBRAND v. FELTSCHAU*, ante, 1221).

Pennsylvania. — *Bowditch v. Gourley* (1904) 24 Pa. Super. Ct. 342; *Philadelphia use of Webster v. Harry C. Nichols Co.* (1906) 214 Pa. 265, 68 Atl. 886.

Tennessee. — See *Bristol v. Bostwick* (1917) 139 Tenn. 304, 202 S. W. 61.

Washington. — *Puget Sound State Bank v. Gallucci* (1914) 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767.

"Nor can the surety be relieved from liability because the condition of the bond is more comprehensive than is required by the ordinance. It was given voluntarily for a lawful purpose, and may be enforced according to its terms, even though it in form exceeds the requirements of the ordinance." *Bowditch v. Gourley* (Pa.) *supra*.

III. Application of rule.

In *Title Guaranty & S. Co. v. State* (1915) 61 Ind. App. 268, 109 N. E. 237, the proceeding was brought and prosecuted under the provisions of an act commonly known as the Three-mile Gravel Road Law. A section of that act provided, among other things, that, with his proposal, each bidder should "submit his bond . . . to the approval of the board, conditioned for the faithful performance of the work . . . which bond shall be for the benefit of any person or corporation who shall suffer loss or damage by reason of any failure or neglect of such bidder to enter into a proper contract, . . . or to pay for any labor or material therefor that shall have been furnished either to him or to any subcontractor, agent, or superintendent under him." The bond sued on was conditioned, among other things,

labor, materials furnished, and for the boarding of laborers thereon." It was held that the condition in excess of the statutory requirement was valid and enforceable, the court saying: "It is thus apparent that the bond here is conditioned more broadly than required by said section, in that it contains the provision respecting the payment of all debts incurred and all claims for boarding laborers. There is, however, no statute that prohibits a board of county commissioners from taking or requiring a bond thus broadly conditioned. Section 4 of the Act of 1899 (Acts 1899, p. 170; Burns's Anno. Stat. 1901, § 5592) makes it the duty of boards of commissioners, in receiving bids for certain public works, to take a bond conditioned in the exact language of the provision above quoted from the bond involved here. Independent of the statute last mentioned, the situation here presents the question of whether the board exceeded its power in causing to be inserted in the bond the provision for the payment of debts incurred by the contractors in the prosecution of the work, regardless of the nature or origin of said debts, or in accepting a bond voluntarily executed and so conditioned, and whether such provision is enforceable. The question has frequently come before the courts as to whether boards of county commissioners and municipal authorities have the power, in the absence of an express statutory grant, to insert in such a bond an enforceable provision for the payment of claims for labor performed and materials furnished in the construction of the public work involved. With practical uniformity, it has been held that, while such public bodies may exercise only granted powers, yet that express authority to cause the work to be performed carries with it the incidental power to do all proper acts reasonably necessary to that end; and that, by virtue of such incidental power, such bodies may cause such a provision to be inserted in the bond in the absence

BRAND v. FELTSCHAU, ante, 1221), wherein it is held that a condition in a highway contractor's bond requiring the payment of "all just debts, dues, and demands incurred in the performance of such work," is enforceable as a common-law obligation, although the Oregon statute requires merely that with respect to the claims of third persons in a public contractor's bond he "shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts."

The case of Puget Sound State Bank v. Gallucci (1914) 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767, is sufficiently set out in the reported case.

In Bowditch v. Gourley (1904) 24 Pa. Super. Ct. 342, the condition of the bond in suit was as follows: "If the above bounden Samuel Gourley, Jr., shall and will promptly pay or cause to be paid to any and all persons, any and all sum or sums of money which may be due for labor and materials furnished and supplied or performed in and about the said work, and shall and will comply with all the provisions of the ordinance of the select and common councils of the city of Philadelphia entitled, 'An Ordinance for the Protection of Subcontractors as Well as for Persons Furnishing Materials and Labor for the Construction of Buildings for the City of Philadelphia and for Any Other City Work,' approved the 30th day of March, A. D. 1896, then this obligation to be null and void; otherwise to be and remain in full force and virtue." The ordinance required that any person entering into a contract for the doing of the city's work should execute a penal bond with sureties, "with the obligation that the contractor shall and will promptly make payment to all persons . . . whether he is a subcontractor or otherwise in the prosecution of the work."

The court held that the fact that the bond was broader than the ordinance did not invalidate it, the claim en-

anced.

In Philadelphia use of Webster v. Harry C. Nichols Co. (1906) 214 Pa. 265, 63 Atl. 886, the bond in suit was given under the ordinance referred to in the case last cited. The bond was conditioned to pay "any and all persons any and all sums of money which may be due for labor and material supplied or performed in and about the said work." The court said: "The bond having been voluntarily given, it may be enforced according to its terms, although it exceeds the requirements of the ordinance. The exact question here raised as to the construction of the ordinance was decided in Bowditch v. Gourley (Pa.) supra, and we concur in the conclusion announced by that court."

In Hilton v. Universal Constr. Co. (1920) 202 Mo. App. 672, 216 S. W. 1034, it appeared that under the contract and bond the defendant company was obligated to pay the proper persons all "amounts due for material and labor used and employed in the performance thereof." The statute required that in public work the authorities should require a bond of the contractor conditioned "for the payment for all material used in such work, and for all labor performed in such work, whether by subcontractor or otherwise." The court, holding the obligors liable for materials which did not enter into the work, said: "Under the broad terms of this contract and bond, the defendant, Universal Construction Company, obligated itself to pay the proper parties for all materials used and employed in the performance of the work. It is plain from the evidence that this coal and all of the lumber was used by J. W. Farley & Company in the performance of the work contemplated by the contract. In the event the contract and bond were not broader than the statute, it would have been necessary for the evidence to have disclosed that the material was used in the work of constructing the sewer. We accordingly hold that, under the provision con-

tained in the bond and contract heretofore quoted, it was not incumbent upon the interveners to show that the coal and lumber furnished by them actually entered into the construction of the sewer. It was sufficient, in order to entitle them to recover, that the evidence disclosed that the lumber and coal were used and employed in the performance of the work contemplated by the contract. In their zeal to carry out the obligation placed upon them by the statute, the city officials inserted provisions in the contract and bond which were broader than was required by the statute. The question may well be raised whether the city had power under the law to enter into such a contract, and place stipulations therein, in regard to the obligation of the contractor to pay materialmen on the work, which are broader than the language specified in the statute, § 1247. Whatever may be the law in other jurisdictions, it seems to be well settled in this state that the city has

full power and authority to enter into the contract and bond in question. . . . The contract and bond in suit . . . are not ultra vires the corporation, and the city, having the general power to build sewers, has the implied power of imposing the obligation upon the contractor to pay those who furnished labor and materials used and employed in the performance of the contract, regardless of the express power given to the city by § 1247 of the statute. In view of the fact that the evidence disclosed that the coal and all lumber furnished by these interveners were used and employed by the subcontractor in the performance of the work, they are entitled to recover."

In *Bristol v. Bostwick* (1917) 139 Tenn. 304, 202 S. W. 61, it was held that the fact the bond was in a penalty larger than that required by the statute did not indicate that the parties were unmindful of the statute.

A. S. M.

**REMINGTON ARMS UNION METALLIC CARTRIDGE COMPANY,
Appt.,**

v.

FEENEY TOOL COMPANY.

Connecticut Supreme Court of Errors — December 23, 1921.

(97 Conn. 129, 115 Atl. 629.)

Duress — threatened attachment — payment.

1. Payment of an illegal claim to avoid an attachment cannot be recovered on the ground that it was made under duress.

[See note on this question beginning on page 1233.]

Mistake — when action lies.

2. To recover money paid under mistake, the payment must have been made under a mistaken belief that the money was due the payee, when in

truth it was neither legally nor morally due.

[See 2 R. C. L. 784; 21 R. C. L. 164 et seq.]

APPEAL by plaintiff from a judgment of the Superior Court for Fairfield County (Kellogg, J.) sustaining a demurrer to the complaint in an action brought to recover money alleged to have been paid by mistake and under compulsion. *No error.*

Statement by Beach, J.:

The complaint alleges, in substance, that between November 23, 1916, and April 24, 1919, the plaintiff and defendant had mutual deal-

ings and accounts, as the result of which the plaintiff became indebted to the defendant in the sum of \$41,815.82, and no more; that during this period the plaintiff overpaid the

defendant to the extent of \$4,735.04, the overpayment being made involuntarily and under compulsion. The allegation as to compulsion is that an unsettled controversy existed between the parties as to the rate at which certain work done by the defendant was to be paid for, the defendant claiming that the sum of \$4,735.04 remained due from the plaintiff; that the defendant instituted suit against the plaintiff for that amount, and directed the officer having the writ to attach the goods and estate of the plaintiff to the amount of \$8,000, and that the plaintiff, to avert the threatened attachment, paid to the officer for the account of the defendant the demanded sum of \$4,735.04. It is further alleged that only \$1,071.89 of the demanded sum was due, and that the balance, \$3,663.15, was paid to the defendant by the plaintiff under a mistake of its rights and under compulsion and coercion, and to prevent the immediate seizure of its property and the shutting down of its entire plant, and that no part of the overpayment of \$3,663.15 had been repaid, though duly demanded.

To this complaint the defendant demurred on the ground that it appeared from the complaint that the payment was voluntary, that it did not appear to have been paid under compulsion, or because of mutual mistake, or because of any fraud or deception practised upon the plaintiff, and that it did appear to have been paid in settlement of a good cause of action, which was thereby adjusted and settled and accord and satisfaction made. The superior court sustained the demurrer on all grounds, and on the refusal of the plaintiff to plead over, judgment was rendered for the defendant.

Messrs. Cummings & Lockwood and Raymond E. Hackett, for appellant:

When money is paid by one under a mistake of his rights and duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, whether the mistake be one of fact or one of law.

Northrup v. Graves, 19 Conn. 548, 50 Am. Dec. 264; Mansfield v. Lynch, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313; Monroe Nat. Bank v. Catlin, 82 Conn. 227, 73 Atl. 3; Morris v. New Haven, 78 Conn. 673, 63 Atl. 123.

Equity will not allow one to enrich himself unjustly at the expense of another, through or by reason of an innocent mistake of law or fact entertained by the loser, or by both.

Bronson v. Liebold, 87 Conn. 293, 87 Atl. 979; Park Bros. v. Blodgett & C. Co. 64 Conn. 28, 29 Atl. 133.

When one has obtained such an advantage over another by reason of that other's mistaken view of his legal rights that it would, under the circumstances, be unconscionable for him to retain it, equity will not allow him to do so.

Bronson v. Leibold, 87 Conn. 299, 87 Atl. 979; Monroe Nat. Bank v. Catlin, 82 Conn. 231, 73 Atl. 3.

Messrs. Cullinan, Cullinan, & Keating, for appellee:

The voluntary payment made by plaintiff cannot be recovered on the ground that it was made under duress.

Kohler v. Wells, F. & Co. 26 Cal. 612; Morris v. New Haven, 78 Conn. 675, 63 Atl. 123; Monroe Nat. Bank v. Catlin, 82 Conn. 231, 73 Atl. 3; Cobb v. Charter, 32 Conn. 364, 87 Am. Dec. 178; Brisbane v. Dacres, 5 Taunt. 149, 128 Eng. Reprint, 643, 14 Revised Rep. 718; Northrop v. Graves, 19 Conn. 561, 50 Am. Dec. 264.

Beach, J., delivered the opinion of the court:

The plaintiff's brief assumes erroneously that the complaint includes a cause of action for the recovery of money paid under a mistake. It is a necessary element of such a cause of action that the pay-

Mistake—when action lies.

ment was made under a mistaken belief that the money was due to the payee, when in truth it was neither legally nor morally due, as when an executor pays a legacy in full, believing that the estate is solvent, when it is not, or that the legacy is due to the payee under the terms of the will, when it is not. Mansfield v. Lynch, 59 Conn. 320, 12 L.R.A. 285, 22 Atl. 313; Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264; Mills v. Britton, 64 Conn. 4, 24 L.R.A. 536, 29

kind is alleged. On the contrary, the complaint, which was filed nearly two years after the payment of the money, attempts to state a case of duress of goods, alleging that the entire claim of the defendant was disputed at the time when it was paid in full, that only \$1,071.89 was actually due, and that the balance of \$3,363.15 was not due and was paid to prevent the immediate attachment of the plaintiff's property. The absence of any allegation that the defendant's original demand was dishonest, and the admission that at some time thereafter, not specified in the complaint, the plaintiff ascertained that a part of the demand was due, acquits the defendant of any possible charge of bad faith in instituting the action and in taking out the writ of attachment.

The complaint attempted to suggest that extreme pressure was put upon the plaintiff, by alleging that the payment was made to prevent the shutting down of its "entire plant and factory;" but this averment is not well pleaded, because there is no direct allegation that the officer threatened to do so, and without such threat an entire shut-down of the plaintiff's notoriously extensive plant could not reasonably have been feared.

All that can rightfully be claimed from the complaint is that the plaintiff paid a disputed claim, now admitted by the demurrer to have been excessive in amount, in order to avoid the inconvenience of an attachment which might have been speedily dissolved on the substitution of a statutory bond. No authority is cited in support of the proposition that a payment so made

can be recovered on the ground that it was paid under duress. The passage relied on from 30

the cases show, to an abuse, or to an inequitable and oppressive use, of legal process; such as a writ of attachment procured by one who knows that he has no cause of action, a demand in excess of that authorized by the process, a threatened levy of execution on the property of a person other than the judgment debtor, a demand on an execution after supersedeas, and the like. Many cases on the subject of involuntary payment are collected in an exhaustive note in 45 Am. Dec. 153, and in summing up the authorities on the precise point at issue it is said: "If, as will hereafter be more particularly shown, the payment is made under the stress of lawful process lawfully used, the party can obtain no relief except by reversal of the proceedings under which the process was issued. Lawful compulsion is no duress."

The cases cited bear out the text. See also *Hoke v. Atlanta*, 107 Ga. 416, 33 S. E. 412; *Strange v. Franklin*, 126 Ga. 715, 55 S. E. 943.

The authorities on the recovery of unlawful taxes paid to escape the penalties imposed by statute rest, in part, on the severity of the "onerous penalties" imposed for nonpayment. *Underwood Typewriter Co. v. Chamberlain*, 92 Conn. 199, 204, 205, 102 Atl. 600; *Seeley v. Westport*, 47 Conn. 294, 299, 36 Am. Rep. 70. And if the statute purporting to authorize the tax is invalid, the whole legal process of collection is void ab initio.

But as between private suitors who stand on an equal footing, the due process of the law invoked in good faith and fairly used cannot amount to duress.

There is no error.

In this opinion the other Judges concur.

Right upon ground of duress to recover back money paid upon an excessive or unfounded claim to avoid an attachment.

The rule appears to be that the mere fact that an overpayment is made in order to avoid an attachment, threatened or levied, of the alleged debtor's property, is of itself insufficient to constitute duress, so as to entitle the party making the payment to recover it on this ground. *Kohler v. Wells, F. & Co.* (1864) 26 Cal. 606; *REMINGTON ARMS UNION M. CARTRIDGE Co. v. FEENEY TOOL Co.* (reported herewith) ante, 1230; *Dickerman v. Lord* (1866) 21 Iowa, 338, 89 Am. Dec. 579; *Paulson v. Barger* (1906) 132 Iowa, 547, 109 N. W. 1081; *Adams v. Reeves* (1873) 68 N. C. 134, 12 Am. Rep. 627; *Flack v. National Bank* (1892) 8 Utah, 193, 17 L.R.A. 588, 30 Pac. 746.

A payment made to release property from an attachment was held in *Kohler v. Wells, F. & Co.* (Cal.) supra, not to be a payment made under duress, where the party attaching the goods had a cause of action against their owner.

It was held in the reported case (*REMINGTON ARMS UNION M. CARTRIDGE Co. v. FEENEY TOOL Co.*) that an overpayment of a disputed claim, made in order merely to avoid the inconvenience of a threatened attachment, which might have been speedily dissolved on the substitution of a statutory bond, could not be recovered on the ground that it was paid under duress.

And it was held in *Flack v. National Bank* (Utah) supra, that a threat by a bank to institute attachment proceedings to collect a note not yet due unless security was given, in consequence of which the maker of the note authorized its satisfaction out of his deposit account, was not in such duress as would entitle the maker to damages in case of the bank's refusal to apply the same money in satisfaction of his outstanding check.

The court in *Paulson v. Barger* (1906) 132 Iowa, 547, 109 N. W. 1081, supra, said it had long been the rule

in that state that a mere threat to begin a civil suit to recover on contracts, and to attach property in aid of such suit, did not constitute such duress as to make a payment on account thereof an involuntary one; that in the case before it the demand was made on a contract evidenced by a note, and even if a threat to attach were in fact made, as alleged, or if an attachment were made following such threat, the plaintiff would have had ample opportunity to assert and maintain his legal rights in that action, and he could not be permitted to select his own time for a legal determination of such rights by then making payment, and thereafter bringing suit to recover the same, on the ground that the payment was involuntary.

And even though the alleged debtor is sued in a state other than the one in which he resides, and his property there is attached, this in itself, if the attachment suit is brought in good faith, will not justify the debtor, with knowledge of all the facts, in paying under protest the amount claimed and seeking to recover it back in the courts of his own state, on the ground that in point of fact the debt had been previously paid or was unjust, and that the payment was under duress. *Dickerman v. Lord* (1860) 21 Iowa, 338, 89 Am. Dec. 579, supra. The court said: "If I am sued in my own state, without attachment, and know the claim is unfounded, and yet pay the money, I cannot recover it back although I may, at the time of payment, have said I paid it under protest. And if I am sued by attachment, the result must be the same, if the attachment is the only circumstance relied upon to make the payment, a compulsory one. And why? Because my adversary, in either case, has made use of no unjust or illegal means to enforce his claim or pretended claim against me. It is my duty to meet him in limine, and liti-

gate and settle the question of my indebtedness. It is for this purpose that courts are instituted. I cannot pay the amount, and by simply saying, 'I do so under protest,' afterward reopen the question. When one pays money on an alleged claim against him, he is forever concluded from saying he did not owe it, if he paid under no mistake of fact, and if the party receiving it made use of no illegal means to coerce the payment. Now, these principles of the law are not varied by the simple circumstance that one is sued in a state foreign to his residence. The defendants, by the law of Illinois, in which state they resided, and in which plaintiff contracted the account, had a right, if they could get jurisdiction, to sue the plaintiff in that state, and, he being a nonresident, the laws of that state gave them a right to an attachment against his property found within the jurisdiction. In thus suing, therefore, they made use of no remedy which the law did not allow; and it will not do to hold that a payment, secured by none but the means provided by the law itself, is a compulsory or coerced one, there being no element of fraud or other ingredient of oppression in the case."

And in *Adams v. Reeves* (1873) 68 N. C. 134, 12 Am. Rep. 627, *supra*, the court said that the mere fact that the original action was begun by an attachment of property, or that property was attached in the course of the action, or that it was brought in another state, did not of itself constitute or imply duress; that it must assume that the plaintiff (who was seeking to compel repayment of money alleged to have been paid under compulsion to the defendants), although a resident of North Carolina, would have received in the courts of Virginia, where the other action was begun, the same justice as he would have received in his own state.

It was held in *Turner v. Barber* (1901) 66 N. J. L. 496, 49 Atl. 676, that a payment by the plaintiff was made voluntarily, and without fraud or force, and therefore could not be recovered, even though the claim was unfounded, where the alleged duress was the seizure and detention of a

scow belonging to the plaintiff, by a deputy United States marshal, under a monition of libel issued in a suit in admiralty brought by the defendant against the scow for wharfage, the plaintiff making the payment, under protest, without contesting the claim, in order to effect a release of the vessel.

And in the early case of *Knibbs v. Hall* (1794) 1 Esp. (Eng.) 84, where the defendant proposed to prove a set-off by evidence that he had overpaid the plaintiff for rent, in order to avoid a threatened distress if the excessive amount claimed were not paid, it was held that the payment was not under compulsion, as the defendant might, by replevin, have defended himself against the distress; that, therefore, since the payment was voluntary, he should not be allowed to dispute its legality, and the evidence offered should be rejected.

And it is held in *Baltimore v. Lefferman* (1846) 4 Gill (Md.) 425, 45 Am. Dec. 145, that a payment made under menace of an impending distress warrant is not a payment under duress, in the absence of bad faith, although the court intimated that there might be duress if the payment was made for the purpose of releasing the property after execution of the warrant.

See also *Colwell v. Peden* (1834) 3 Watts (Pa.) 327, holding that a tenant cannot maintain assumpsit for money paid to relieve his goods from distress for rent, if the claim was not made fraudulently, even though no rent was due; but that he must resort to some other remedy, as trespass or replevin.

Attention is called also to *Webber v. Aldrich* (1822) 2 N. H. 461, in which it was held that assumpsit would not lie to recover money paid by the plaintiff to secure the release of his property from the defendant, an Army officer, who had taken it under a warrant of distress for neglect of military duty, the payment being voluntary, even though the seizure of the property was illegal. The court indicated that the plaintiff's remedy was an action of trespass for the illegal seizure.

But the doctrine that a payment by

be regarded as paid under duress, so as to entitle the debtor on this ground to recover it, was held in *Lyman v. Lauderbaugh* (1888) 75 Iowa, 481, 39 N. W. 812, not to apply so as to prevent recovery of a payment by the debtor made to secure the release from garnishment of the debtor's money in a bank, under an express oral promise by the creditor to repay the same if the debtor could show that he was not so indebted. The court said that the release of the money garnished, the dismissal of the action, and the payment to the plaintiff in that action of the money claimed, were a sufficient consideration for the agreement to repay the money if it was shown not to be due.

And there are several cases in which, under special circumstances, it was held that the payment was under duress and could be recovered, the parties not being on equal terms, or the attachment not being in good faith.

Thus, if one knowing that he has no just claim against an alleged debtor fraudulently brings an action and attaches the debtor's goods for the purpose of extorting money from him, the payment of money by the latter in order to release his goods from such fraudulent and wrongful detention is not voluntary, but by compulsion, and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution. *Chandler v. Sanger* (1874) 114 Mass. 364, 19 Am. Rep. 367. In this case the attachment was levied on teams and wagons of an ice dealer as they were about to start out in the morning to deliver ice to customers, the attorney for the attaching creditor representing that three days would be required to dissolve the attachment by the giving of a bond, and the plaintiff making the payment in order to carry on his business.

And in *Adams v. Reeves* (1873) 68 N. C. 184, 12 Am. Rep. 627, the court laid down the rule that if one knowing that he has no claim upon another sues out legal process against him and

being able at the time, by reasonable diligence, to know or to prove that such representations are false, pays the demand, he may recover it back in a subsequent action.

So, it was held that money was not voluntarily paid, but was extorted by intimidation and fraud, and might be recovered, where the plaintiff made the payment on the false claim by the defendants that he was liable to them for the debts of a former owner of the plaintiff's store, after being induced by them to come to their place of business and being taken to a room on the fifth floor, which was not the office, in the presence of the defendants' attorney and the former owner and his attorney, payment being demanded then and there, and being made by the plaintiff under the belief that, if he did not pay the unfounded claim, they would attach his store. *Weber v. Kirkendall* (1894) 39 Neb. 193, 57 N. W. 1026. The court said the case looked very much like a conspiracy on the part of the defendants and the debtor to compel the plaintiff to pay the debt; that the money which the defendants extorted might not have been obtained by duress of property, technically speaking, but was obtained involuntarily, by a species of intimidation, fraud, and compulsion, and that no court of equity would permit its retention; that if it had been a debt which the plaintiff owed to the defendants, and he had paid it under the fear that if he did not his goods would have been attached, the case would be entirely different, but that in this case it was not the plaintiff's debt, and it was not voluntarily paid. The court further said: "To do anything voluntarily means to do it with one's free will, and without fear of compulsion of mind or body. The court will not shut its eyes to the everyday transactions of life. Here was a young man in business. A demand is made upon him that he pay some \$800 that another owes. He protests that he does not owe it. He asks that he be given time to consider the matter and consult his friends. He is told by

redress; and that it was very clear, therefore, that the plea of duress was good, and the circumstances should all have been submitted to the jury.

And where the husband's creditor, who had no claim against the wife, attached a carload of goods belonging to her, among which were furniture and wearing apparel, and she, being unable to furnish the statutory bond necessary to secure the release of the attachment, and being at a hotel in a strange city, to which she had just removed from a distant part of the state, and to which the car had been shipped, paid the claim, in order to secure possession of the goods, it was held in *Finch v. Cox Co.* (1916) 19 Ga. App. 256, 91 S. E. 281, that the payment was not voluntary and could be recovered. The court said: "A payment can be recovered back where it is made under an urgent and immediate necessity therefor, or where it is made to release property from detention. Civ. Code 1910, § 4317." And this Code provision, it was said, should be construed together with another statute providing: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of the other, and actually inducing him to do an act contrary to his free will."

And in *Fenwick Shipping Co. v. Clarke Bros.* (1909) 133 Ga. 43, 65 S. E. 140, where the evidence showed a service of summons upon and threatened attachment of the baggage of a traveler, who was a member of the firm owing the alleged claim, and was in Europe on his way to fulfil important business engagements, when other property was there available to meet the claim, and the jury might infer that the alleged creditor was seeking to collect an unfounded and unjust claim, knowing it to be such, it was held that the payment was not voluntary, but might be recovered back as having been paid under duress, within the meaning of the statutes in that state.

stated a cause of action as for money had and received, on the ground of an involuntary payment, where it was alleged that the defendants, maliciously contriving against the plaintiff and falsely pretending that he was indebted to them in a certain sum for rent, with intent to oppress and injure him, filed an unlawful attachment suit for said sum before a justice of the peace in another state in which he was employed, falsely swearing that the plaintiff was about fraudulently to conceal, assign, or otherwise dispose of his property to hinder or delay creditors, and caused the plaintiff's employer to be summoned as garnishee, although the wages garnished were by statute exempt; that the plaintiff paid the sum demanded because of his inability to defend the suit without great sacrifice of time and money, and because of the fact that he had a family dependent upon him, and feared that his position would be jeopardized.

That the payment of money by a person to free his goods from an attachment sued out for the purpose of extortion, by one who knows that he has no valid cause of action, constitutes a payment under duress, is recognized (*arguendo*) in *Fuller v. Roberts* (1895) 35 Fla. 110, 17 So. 359.

And there is an obiter statement in *Hackley v. Headley* (1881) 45 Mich. 569, 8 N. W. 511, that one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action.

In *Clark v. Pearce* (1891) 80 Tex. 146, 15 S. W. 787, in an action for damages for wrongfully and maliciously suing out a writ of sequestration of the plaintiff's property, the court, in holding that the plaintiff could recover as a part of the damages the amount of money paid to secure the release of the property from the levy, said in reply to the contention that where money had been voluntarily paid it could not be recovered; that it was well settled that when

the form of law, and money had been paid to secure their release, the payment was not voluntary, and might be recovered.

Although beyond the scope of the annotation, attention is called to *Joannin v. Ogilvie* (1892) 49 Minn. 564, 16 L.R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217, in which the court held that the money was paid under duress and might be recovered, where a party filed a mechanic's lien against property on an unfounded claim, which the owner paid under protest, in order to clear the title of record so that he might consummate a loan upon the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money. The court distinguished cases to the effect

that money paid to a creditor under duress or property has been seized on legal process in judicial proceedings in order to enforce an illegal demand; at least, in the absence of fraud on the part of the demandant in resorting to legal process to extort payment of a claim which he knows is unjust. The ground upon which the latter decisions rest, it was said, is that the party has an opportunity to plead and test the legality of the claim in the proceedings in which his property is seized.

In *Quinnett v. Washington* (1846) 10 Mo. 53, it was held that money paid by one to obtain a restoration of his goods, which had been wrongfully taken on a distress warrant on the mistaken ground that he was a subtenant of the debtor, could be recovered.
R. E. H.

WILLIAM H. WILLIAMS, Appt.,

v.

FRANCIS D. GALLATIN, Commissioner of Parks of the City of New York, et al., Respts.

New York Court of Appeals — June 11, 1920.

(229 N. Y. 248, 128 N. E. 121.)

Park — lease for increasing knowledge of health devices.

1. Commissioners charged with the duty of maintaining a public park have no authority to lease space in it for an exhibit designed to advance the knowledge of the people in methods of lessening the number of casualties and avoiding the causes of physical suffering and premature death.

[See note on this question beginning on page 1246.]

The complaint states a cause of action under provisions of the General Municipal Law and of the Code of Civil Procedure.

Bush v. Coler, 60 App. Div. 56, 69 N. Y. Supp. 770, 170 N. Y. 587, 68 N. E. 1115; *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216; *Warrin v. Baldwin*, 105 N. Y. 534, 12 N. E. 49; *Queens County Water Co. v. Monroe*, 88 App. Div. 105, 82 N. Y. Supp. 610.

Central Park, including the leased building, was acquired under acts of the legislature, impressed with a trust to be used as a public square, or park, for purposes exclusively of pleasure, exercise, amusement, or ornament.

Brooklyn Park v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696; *Perrin v. New York C. R. Co.* 36 N. Y. 120; *People ex rel. Seaver v. Green*, 52 How. Pr. 440; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Riverside v. MacLain*, 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408; *Bennett v. Saibert*, 10 Ind. App. 369, 35 N. E. 85, 37 N. E. 1071; *Ehmen v. Gothenburg*, 50 Neb. 715, 70 N. W. 237; *Steel v. Portland*, 23 Or. 176, 31 Pac. 479; *Laird v. Pittsburgh*, 205 Pa. 1, 61 L.R.A. 332, 54 Atl. 324; *Com. v. Hazen*, 20 Pa. 487, 207 Pa. 52, 56 Atl. 263; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Archer v. Salinas City*, 93 Cal. 43, 16 L.R.A. 145, 28 Pac. 839.

The lease of the building is illegal, null, and void.

3 *Dill. Mun. Corp.* 5th ed. § 1096; 3 *McQuillin, Mun. Corp.* §§ 1141, 1155; 2 *Abbott, Mun. Corp.* 1906, § 815; *Rowzee v. Pierce*, 75 Miss. 846, 40 L.R.A. 402, 65 Am. St. Rep. 625, 23 So. 307; *Riverside v. MacLain*, 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408; *Fessler v. Union*, 67 N. J. Eq. 14, 56 Atl. 272, 68 N. J. Eq. 657, 60 Atl. 1134; *Church v. Portland*, 18 Or. 73, 6 L.R.A. 259, 22 Pac. 528; *Mulvey v. Wangenheim*, 23 Cal. App. 268, 137 Pac. 1106; *Hopkinsville v. Jarrett*, 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85; *McEntyre v. El Paso County*, 15 Colo. App. 78, 61 Pac. 237; *Board of Education v. Kansas City*, 62 Kan. 374, 63 Pac. 600; *Wessinger v. Mische*, 71 Or. 239, 142 Pac. 612; *El Paso Union*

O'Brien, and John Lehman, for respondent commissioner et al.

Mr. William J. Moran, for respondent Safety Institute of America:

The complaint does not state facts sufficient to constitute a cause of action.

Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 337, 4 N. E. 522; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712; *Blum v. Whitney*, 185 N. Y. 242, 77 N. E. 1159; *United States Asphalt Ref. Co. v. Comptoir Nat. D'Escompte De Paris*, 166 App. Div. 67, 151 N. Y. Supp. 604, 221 N. Y. 540, 116 N. E. 1080.

Defendants' use of the arsenal under the agreement is proper, and hence the giving of the privilege therefor was within the power and discretion of the defendant commissioner.

Gushee v. New York, 42 App. Div. 87, 58 N. Y. Supp. 967; *Gredinger v. Higgins*, 139 App. Div. 606, 124 N. Y. Supp. 22; *Tompkins v. Pallas*, 47 Misc. 309, 95 N. Y. Supp. 875; *Kurtz v. Clausen*, 38 Misc. 105, 77 N. Y. Supp. 97; *Sherburne v. Portsmouth*, 72 N. H. 537, 58 Atl. 38; *Strock v. East Orange*, 80 N. J. L. 619, 77 Atl. 1051; *Com. v. Abrahams*, 156 Mass. 57, 30 N. E. 79; *International Garden Club v. Hennessy*, 104 Misc. 141, 172 N. Y. Supp. 8.

Pound, J., delivered the opinion of the court:

The plaintiff, a taxpayer, seeks to enjoin the defendant New York city park commissioner from executing a lease of the Arsenal Building in Central Park to the other defendant, Safety Institute of America, for a term of ten years, upon the ground that the use of the premises by the tenant for the purposes expressed in the lease is contrary to the Greater New York Charter in that it is foreign to park purposes. The complaint alleges that Central Park is a public park, owned by the city of New York; that the Arsenal Building is located in Central Park, and is a part thereof, and is intended for use solely as public park property; that the defendant Francis D.

Gallatin, as commissioner of parks, is the chief executive in charge of Central Park and of the Arsenal Building under the provisions of § 612 of the Greater New York Charter (Laws 1901, chap. 466); that under § 627 of the Greater New York Charter it is unlawful for the defendants to grant, use, or occupy for the purposes of a public fair or exhibition any portion of Central Park; that the defendants entered into a written lease, a copy of which is attached to the complaint, and defendants plan to proceed with the performance and execution of its terms and with the use and alteration of the said Arsenal Building; that the use of Central Park or the Arsenal Building for any of the purposes referred to will impede and materially hinder the beneficial use of Central Park by the public and the people of the city of New York as a place of resort, amusement, recreation, and exercise; that it was illegal for the defendants to enter into the lease. The lease recites it is made "in order to promote and increase the public enjoyment, use, and convenience of the public park known as Central park." The lease further provides: "That the said building, after it shall have been altered and repaired as herein provided for, shall be kept open and accessible to the public hereafter free of all charge throughout the year, five days in each week, one of which shall be Sunday afternoon, and also for two evenings in each week, within such hours and subject to such rules and regulations as may be determined by the trustees of said institute; and also that on the two days in each week during which said building may remain closed to the general public, it shall be open and accessible to students, schools, and societies organized for the purpose of promoting means and methods of safety and sanitation within such hours and subject to such rules and regulations as may be determined by the trustees of said institute."

The American Museum of Safety,

now the Safety Institute of America, was incorporated by chapter 152 of the Laws of 1911, which, by § 2 thereof, defines its objects as: "Sec. 2. The objects of the corporation hereby created are to study and promote means and methods of safety and sanitation and the application thereof to any and all public or private occupations whatsoever, and of advancing knowledge of kindred subjects; and to that end to establish and maintain a museum, library and laboratories, and their branches wherein all matters, methods and means for improving the general condition of the people as to their safety and health may be studied, tested and promoted, with a view to lessening the number of casualties and avoiding the causes of physical suffering and of premature death; and to disseminate the results of such study, researches and test by lectures, exhibitions and other publications."

Chapter 466, Laws of 1914 (amending Greater New York Charter), § 244a, authorizes the board of estimate and apportionment of the city of New York to appropriate annually "such sum as it may deem proper, not exceeding \$50,000, for the keeping, preservation, and exhibition of safety devices and means and methods of safety and sanitation in the building or any part thereof in the city of New York now or hereafter occupied by the American Museum of Safety." It is assumed, rather than stipulated, that the purpose of the lease is to provide a place for such exhibition, but the lease is general in its terms. The tenant occupies the building rent free, except as it agrees to expend a substantial sum on alterations of the Arsenal for its purposes, for all its noncommercial purposes. The lease may, by its terms, be canceled "when said property shall be required by the party of the first part for other park purposes."

Defendant is one of a number of private corporations which are deemed to exercise quasi public

functions, and to be entitled to aid from the public treasury. To this end it has obtained space in Central Park and legislative authority for an annual appropriation by the city. Without reflection upon its worthiness or consideration of its constitutional right to public aid, we approach the question of the legislative authority of the park commissioner to lease to it the old Arsenal now standing in Central Park, even to enable it to exhibit its safety and sanitary appliances. The park commissioner may control and manage the parks for park purposes. Are the purposes of the defendant Safety Institute of America, in any proper sense, park purposes? They are primarily utilitarian and educational in character. Its proposed exhibition is instructive. It is for a long period of years, and is not a mere temporary show of things of passing interest. Incidentally it may amuse those who frequent the park for health and recreation, as any show of mechanical devices might, but so far as it fails to promote "means and methods of safety and sanitation," and to advance knowledge of such subjects, it fails to accomplish its corporate purpose.

A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment.

**Definition—
park.**

Perrin v. New York
C. R. Co. 36 N. Y.
120, 124. It need

not, and should not, be a mere field or open space, but no objects, however worthy, such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to park purposes is made by the public itself and the strict construction of a private grant is not insisted upon. Brooklyn Park v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Higginson v. The Treasurer (Higginson v. Slattery) 212 Mass. 583, 42 L.R.A. (N.S.) 215, 99 N. E. 523; Riverside v. MacLain, 210 Ill. 308, 66 L.R.A. 288, 102 Am.

St. Rep. 164, 71 N. E. 408; Hopkinsville v. Jarrett, 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85. Differences naturally arise as to the meaning of the phrase "park purposes." Under local statutes it has been held that a public library may be erected in a park without diverting it from such purposes (Spies v. Los Angeles, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465; Riggs v. Board of Education, 27 Mich. 262), and the city of Hartford was permitted to turn over a part of the land it had dedicated as a public park to the state for the purpose of a state capitol (Hartford v. Maslen, 76 Conn. 599, 57 Atl. 740). Monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoölogical gardens, playing grounds, and even restaurants and rest houses, and many other common incidents of a pleasure ground, contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation, and amusement, and thus provide for the welfare of the community. The environment must be suitable and sightly or the pleasure is abated. Art may aid or supplement nature in completing the attractions offered. The legislative will is that Central Park should be kept open as a public park ought to be, and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end.

To promote the safety of mankind and to advance the knowledge of the people in methods of lessening the number of casualties and avoiding the causes of physical suffering and premature death is the purpose of the Safety Institute of America; to provide means of innocent recreation and refreshment for the weary mind and body is the purpose of the system of public

parks. The relation of the two purposes is at best remote. No reproach is cast upon the humanitarian aims of the Safety Institute when we say that it must find another place in which to bring them to the attention of the public.

The judgment should be reversed, with costs in all courts, and the motion for judgment on the pleadings denied, with \$10 costs.

Hiscock, Ch. J., and Chase, Collin, Cardozo, Crane, and Andrews, JJ., concur.

NOTE.

The uses to which park property may be devoted is the subject of the annotation following *WRIGHT v. WALCOTT*, post, 1246. See specifically, as to leasing of park property, subs. III e, 2, and IV. f.

GEORGE G. WRIGHT et al.

v.

ROBERT WALCOTT et al.

Massachusetts Supreme Judicial Court — May 25, 1921.

(238 Mass. 432, 131 N. E. 291.)

Eminent domain — power to devote public property to private use.

1. The legislature may authorize land acquired by a municipal corporation in fee for a public park to be leased for general commercial purposes when it is no longer needed for the purposes for which it was acquired.

[See note on this question beginning on page 1246.]

Statute — dependent on acceptance by municipal corporation.

2. The legislature may make the operation of a statute affecting a particular municipality dependent upon acceptance of it by the municipality.

Public property — lease — disposition of income.

3. Income from public land leased for private purposes must be devoted solely to public uses.

RESERVATION by the Supreme Judicial Court for Middlesex County (Jenney, J.) for determination by the full court of a suit to enjoin defendants, members of the industrial commission, from leasing or attempting to lease certain park lands for private business purposes. *Bill dismissed.*

The facts are stated in the opinion of the court.

Mr. Francis J. Carney for plaintiffs.

Mr. Peter J. Nelligan, for defendants:

The act of the legislature in enacting the acts here in question must be construed as a determination that, by reason of changed conditions, land deemed necessary at the time of taking has become no longer needed.

Re *Wellington*, 16 Pick. 87, 26 Am. Dec. 631.

When a fee simple is taken, there is no reversion, but, when the particular use ceases, the property may, by au-

thority of the state, be disposed of for either public or private uses.

Lewis, Em. Dom. 3d ed. § 861; *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282; *Nelson v. Fleming*, 56 Ind. 310; *Frank v. Evansville & I. R. Co.* 111 Ind. 132, 12 N. E. 105; *Heyward v. New York*, 8 Barb. 486; *Rexford v. Knight*, 11 N. Y. 308; *Lake County Water & Light Co. v. Walsh*, 160 Ind. 32, 98 Am. St. Rep. 264, 65 N. E. 530; *Tift v. Buffalo*, 82 N. Y. 204; *Atty. Gen. v. Revere Copper Co.* 152 Mass. 444, 9 L.R.A. 510, 25 N. E.

N. 1. 408, 68 N. E. 884, Huron Waterworks Co. v. Huron, 7 S. D. 9, 30 L.R.A. 348, 58 Am. St. Rep. 817, 62 N. W. 975; Ogden City v. Bear Lake & River Waterworks & Irrig. Co. 16 Utah, 440, 11 L.R.A. 305, 52 Pac. 697; Roper v. McWhorter, 77 Va. 214; Ft. Wayne v. Lake Shore & M. S. R. Co. 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215.

The legislature may authorize the sale of lands acquired for a park where the title is vested in a municipality in fee.

Brooklyn Park v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Brooklyn v. Copeland, 106 N. Y. 496, 13 N. E. 451.

Rugg, Ch. J., delivered the opinion of the court:

This is a bill in equity by ten taxpayers under Rev. Laws, chap. 25, § 100, now Gen. Laws, chap. 40, § 53, to restrain conduct of the industrial commission of Cambridge alleged to commit that city to obligations unauthorized by law. The pertinent facts are that the city of Cambridge was authorized by Stat. 1892, chap. 341, and Stat. 1893, chap. 337, to acquire land for public parks. Under that power and pursuant to a general plan for the development of a parkway and riverside reservation along the Cambridge bank of the Charles river, the city took by eminent domain and purchase about 113.6 acres (exclusive of the land here in question) extending on the river front approximately 4 miles. That general plan has been carried out (except as to the land here in question) and stretches from the Cambridge bridge, on or near the site of an earlier structure called the West Boston bridge, to the Cambridge hospital in the westerly part of the city, at an expense of about \$2,000,000. The land in question, called "The Front," contains 349,828 square feet of land bounding easterly on the Charles river 1,759 feet, northerly on Lechmere canal, westerly on a street, and southerly on land of private owners. It was taken by eminent domain in 1894, and the

city, which became vested with the title in fee. A sea wall has been built and the land has been filled to grade, each costing slightly in excess of \$50,000, the total expense including original cost being nearly \$150,000. The land has not been further worked for park purposes. It would cost now from \$10,000 to \$30,000 to adapt it for park uses, depending upon the extent of development. Since "The Front" was acquired the Cambridge bridge has been built at great expense, connecting Boston and Cambridge, having been opened for use in 1909. It is a substantial structure of fine architectural design. From this bridge on the Boston side of the Charles river, upstream for a considerable distance, there is an attractive river bank park under the jurisdiction of the metropolitan park commission. "The Front" and the present parkway system of Cambridge are separated by three lots of land, occupied by buildings, and utilized as a purely business and commercial district, and communication between the two is by an underpass under Cambridge bridge and through a business street. Since 1894 "The Front" has not been in fact devoted to uses of a public park, except that opposite it in the river, in each year recently, from about June 30 to the first Monday in September, a floating bathhouse has been maintained, access to which is by crossing "The Front," and which has been used annually by at least 10,000 people. The neighborhood in its vicinity has been largely given over to business and commercial activities. By Stat. 1913, chap. 393, as amended by Special Stat. 1917, chap. 223, and Special Stat. 1919, chap. 79, the city of Cambridge has been authorized by vote of its city council "to alter use" of "The Front," to "maintain public dock or wharf thereon," and to "lease said land or any part of it for wharves, terminals, and all other commercial purposes for periods not exceeding ninety-nine

years." The city council has passed the requisite votes. The defendants as the authorized agents of the city have had tentative proposals concerning leases of the land in question. The plaintiffs contend that the legislative acts just cited authorizing the alteration in the use of the land and its lease for private business and commercial uses are unconstitutional.

It is to be observed that no one having a special or private stake in the matter is objecting. No one complains on the ground of having paid a betterment assessment for the laying out of this land as a park. The proceeding is wholly under the statute by those having a public interest as taxpayers.

There are certain fundamental principles too well settled to be open to question. Moneys raised by taxation and all public funds can be expended only for public purposes. Private property cannot be taken by eminent domain or by contract of purchase except for a public use. It cannot be so taken or purchased from one person or set of persons with the design of handing it over directly or indirectly to another person or set of persons for their private advantage. The taking of private property except for ends which are of a public nature, even though accompanied by full compensation to the owner, is contrary to fundamental principles of American jurisprudence and violative of the essential character of a free government. Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons, after it has been taken by the superior power of the government from another private person avowedly for a public use, is unconstitutional. *Salisbury Land & Improv. Co. v. Com.* 215 Mass. 371, 46 L.R.A. (N.S.) 1196, 102 N. E. 619, and cases there reviewed and collected; *Riverbank Improv. Co. v. Chadwick*, 228 Mass. 242, L.R.A. 1918B, 55, 117 N. E. 244; *Re Opinion of Justices*, 237 Mass. 598, 131 N. E. 25, and cases there collected; *Lynch v.*

Forbes, 161 Mass. 302, 309, 42 Am. St. Rep. 402, 37 N. E. 437; *Wheelock v. Lowell*, 196 Mass. 220, 225, 124 Am. St. Rep. 543, 81 N. E. 977, 12 Ann. Cas. 1109; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 251, 49 L. ed. 462, 467, 25 Sup. Ct. Rep. 251; *Hairston v. Danville & W. R. Co.* 208 U. S. 598, 606, 52 L. ed. 637, 640, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008.

The taking of land for a public park is for a public use. To that end title may be taken in fee. Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest, or other trust or condition, is under the control of the general court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. The power of the general court in this regard is supreme over that of the city or town. When title in fee is acquired in the land by the municipality for such a public use, there is no right of reversion to the original owner. He has been divested of every vestige of title when he parted with the fee. *Higginson v. Treasurer (Higginson v. Slattery)* 212 Mass. 583, 42 L.R.A. (N.S.) 215, 99 N. E. 523; *Stewart v. Kansas City*, 239 U. S. 14, 16, 60 L. ed. 120, 121, 36 Sup. Ct. Rep. 15.

The question never has arisen for express judicial determination in this commonwealth, whether land once taken in fee for a public use can be sold and devoted to private uses when, through the lapse of time or by reason of changed conditions and under legislative authority, it has been decided that such land is no longer needed for public uses.

Since 1901 there has been a general law authorizing the abandonment of lands, easements, and other rights taken by cities and towns otherwise than by purchase, upon compliance with certain conditions set forth in the statute. Gen. Laws,

cial statutes authorizing cities to sell certain lands acquired or held for park purposes. None of these acts has been attacked in this court.

The question has arisen in other jurisdictions, where it has been held that, when there is legislative determination or approval to that end, such conveyance may be made when by reason of altered conditions the land is no longer needed for the public use. *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Reichling v. Covington Lumber Co.* 57 Wash. 225, 135 Am. St. Rep. 976, 106 Pac. 777; *Craig v. Allegheny*, 53 Pa. 477, 481; *Malone v. Toledo*, 34 Ohio St. 541; *Re New York*, 190 N. Y. 350, 358, 16 L.R.A.(N.S.) 335, 83 N. E. 299, 13 Ann. Cas. 598; *McGuire v. Atlantic City*, 63 N. J. L. 91, 42 Atl. 781; *Konrad v. Rogers*, 70 Wis. 492, 36 N. W. 261; *Lyman v. Gedney*, 114 Ill. 388, 403, 55 Am. Rep. 871, 29 N. E. 282. See *Driscoll v. New Haven*, 75 Conn. 92, 52 Atl. 618. It was held in *Chase v. Sutton Mfg. Co.* 4 Cush. 152, that a mill privilege and flowage rights acquired for the public use of establishing and maintaining a canal, when no longer necessary for the promotion of that enterprise because of its failure, might be sold under legislative authority for private uses. See *Winnisimmet Co. v. Grueby*, 209 Mass. 1, 95 N. E. 293. It has been held by this court that land acquired by railroads for their public aims may be sold when no longer required. *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90. Cities may devote for hire to private uses land or buildings not, for the time being, needed for public purposes. *French v. Quincy*, 3 Allen, 9; *Worden v. New Bedford*, 181 Mass. 23, 41 Am. Rep. 185; *Davis v. Rockport*, 213 Mass. 279, 43 L.R.A.(N.S.) 1139, 100 N. E. 612. It is a familiar incident in public affairs that the easement taken for public travel in laying out a highway may be abandoned by legislative authority, and thereby

chap. 82, §§ 1, 21, 30. *Coakley v. Boston & M. R. Co.* 159 Mass. 32, 38 N. E. 930. In *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014, with reference to takings, authorized by Stat. 1902, chap. 534, for the Boston subways and tunnels, it was said at page 90: "The legislature well might determine that a taking in fee might be necessary in certain cases, in reference to a reasonably economical management of the business, in the public interest, even though the use of the fee would not be needed permanently, and might authorize a subsequent sale or leasing of any rights in the property that were no longer devoted to the public use."

Stating the proposition broadly, the taking in fee of private lands for a public use, the achievement of the aim contemplated, the complete accomplishment of the public purpose designed, and the subsequent sale of the land so taken for private improvement, is a recognized and valid exercise of the power of the general court under our Constitution. *Dingley v. Boston*, 100 Mass. 544; *Talbot v. Hudson*, 16 Gray, 417; *Bancroft v. Cambridge*, 126 Mass. 488; *Moore v. Sanford*, 151 Mass. 285, 7 L.R.A. 151, 24 N. E. 323; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43. Most of these cases related to exercise of the police power combined with and supplemented by eminent domain, but they all recognized the existence of power to sell for private improvement land taken by eminent domain for public use when continued ownership by the public agency is no longer necessary.

On principle there is no reason why land taken and used for a municipal building of any sort or other public function may not, when the need is at an end, under legislative authority, be sold, or otherwise, with due regard to the public interests, be devoted to private purposes.

The facts in the case at bar war-

Eminent domain
—power to de-
vote public
property to pri-
vate use.

2. Capitol; city or town hall, 1253.
3. Courthouse, 1254.
4. Jail, 1254.
5. Library, 1255.
6. Museum, 1256.
7. Schoolhouse, 1256.
8. Incident to ordinary park purposes, 1257.
9. Miscellaneous buildings, 1258.
- d. Erection of monuments, 1259.
- e. Conveyance or lease of property:
 1. Sale, 1259.
 2. Lease, 1262.

I. Scope.

This annotation discusses the question as to what particular uses park land, however acquired, may be devoted, covering the question of the power of the legislature, state or municipal government, or its officers to control the uses to which park property may be put; but does not deal with the question of who may object to the changed use.

The term "park" in the title of the annotation is taken to include all open plots of ground, commonly spoken of as parks, squares, commons, etc., except playgrounds; and the term "uses" is confined to permanent or semipermanent uses as distinguished from merely temporary or intermittent uses, such as for delivering addresses, holding meetings, etc., cases involving which are excluded.

II. In general.

The municipal authorities have power to devote park property to uses which are proper park purposes or consistent with the purposes of its dedication; but it is generally held that they cannot divert park property from park purposes or the purposes of its dedication.

The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, i. e., whether dedicated by the owner thereof, or purchased or condemned by the municipality.

Thus, the uses to which land dedicated by its private owner as a park may be devoted depend upon the pur-

- g. Inclosure of land, 1264.
- h. Setting out of trees, 1265.
- i. Municipal water supply and sewage, 1265.
- j. Miscellaneous uses, 1266.

IV. Power of legislature or state officers:

- a. In general, 1266.
- b. Railroad uses, 1266.
- c. Use for buildings, 1267.
- d. Use for monuments, 1268.
- e. Sale, 1268.
- f. Lease, 1270.
- g. Inclosure, 1271.

V. Power of eminent domain, 1271.

poses of the dedication, as determined by the intention of the dedicator, and such land cannot be used for any purpose which is inconsistent with such intention. *McIntyre v. El Paso County* (1900) 15 Colo. App. 78, 61 Pac. 237; *Riverside v. MacLain* (1904) 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408; *Hopkinsville v. Jarrett* (1914) 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85; *Louisville & N. R. Co. v. Cincinnati* (1907) 76 Ohio St. 481, 81 N. E. 983; *Harris County v. Taylor* (1883) 58 Tex. 690; *Clement v. Paris* (1913) — Tex. Civ. App. —, 154 S. W. 624; *McBride v. Rockwall County* (1917) — Tex. Civ. App. —, 195 S. W. 926.

The dedication of lands as "public grounds" is an unrestricted dedication to public use, and in such case the use is indefinite and may be any public use. *Chicago, R. I. & P. R. Co. v. Joliet* (1875) 79 Ill. 25.

A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted. *Harter v. San Jose* (1904) 141 Cal. 659, 75 Pac. 344; *Spires v. Los Angeles* (1906) 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465; *Riverside v. MacLain* (1904) 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408; *Hopkinsville v. Jarrett* (1914) 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85.

When the purposes for which public squares may be used are defined by

Supp. 807, that there was no statute under which the park commissioners of Buffalo could lay a public highway across a public parkway; that they had no proprietary right or interest in the park lands, nor the right or power to dispose of any such interest; nor the right to consent that any of such lands should be used otherwise than for park purposes as distinguished from public highways.

And a city has no authority to dedicate part of the land conveyed to it for a public market for the purpose of a highway, and therefore no dedication can be presumed from any length of user. *Hamilton v. Morrison* (1868) 18 U. C. C. P. 228.

It was held in *Look v. El Paso Union Pass. Depot Co.* (1921) — Tex. Com. App. —, 228 S. W. 917, that while to lay sidewalks through and around parks is not necessarily a diversion of that part of the park so used to other than park purposes, where the purpose on the part of a city, in laying a sidewalk along the outside of a park, is to secure an adjustment of its lawsuit with a private individual in reference to the title of land adjoining the park, and the laying of such sidewalk results in an appropriation of a part of the park property for the benefit of a private party, the laying of the walk, under such circumstances, is a diversion of the property from park purposes.

And land dedicated for use as a "public square" may not be occupied by a bridge company as an approach to the bridge, and such use of the land constitutes an abandonment of it as a public square. *Porter v. International Bridge Co.* (1910) 200 N. Y. 234, 93 N. E. 716, 21 Ann. Cas. 684.

But a borough given by statute power to regulate public squares may lay out a pleasure drive around the borders of a square dedicated by the commonwealth for such appropriate public uses as would, under usage and custom, be deemed to have been fairly in contemplation, at the time of the reservation of the square, as public uses, such as courthouses, markets,

(1895) 171 Pa. 542, 33 Atl. 112.

And it is intimated in *Riverside v. MacLain* (1904) 210 Ill. 308, 66 L.R.A. 288, 102 Am. St. Rep. 164, 71 N. E. 408, where a village was enjoined from constructing a public highway across a park, that the use of a strip across the park for the purposes of a pleasure driveway would not be a misuse of the park lands.

And the construction of a speedway in a public parkway is a use for a strictly park purpose, and is within the power of a municipal board of park commissioners, who are given by statute exclusive control of the parks of the city, and vested with an absolute discretion to improve and maintain such parks as in their judgment shall seem proper. *Holtz v. Diehl* (1899) 26 Misc. 224, 56 N. Y. Supp. 841.

And where a county purchases land and causes a town to be platted as the county seat, in which a public square is designated for the county buildings, the public may acquire a right to maintain a highway across the square by dedication by the county commissioners, or by user for twenty years, since the use of a portion thereof as a highway is not inconsistent with its use as such a square. *Greene County v. Huff* (1883) 91 Ind. 333.

b. Use for railroad purposes.

See also cases under subds. IV. b, and V. *infra*.

The construction of railroads in squares, parks, and commons has been generally held an inconsistent use of the property. *United States v. Illinois C. R. Co.* (1869) 2 Biss. 174, Fed. Cas. No. 15,437; *Douglass v. Montgomery* (1897) 118 Ala. 599, 43 L.R.A. 376, 24 So. 745; *Jacksonville v. Jacksonville R. Co.* (1873) 67 Ill. 540; *Porter v. International Bridge Co.* (1910) 200 N. Y. 234, 93 N. E. 716, 21 Ann. Cas. 684; *Re New York & B. B. R. Co.* (1880) 20 Hun (N. Y.) 201; *Louisville & N. R. Co. v. Cincinnati* (1907) 76 Ohio St. 481, 81 N. E. 983; *Morrow v. Highland Grove Traction Co.* (1908) 219 Pa. 619, 123 Am. St. Rep. 677, 69 Atl. 41.

Thus, it has been held that where

individual for park purposes, and he has sold abutting lots with reference thereto, and the municipality has accepted the land for a park, the use of such land for railroad purposes is a manifest perversion of the trust under which the city holds the land for the use of the public. *Jacksonville v. Jacksonville R. Co.* (1873) 67 Ill. 540.

And it was not denied in *Re Boston & A. R. Co.* (1873) 53 N. Y. 574, but that the use for the purposes of a railroad of property dedicated as a park was an inconsistent use. The question there decided was whether the legislature had conferred the power upon the railroad to enter upon and take possession of the property.

And it has been held that where lands are dedicated by a private individual for a public common or landing, the erection of an elevated railroad structure thereon is a diversion from the use for which the lands are dedicated, and that an ordinance granting a railroad company the right to do so is void. *Louisville & N. R. Co. v. Cincinnati* (1907) 76 Ohio St. 481, 81 N. E. 983.

A grant to a railroad company of a right to construct its road over a city park, and the abandonment and discontinuance of the park by the city, which attempts to confirm the title of the railroad company which had purchased the reversion, are a violation of the trust under which the city held the land for the public, where the land was conveyed to the city for a common or park only, with a provision for its reversion if used for other purposes. *Douglass v. Montgomery* (1898) 118 Ala. 599, 43 L.R.A. 376, 24 So. 745.

And it has been held that the use of land, designated on a map of a proposed extension of a village, by those subdividing the property, as a public square, for the erection and maintenance of a railway station and tracks, is not consistent with the purposes for which the property was dedicated, and the granting of permission by the municipality for the permanent occupation of such public square by such structures amounts in law to an aban-

donment of the land to the original dedicators. *Porter v. International Bridge Co.* (1910) 200 N. Y. 234, 93 N. E. 716, 21 Ann. Cas. 684.

Where lands have been condemned by a municipality for park purposes pursuant to a special statute, the municipality cannot permit the lands to be used for railroad purposes inconsistent with their use as a park, without express legislative authority. *Re New York & B. B. R. Co.* (1880) 20 Hun (N. Y.) 201. In this case, the use of a seaside concourse or park by a railroad company for the purposes of a depot, engine house, etc., was held utterly inconsistent with the use of such land as a public park.

And where the proper government agent, on making a plat of land of the United States, designates a portion thereof as "public ground, forever to remain vacant of buildings," the municipality in which it is situated cannot grant such land to a railroad company for the erection of a passenger depot and for other railroad purposes. *United States v. Illinois C. R. Co.* (1869) 2 Biss. 174, Fed. Cas. No. 15,437.

And it was held in *Morrow v. Highland Grove Traction Co.* (1908) 219 Pa. 619, 123 Am. St. Rep. 677, 69 Atl. 41, that the purchasers of lots according to a plan on which an open square was shown could enjoin the use of such square by a street railway company for a car barn, sand sheds, and tracks.

But where the act under which a city was laid out directed the state to reserve 100 acres for a common pasture, and the state conveyed the property to the city for such public uses as the city council might ordain, the use of a part of the land for the road-bed of a railroad is a public use within the meaning of the conveyance. *Allegheny v. Ohio & P. R. Co.* (1855) 26 Pa. 355. And it was held by a divided court in this case that the city council had authority to grant such land to a railroad company for such use. The railroad company, however, was enjoined from erecting depots or

ed, and it was also enjoined so to transact its business as to prevent intrusions upon the remainder of the square by passengers or by persons coming to or departing from the cars with their freight or baggage.

And before land purchased by a city for a park has been actually dedicated to the public use, the city may convey it to a railroad company for a yard and depot grounds, if no limitation or restriction as to alienation was inserted in the deed to it. *Ft. Wayne v. Lake Shore & M. S. R. Co.* (1892) 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215.

And a grant by a municipality of the legal title to a part of a common reserved by the state, and used by the municipality as a park, for the construction of a railroad passenger depot and a driveway therefor, has been held to be authorized by a statute which granted the lands to the municipality for such public uses as the select and common council might, from time to time, direct and ordain. *Larkin v. Allegheny* (1908) 89 C. C. A. 369, 162 Fed. 611.

A city may permit a railroad track to be laid across a strip of land upon the bank of the river, donated for a common. *Goode v. St. Louis* (1892) 113 Mo. 257, 20 S. W. 1048. The court said: "It is true that in the course of time the city authorities have permitted, perhaps encouraged, by their licenses, & substitution of the rapid transit of railroad trains across the common in lieu and stead of the slow-moving wagons of former times; but this is but a change in the method of the public use, and not in the use itself; and such method is entirely germane to the purposes of the original dedication, and within the legitimate regulation and control of the municipal authorities." It is intimated, however, in this case, that a city would have no power to permit the construction of a railroad across a public park, since, although holding that a railroad could be permitted to cross a common, the court reached such conclusion upon the ground that a common differed from a park, overruling the contention of counsel that the word "com-

mon" should be treated as synonymous with "park," holding that the word "common" had a much more comprehensive meaning, and meant simply an uninclosed piece of land set apart for public use, while a park was a piece of ground within a city or town, inclosed and kept for ornament and recreation.

And it has been held that a municipality had the right to lease for railroad purposes lands designated by the county commissioners, who laid out the town, as "public grounds," and which were used as a common and for an approach to a municipal bridge, so long as the use to which the lands were put did not obstruct the approach to the bridge. *Platt v. Chicago, B. & Q. R. Co.* (1887) — Iowa, —, 31 N. W. 888. In this case, an action by an abutting owner for damages, and to have abated, as a nuisance, an obstruction, consisting of a railroad engine house, turntable, and tracks, to passage across the common directly from his property to the bridge, the court upheld a city ordinance leasing such land to a railroad company by a lease reserving a right of way over the common to the bridge, stating that the question in the case which controlled the rights of the parties was whether the plaintiff had a legal right to demand that a direct line of travel should remain unobstructed between his property and the bridge, and that the vital question in the case was whether the city had the power to provide for one approach to the bridge; and the court answered the first question in the negative, and the second question in the affirmative, and held that as the city had provided in the lease for one approach to the bridge, the plaintiff could not recover. This case simply amounted to a decision that the city had the right to obstruct travel over the common in any specified place, provided it left one way open over the common to the bridge.

And it has been held that a court of equity will interfere, at the instance of a street railroad company, to prevent a municipality which has granted, by ordinance, the right to lay tracks across a public square, which tracks have been constructed at a

considerable cost, from fencing the square so as to include a portion of the tracks and interrupt traffic, as the damages cannot be compensated in an action at law, and a court of equity will interfere to protect rights acquired under a franchise. *Springfield R. Co. v. Springfield* (1885) 85 Mo. 674. The power of the city to authorize such use of the park, or the question whether such use was a proper park use, was not discussed or passed upon in this case.

Where property was set apart and designated on a town plat by the proprietor as "public ground," and upon the request of the county authorities a railroad was built across a portion thereof at a great expense, and was operated without objection for twenty years, it was held that the use of a part of the land for a railroad was not inconsistent with the uses for which the lands were dedicated. *Chicago, R. I. & P. R. Co. v. Joliet* (1875) 79 Ill. 25, 22 Am. Rep. 158.

And where the construction of a railroad does not interfere with the enjoyment of the property, or affords the public better opportunity to use the land dedicated, it has been held a lawful use of the property.

Thus, the construction of a railroad in a park, which in no wise affects or obstructs the free and comfortable use and enjoyment of the park in the customary manner, does not constitute a nuisance abatable at the suit of the people. *People ex rel. Britton v. Park & O. R. Co.* (1888) 76 Cal. 156, 18 Pac. 141.

And there is no diversion from the purposes of its dedication in running a subway under land deeded for common use as a training field and cow-pasture, where there will be no interference with the surface except a slight enlargement of the approaches to a station. *Codman v. Crocker* (1909) 203 Mass. 146, 25 L.R.A.(N.S.) 980, 89 N. E. 177.

And where the dedication of a park excepts a lane running through the property from the uses and purposes of a public park, and stipulates that it shall always remain open as a public highway, the way is subject to use for

street railways in the same manner as other highways. *Bancroft v. Bancroft* (1905) — Del. —, 61 Atl. 689.

c. Construction of buildings.

See also subd. IV. c, *infra*.

For use for railroad buildings, see subd. III. b, *supra*.

1. In general.

Where park lands are acquired by dedication, the question whether buildings may be erected thereupon, or the nature of the buildings that may be erected, depends upon the purposes of the dedication. It is generally held, where land is dedicated for the ordinary use of a park or common, that the erection of buildings thereupon not distinctively for park purposes is inconsistent with such use. *Chicago v. Ward* (1897) 169 Ill. 392, 38 L.R.A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; *Ward v. Field Museum* (1909) 241 Ill. 496, 89 N. E. 731; *Fisher v. Beard* (1875) 40 Iowa, 625; *Fessler v. Union* (1904) 67 N. J. Eq. 14, 56 Atl. 272, affirmed upon opinion below in (1905) 68 N. J. Eq. 657, 60 Atl. 1134; *Watertown v. Cowen* (1834) 4 Paige (N. Y.) 510, 27 Am. Dec. 80; *Brown v. Manning* (1834) 6 Ohio, 298, 27 Am. Dec. 255; *San Antonio v. Lewis* (1855) 15 Tex. 388.

Thus, a town has no right to erect buildings on land dedicated to the public for use as an open pleasure ground, and the erection of such buildings is a breach of the trust for which the land is held. *Fessler v. Union* (1904) 67 N. J. Eq. 14, 56 Atl. 272, affirmed upon opinion below in (1905) 68 N. J. Eq. 657, 60 Atl. 1134.

And the erection of buildings by the grantees of the city, on commons dedicated to the public use, is unlawful. *San Antonio v. Lewis* (1855) 15 Tex. 388.

And inclosures and buildings caused to be erected by the original proprietors long after the dedication, on land dedicated as a public square, will be abated as nuisances. *Brown v. Manning* (1834) 6 Ohio, 298, 27 Am. Dec. 255.

A city has no power to erect or permit to be erected any buildings upon

land dedicated as a public park with the restriction that no buildings shall be erected thereon. *Chicago v. Ward* (1897) 169 Ill. 392, 38 L.R.A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; *Ward v. Field Museum* (1909) 241 Ill. 496, 89 N. E. 731 (museum).

The owners of lots facing a square dedicated by a county, and marked "public lots" on its plat of the county seat, may enjoin purchasers of a part of such square from erecting buildings thereon. *Rutherford v. Taylor* (1866) 38 Mo. 315.

And a purchaser of abutting lots from a grantor who represents that a space marked as a public square on a plat shall forever be used for that purpose may enjoin the erection of buildings thereon by a grantee of the dedicator. *Fisher v. Beard* (1875) 40 Iowa, 625.

And it was held in *Watertown v. Cowen* (1834) 4 Paige (N. Y.) 510, 27 Am. Dec. 80, that the erection of buildings on land dedicated for a public park might be enjoined.

A restriction against the erection of buildings upon land dedicated as a park is not removed by the change of the use of the buildings abutting thereon from residence to business purposes. *Chicago v. Ward* (Ill.) supra.

And the submergence of lands, dedicated as a public park with the express condition that no buildings shall be erected thereon, as the result of heavy storms, and the subsequent reclamation by the city of such land, do not destroy the restrictions. *Ibid*.

The consent of the cestuis que trust to the erection of one building on land dedicated for an open public pleasure ground does not amount to a consent to the erection of other buildings on such land. *Fessler v. Union* (1904) 67 N. J. Eq. 14, 56 Atl. 272, affirmed without opinion in (1905) 68 N. J. Eq. 657, 60 Atl. 1134.

And consent of owners abutting upon a park dedicated under restrictions against the erection of buildings, to the erection of one or more buildings upon such park, will not estop them from bringing suit to enjoin the erection of other buildings. *Chicago v. Ward* (Ill.) supra.

Where a square is dedicated for use as a site for a particular kind of building, the municipality has no authority to erect thereon buildings for other purposes. *Harris County v. Taylor* (1883) 58 Tex. 690; *Llano v. Llano County* (1893) 5 Tex. Civ. App. 132, 23 S. W. 1008; *Clement v. Paris* (1913) — Tex. Civ. App. —, 154 S. W. 624. In the last case, the court said that the city, as such, could not erect any building upon the square.

But where a square is dedicated to the public use, or to public purposes, generally, buildings may be erected thereon by the municipality. *Reid v. Board of Education* (1880) 73 Mo. 295.

And the occupation of the central square of a county seat in Pennsylvania by a public building is consistent with the purposes for which it was dedicated. *Mahon v. Luzerne County* (1900) 197 Pa. 1, 46 Atl. 894.

And where the act incorporating a town gives it the power to erect buildings on its lands, and land is sold to it for the purpose of having the courthouse and jail on the lot, with a covenant for quiet enjoyment so long as judicial proceedings are held there, the town may erect buildings on part of the land and lease them to individuals. *Bolling v. Petersburg* (1837) 8 Leigh (Va.) 224.

2. Capitol; city or town hall.

The use of a part of a park as a state capitol is not inconsistent with its use as a park. *Hartford v. Maslen* (1904) 76 Conn. 599, 57 Atl. 740.

The general dedication of land for public squares implies that they are to be enjoyed by the public at large, and they cannot be used by a city for the site of a city hall with a jail in the basement. *Church v. Portland* (1889) 18 Or. 73, 6 L.R.A. 259, 22 Pac. 528. The court said: "The blocks were indicated on the map as public squares, which implied, of course, that they were to be enjoyed as such by the public at large, and not be appropriated and used by the city in the management and conduct of its affairs. The use of them in the way proposed would necessarily exclude the public from the use of them except for the

privilege can be enjoyed wherever the buildings may be located. The act of building the city hall in question would virtually be a purpresture. The city would be making that several to itself which ought to be common to many."

And the mere fact that a block of ground was dedicated by the original proprietors of a town for a "public square" does not confer upon the village trustees authority to appropriate it, in whole or in part, as a site for a town hall, against the wishes of any citizen interested. *Princeville v. Auten* (1875) 77 Ill. 325.

And land composing part of a park to be used "as public walks or pleasure grounds" cannot be used for the site of a town hall. *Atty. Gen. v. Sunderland Corp.* (1875) L. R. 2 Ch. Div. (Eng.) 634, 45 L. J. Ch. N. S. 839, 34 L. T. N. S. 921, 24 Week. Rep. 991.

But leave to build a city hall upon a city common was held in *Foster v. Worcester* (1895) 164 Mass. 419, 41 N. E. 654, to be impliedly granted by a statute authorizing the city to acquire the title to a meetinghouse standing on the common, "for the purposes of a public park or for the purposes of a city hall."

And where land adjoining a river is dedicated as "public ground" for use for the erection of temporary boat yards, which use has ceased in fact, the town may use a small portion of such land as a site for a building for general municipal purposes, and lay out the remainder as a park, and improve and ornament it as such. *Com. ex rel. Atty. Gen. v. Connellsville* (1902) 201 Pa. 154, 50 Atl. 825.

3. Courthouse.

The erection of a courthouse upon a public park or square is inconsistent with the dedication of such park or square for the public use. *McIntyre v. El Paso County* (1900) 15 Colo. App. 78, 61 Pac. 237; *McBride v. Rockwall County* (1917) — Tex. Civ. App. —, 195 S. W. 926.

But the erection and use of a courthouse on land designated as "public ground" on a plat of a town has been

which the property was dedicated. *Lebanon v. Warren County* (1839) 9 Ohio, 80, 34 Am. Dec. 422.

And the erection of a courthouse in a square dedicated for "public concerns" is consistent with the purposes of its dedication. *Baird v. Rice* (1869) 63 Pa. 489.

And in Pennsylvania a county has a right based upon usage, which has acquired the consistence of law, to reasonable accommodation for its courthouse and public offices in the great square of the county town; but the extent of the right is limited to the single purpose sanctioned by that usage. *Com. v. Bowman* (1846) 3 Pa. St. 202.

So, where a courthouse erected on part of the great square of the county town is vacated by the county officials formerly occupying it, for new quarters in another part of the square, the county commissioners have no right to let the old building for a printing office or for a county treasurer's office. *Com. v. Bowman* (Pa.) *supra*. The court said: "The commissioners have no more right to hold this part of the square than they would have to hold the whole of it, by distributing the public buildings to the four quarters of it. When they removed the courthouse and offices to another part of it, their duty required them to remove the materials of the old buildings, or abandon them to the municipal authorities; and by omitting to do so, they became obnoxious to the offense of which they stand indicted."

But it was held in *Mahon v. Luzerne County* (1900) 197 Pa. 1, 46 Atl. 894, that the county commissioners, when authorized by the proper proceedings of the grand jury and the court as required by statute, have the power to erect upon the central square of the county seat a new and enlarged courthouse upon the site of the old courthouse.

4. Jail.

It was held in *Flaten v. Moorhead* (1892) 51 Minn. 518, 19 L.R.A. 195, 53 N. W. 807, where the clause, "said tract of land hereby conveyed to be

forever held and used as a public park," followed the description in a deed, naming a nominal consideration, to a municipality, that the municipality did not acquire an absolute title in fee, and an order refusing an injunction to restrain the erection of a city prison on the land was reversed.

And a county which has accepted a square from the donor for the purpose of erecting a courthouse thereon cannot use the property as a site for a jail. *Harris County v. Taylor* (1883) 58 Tex. 690.

And a county has no authority to erect a county jail and a cesspool in connection therewith upon land dedicated by it to the public for use as a public square and a site for the county courthouse. *Llano v. Llano County* (1893) 5 Tex. Civ. App. 132, 23 S. W. 1008. In this case the court said: "The dedication of the public square to use and enjoyment of the public, with the rights reserved in the county to erect thereon a courthouse, would imply that the county had reserved all the rights it intended to retain in the thing granted; and a use by it for other purposes that are not in keeping with the original purpose for which the dedication was made, and in furtherance of some act tending to increase the facilities of the public generally in the use of the square in a way that said public squares are generally used by the public, would clearly be a diversion of the use and an invasion of the rights of the public. The easement in the public to the use of the square cannot thus be invaded by the owner. Except as to those privileges reserved, he has only such rights to use as any other member of the public, and a use not consistent with that of the public cannot be made by the owner. . . . A dedication of property to public uses by the government or a county is measured by the same law that governs a dedication for such purposes by an individual, and when the dedication is made by the county, it has no more right to devote the property to uses foreign to the dedication than an individual would have."

But the erection of a jail on land

designated as "public ground" plat of a town, has been not inconsistent with it. *Warren County v. Warren County* (Ohio, 80, 34 Am. Dec. 42).

And it was held in *Duval County v. Island County* (1916) 278 N. E. 342, that the words "public square" written on a map of ground was a clear indication that the square was dedicated to a public square and to be used by the public for some public purpose, but the words did not indicate an definite use of the square for its use as a site for a courthouse. The use sought to be restrained, a proper use, was, however, not decided.

5. Library.

A square in a city dedicated to a public place forever for the use of the community in general, if used as a park, may properly be used for the erection of a public library. It appearing that such use is consistent with the public enjoyment of the park. *Spires v. Los Angeles* (1906) 150 Cal. 64, 87 Pac. Ann. Cas. 465. In this case the court said: "Now, we are at a loss to conceive why, if the erection of conservatories, and art galleries, and the like, are permitted and sustained as in aid of the enjoyment of the public in the property dedicated to the use of the public, the erection of a public library in a park should be proscribed. The latter is as much in the enjoyment of the public as the former, and, as far as the right of the public to it is concerned, stands on entirely the same footing. If a municipality were undertaken to establish on this property a fire-engine station, hospital, or the like, endeavoring to devote the property (assuming it was dedicated to a public park) to the erection of public buildings, or offices or for use in the transaction of public business, a different question would be presented, and there would be little hesitancy in holding that it could not do so. But the erection of said dedicated property

a museum, or art gallery, or conservatory, or library, designed for the recreation, pleasure, and enjoyment of the community in general, is an entirely different proposition, and is a distinction generally recognized by the authorities. Public buildings such as we have last mentioned are for the benefit of the same public that enjoys the advantages of the park; there is nothing exclusive about it, and they are in fact erected and maintained as additional and ancillary means to promote the recreation and pleasure of those to whom the enjoyment of the park is devoted."

Such library building can, however, be used for library purposes only, and cannot be devoted to the establishment of municipal offices therein, or used for municipal administration purposes other than as a meeting place for the board of library directors, and injunction will lie at the suit of a resident abutting owner on the park, to prevent such improper use of the building. *Ibid.*

The use of a park set apart by the territorial legislature for such uses as the city council might provide, for a public library, is clearly within the purpose of the dedication. *Riggs v. Board of Education* (1873) 27 Mich. 262.

And land composing part of a park, to be used "as public walks or pleasure grounds," may be used for the site of a library. *Atty. Gen. v. Sunderland* (1875) L.R. 2 Ch. Div. (Eng.) 634, 45 L. J. Ch. N. S. 839, 34 L. T. N. S. 921, 24 Week. Rep. 991.

But the erection of a public library building upon a portion of a tract of land devised to a city upon condition that it shall be used forever solely as a public park is inconsistent with the purpose for which the park was dedicated, and amounts to a diversion. *Hopkinsville v. Jarrett* (1914) 156 Ky. 777, 50 L.R.A.(N.S.) 465, 162 S. W. 85.

And in *Jones v. Jackson* (1913) 104 Miss. 449, 61 So. 456, where a statute directed the sale of certain land donated to the state for a seat of government, except such blank squares as the commissioners and governor should

select as necessary to be reserved as "commons" for the health, ornament, and convenience of a city, and certain land was set apart on a map as a "promenade," it was held that the city could not erect a public library on such land. The court said: "Taking into consideration the time when the state dedicated this square, and the uses to which it was dedicated, we think it was the intention that the square was to be kept open for the use of all the people, and that this was the construction placed upon the act by the commissioners appointed to carry out the purpose of the dedicator is manifested by the designation of the square as a 'promenade.'"

6. Museum.

The erection of a museum upon land composing part of a park, to be used "as public walks or pleasure grounds," is allowable. *Atty. Gen. v. Sunderland* (1875) L. R. 2 Ch. Div. (Eng.) 634, 45 L. J. Ch. N. S. 839, 34 L. T. N. S. 921, 24 Week. Rep. 991.

But the use of a park as a site for a museum is inconsistent with the purposes of its dedication, where the terms of its dedication prohibit buildings of any kind. *Ward v. Field Museum* (1909) 241 Ill. 496, 89 N. E. 731.

7. Schoolhouse.

See also *Higginson v. Treasurer* (Mass.) under subd. IV. c, *infra*.

The city authorities have no power to erect a schoolhouse upon land dedicated for a public use as an ornamental park, since such use would be inconsistent with the purposes of its dedication. *Rowzee v. Pierce* (1898) 75 Miss. 846, 40 L.R.A. 402, 65 Am. St. Rep. 625, 23 So. 307.

And it was held in *McCullough v. Board of Education* (1876) 51 Cal. 418, that the purposes for which public squares may be used are those defined by positive law, and that the erection of schoolhouses thereon was not one of the purposes provided for; and that therefore the board of supervisors of the county of San Francisco had no power to authorize the board of education of the city and county of San Francisco to use a part of a public square for a high school.

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been regarded as practically necessary."

But a city has no power to erect a garage for the automobiles and motor trucks of the park board and employees, upon lands purchased by the city and dedicated by it to the public as a park. *Wessinger v. Mische* (1914) 71 Or. 239, 142 Pac. 612. Upon a petition for a rehearing it was held that a provision of the city charter authorizing the city to lease, sell, or dispose of parks for the benefit of the city, did not authorize the erection of such garage. In distinguishing this case from *State ex rel. Johnson v. Brown* (Minn.) supra, the court said: "In that case the authority so to appropriate a part of the park was deduced from a liberal construction of a clause of the charter of that city and the exercise of implied power derived therefrom, which enactment empowers the board of park commissioners to maintain parks and to 'hold, improve, govern, and administer the same for such purposes.' In reaching that conclusion, Mr. Justice Jaggard, speaking for the majority of the court, observes: 'It is clearly within the implied powers of the park board to erect on its property pavilions, boathouses, workhouses, stables, greenhouses, storehouses, an administrative building, and the like. It is within the discretion of the board whether it should combine with the administrative building a superintendent's residence.' In a dissenting opinion, Mr. Justice Brown, however, presents what we deem to be the better reason, wherein he denies such power may exist by implication. There may be lawfully erected in a public park, devoted to recreation and amusement, buildings, such as the power houses and the like from which the public, as a matter of precaution for their safety, must necessarily be excluded, but these structures are only designed as a means to an end, whereby rest is induced and happiness promoted by enjoyment of the remainder of the premises. It is not to be supposed that a visitor to a public park would be permitted to enter a cage of ferocious animals or a den of poisonous snakes, yet the exhibition of beast and

reptiles furnishes lessons in the study of the nature of animals, and for that reason places of confinement to prevent their escape and to preclude their contact with the public may be built in a park. Because the private use of a building in a public park may prove advantageous to persons engaged in caring for the premises affords no reasonable excuse for the maintenance or erection thereon of such structures, since the public would be excluded therefrom without necessity therefor."

The erection of a building upon a public square for storing the county's fuel, and for water-closets to be used in connection with the county courthouse, is inconsistent with the dedication of the land as a public square "to and for the public use," and the acquiescence in the use of the square as a site for the courthouse, which was unauthorized, does not authorize the erection by the county of such other building, upon the ground that it is necessary to the use of the courthouse. *McBride v. Rockwell County* (1917) — Tex. Civ. App. —, 195 S. W. 926.

And where the purpose of the dedication of a public square is for the erection of a court house thereon, the erection of a public comfort station is inconsistent with such purpose. *Clement v. Paris* (1913) — Tex. Civ. App. —, 154 S. W. 624.

And it was held in *Samuels v. Nashville* (1855) 35 Tenn. 298, that the county court, by virtue of its incidental control of the courthouse, had no power to create a nuisance by the erection of horse racks in the public square upon which the courthouse was built in accordance with the act of the legislature laying out such square.

D. Miscellaneous buildings.

A town has authority to erect a market house upon a public square marked "market," where there is nothing to indicate that it was intended to be open public ground, since such use is not inconsistent with the purposes of its dedication. *Sequin v. Ireland* (1882) 58 Tex. 183.

And a city having power to acquire land for corporate uses, and to lay out

parks, and vacate the same, may use, as a site for a lighting plant substation, land acquired in fee, for park purposes, by eminent domain proceedings, where the full purchase price of the land is paid by the city from its general funds. *Seattle Land & Improv. Co. v. Seattle* (1905) 37 Wash. 274, 79 Pac. 780. The court stated that the land could not be diverted to such use, if it had been dedicated to the city for a park, or if it had been paid for with money raised by assessment upon the neighboring property specially benefited.

But it was held in *Foster v. Buffalo* (1882) 64 How. Pr. (N. Y.) 127, affirmed by the general term on the opinion below, that a city has no power to erect a building for the police department upon land dedicated as a terrace, which is used in part as a public street and in part as a public park.

Nor has a city power to erect a pumping station for supplying it with water, upon land bought by the city evidenced by a deed providing that the land shall be improved, dedicated, and forever used by the city as and for a common park, or boulevard, and for no other purpose, since the use of such lands for a pumping station is inconsistent with the uses described by the deed. *Howe v. Lowell* (1898) 171 Mass. 575, 51 N. E. 536. The court said: "It may be, when large tracts of land are granted for a public park, that a pumping station for irrigating the land granted, or for supplying it with water sometimes, would be reasonably necessary for the maintenance of the park. But this pumping station was not erected and is not used for that purpose. So far as appears, none of the water is used on the lands granted, but it is a pumping station for supplying the inhabitants of the city of Lowell with the water."

And ejectment may be maintained by a municipality to recover possession of a lot of land dedicated as a public square, where the grantee of the dedicatory has erected a church thereon. *Methodist Episcopal Church v. Hoboken* (1868) 33 N. J. L. 13, 97 Am. Dec. 696.

Land adjoining a church, which was

conveyed to the society for a village green, cannot be used as a building site for a barn, by a purchaser of the property holding under a sheriff's deed, on sale upon execution against the religious corporation. *Cady v. Conger* (1859) 19 N. Y. 256.

And a stable and shed erected on land dedicated as a public square are public nuisances, and the owner is not entitled to recover in an action of trespass against the duly appointed officers of the borough who removed the buildings peaceably. *Rung v. Shoneberger* (1833) 2 Watts (Pa.) 23, 26 Am. Dec. 95.

d. Erection of monuments.

See generally subd. IV. d, *infra*.

The erection in a park of a life-size monument of one of the donors of the land for the park is not a diversion of the park property from the purposes of its dedication. *Brahan v. Meridian* (1916) 111 Miss. 30, 71 So. 170.

And the erection of a soldiers' and sailors' monument in a park is not a breach of the trust in which the park is held, which requires the land to be always kept open for a public place forever, the court saying that the placing of monuments and statues in parks is a generally recognized and legitimate use of such parks, whether such monuments are purely ornamental, or include the idea of a memorial. *Parsons v. Van Wyck* (1900) 56 App. Div. 329, 67 N. Y. Supp. 1054.

And the erection of a soldiers' monument, being a devotion of the land to a public use, does not violate the dedication of the land for a public square, or common, where the dedicators do not specify the uses to which the land may be put, since under such dedication the land may be put to any public use. *Hoyt v. Gleason* (1892) 65 Fed. 685.

e. Conveyance or lease of property.

For transfer of park land to railroad companies, see generally subd. III. b, *supra*.

1. Sale.

See generally, subd. IV. e, *infra*.

A municipality, generally, has no

power to convey or sell land dedicated as a public park, square, or common.

United States.—*Hoadley v. San Francisco* (Clarke v. San Francisco) (1887) 124 U. S. 639, 31 L. ed. 553, 8 Sup. Ct. Rep. 659.

Colorado.—*McIntyre v. El Paso County* (1900) 15 Colo. App. 78, 61 Pac. 237.

Missouri.—*Price v. Thompson* (1871) 48 Mo. 361; *Cummings v. St. Louis* (1886) 90 Mo. 259, 2 S. W. 130.

New Jersey.—*Ocean City Land Co. v. Ocean City* (1906) 73 N. J. L. 493, 63 Atl. 1112, affirmed on opinion below in (1908) 75 N. J. L. 942, 70 Atl. 1101.

New York.—*Re Boston & A. R. Co.* (1873) 53 N. Y. 574; *Still v. Lansingburgh* (1852) 16 Barb. 107.

Oklahoma.—*Sharp v. Guthrie* (1914) — Okla. —, 145 Pac. 764.

Pennsylvania.—*Com. v. Rush* (1850) 14 Pa. 186.

Texas.—*San Antonio v. Lewis* (1855) 15 Tex. 388.

Canada.—*Re Peck* (1881) 46 U. C. Q. B. 211.

And a city cannot sell, without legislative authority, land condemned by it for a public park, although it holds the absolute fee in such land. *Brooklyn Park v. Armstrong* (1871) 45 N. Y. 234, 6 Am. Rep. 70.

A provision of a city charter authorizing it to lease or sell the city commons and all property belonging to the city, subject only to the conditions on which the property is held, does not authorize the city to dispose of the commons, where, in the deed conveying the commons to the city, it is stated that the property is to be held for the use and benefit of the city. *Compton v. Waco Bridge Co.* (1883) 62 Tex. 715.

And a statute giving municipal authorities the power to vacate parks does not authorize such authorities to convey land dedicated to the city as a public park, to the county for the erection by it of a county courthouse, which is a use inconsistent with the purposes of the dedication; the court saying: "The complaint in this case is not of any attempted vacation of this square or park, but of an attempted appropriation of a portion of it for a use inconsistent with the purpose of

the dedication, and of an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use of the square." *McIntyre v. El Paso County* (1900) 15 Colo. App. 78, 61 Pac. 237.

And an ordinance passed under a legislative act giving a city power, with consent of the dedicator, to vacate or extinguish the public rights in land devoted wholly or partially to public uses, and restore the land to the holder of the legal fee, which provides for the vacation of lands dedicated by a camp-meeting association for a camp ground, is invalid as a violation of the rights of owners of lots in the camp-meeting tract; since they have a right to have the land devoted to the purpose indicated by the dedicator when they bought their lots. *Ocean City Land Co. v. Ocean City* (1906) 73 N. J. L. 493, 63 Atl. 1112, affirmed without opinion, in (1908) 75 N. J. L. 942, 70 Atl. 1101.

And where a city is granted by the legislature power to extend a park into an adjoining river, the extension to be used for a public walk and for erecting works of defense thereon, but without any power to dispose of the space for any other use, the city cannot afterwards sell or otherwise dispose of any part of the land so filled in, for any private purpose. *People v. Vanderbilt* (1862) 38 Barb. (N. Y.) 282.

It has been held that an act declaring that, when a parcel of land held for a public use shall not be longer needed for that use, the city may sell it, has no application to land dedicated by a proprietor for a particular use. *Cummings v. St. Louis* (1886) 90 Mo. 259, 2 S. W. 130.

And a part of land conveyed to a town for use as a market place cannot be granted away for the site of a courthouse, although the town decides that there is more land than it requires for the purpose for which the dedication was made. *Atty. Gen. v. Goderich* (1856) 5 Grant, Ch. (U. C.) 402.

And where land is dedicated to a village for use as a public square, permission to be granted by the village to the stockholders of a church to erect

a church upon the square, a subsequent deed of the land upon which a church has been erected, by the trustees of the village to the trustees of the church, is a violation of the trust upon which the land is held by the village. *Still v. Lansingburgh* (1852) 16 Barb. (N. Y.) 107.

And a city has no right to sell property, dedicated as a common, for private purposes, although the proceeds are applied to the public purpose of supplying the city with water; and the erection of a private dwelling house on such land will be enjoined. *Com. v. Rush* (1850) 14 Pa. 186.

The purpose of a city to subdivide a tract of ground dedicated by a proprietor for a "public square," sell the lots, and invest the proceeds in other property to be used for a park, is a diversion from the uses and purposes intended by the original proprietor, and a legislative act authorizing the city so to dispose of the property is invalid. *Warren v. Lyons City* (1867) 22 Iowa, 351.

A county cannot sell, to be used for private business, land donated to it for a public square, since such use would be inconsistent with the purposes of its dedication. *Lamar County v. Clements* (1878) 49 Tex. 347.

And a county has no power to sell any part of a parcel of land dedicated by it as a square, and marked "public lots" on its plat of the county seat. *Rutherford v. Taylor* (1866) 38 Mo. 315.

And a public square cannot be sold to private parties for the erection of private buildings thereon, by the county court, where it has been for more than eighty years used as a public square, and especially when, in consideration of the conveyance of a lot for a jail, the county court has agreed that no public buildings shall be erected thereon. *Sturmer v. County Court* (1896) 42 W. Va. 724, 36 L.R.A. 300, 26 S. E. 532.

And land dedicated for a public square for a courthouse cannot, after the county removes the courthouse to another lot, be sold for private business purposes. *Lamar County v. Clements* (1878) 49 Tex. 347. To the

same effect is *Lebanon v. Warren County* (1839) 9 Ohio, 80, 34 Am. Dec. 422.

And a trust created by the conveyance of land for a courthouse square is not executed by a sale of a portion of the tract and the application of the proceeds to the erection of a courthouse. *Elder v. Franklin County* (1889) 42 Kan. 652, 22 Pac. 1152; *Franklin County v. Lathrop* (1872) 9 Kan. 458.

And where a square has been dedicated to public use, a subsequent grant by the successors of the original proprietor, of a part of the square to a religious corporation for the purpose of a burying ground, is void. *Com. v. Alburger* (1836) 1 Whart. (Pa.) 469.

And the proprietors of land dedicated as a market square have no right to sell part of the land for building lots, and such sale will be restrained. *Guelph v. Canada Co.* (1854) 4 Grant, Ch. (U. C.) 632.

But a city has the power to convey for private use property purchased by it for a public park, at any time before it is dedicated as a public park, where the deed to it contains no limitation or restriction as to the alienation of the land. *Ft. Wayne v. Lake Shore & M. S. R. Co.* (1892) 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215.

And a city which has dedicated land as a park has the power to tender a part of it to the state for use as a state capitol, and such use is not inconsistent with its use as a park. *Hartford v. Maslen* (1904) 76 Conn. 599, 57 Atl. 740.

And where statutes authorizing sales of property dedicated for squares, parks, or commons existed at the time of dedication, it has been held that a sale of such property was lawful.

Thus, where a party dedicated land for a public park, and for no other purpose, with condition that in case the land were used for any other than park purposes it should revert, having knowledge of a statute empowering the common council, on petition of a majority of the voters, to sell any pub-

lic squares or parks, and use the money for purchasing other land for other public parks or squares, a sale duly made is valid. *East Chicago Co. v. East Chicago* (1909) 171 Ind. 654, 87 N. E. 17.

2. Lease.

See generally subd. IV. f, *infra*.

A city cannot, by lease, grant to an association the use and control of part of a park for a race track, so as practically to deprive the public continuously of its enjoyment. *Nebraska City v. Nebraska City Speed & Fair Asso.* (1922). — Neb. —, 186 N. W. 374.

Where land was dedicated as a public square and for a site for a courthouse and jail, the town cannot, after the removal of these public buildings, lease the property and give the lessee an exclusive right thereto. *Pomeroy v. Mills* (1831) 3 Vt. 279, 23 Am. Dec. 207.

And a town has no right to execute building leases of part of land dedicated for a public market square. *Atty. Gen. v. Brantford* (1858) 6 Grant, Ch. (U. C.) 592.

And where land is dedicated as a public square, to be appropriated for the use of public buildings, buildings erected thereon cannot be leased to private parties, nor for private purposes, by the county court as trustees for the inhabitants of the county, though such court is vested with the naked legal title thereto. *Campbell County Ct. v. Newport* (1851) 12 B. Mon. (Ky.) 538.

The lease of a building in a park to the Safety Institute of America for a safety museum was enjoined upon the ground that such use of the building was not for a park purpose. *WILLIAMS v. GALLATIN* (reported herewith) ante, 1238.

But where land is deeded to a town for the use of the town, for the purpose of having a courthouse and a jail built thereon, and provided that, in case judicial proceedings shall be discontinued to be held on such land, it shall revert to the grantor, the town has power to lay off part of the land into building lots and lease them to in-

dividuals. *Bolling v. Petersburg* (1837) 8 Leigh (Va.) 224.

And the inhabitants of a town may authorize the leasing for the erection of summer cottages of "common land" within its limits, which has not been granted into private ownership and which is not needed for public purposes. *Davis v. Rockport* (1913) 213 Mass. 279, 43 L.R.A.(N.S.) 1189, 100 N. E. 612. In this case the court said: "A municipality has the power to let for profit real estate held for public purposes, and not needed for the present for such a purpose. It is not compelled to let the property lie idle. While it may not expend money to go into business, it may lease the property on reasonable terms and receive the rents. If some minor expense is needed to make the property rentable, such, for instance, as for a new key, a new blind, or new steps in the case of a building, or for suitable ways in the case of vacant land, either by leveling the land or making plank walks, such expense, within reasonable limits, may be legally incurred. We see nothing ultra vires in the acts of the defendant. It either could allow the property to remain unused, or it could let the same or any part thereof for profit."

A city has power to lease to the board of education for the erection of a public library a park set apart by the territorial legislature for such uses as the city council might provide. *Riggs v. Board of Education* (1873) 27 Mich. 262.

And where the act empowering a city to purchase land gives it the right to grant, sell, convey, transfer, let, etc., such land, the city has power thereunder to lease a part of land acquired by it for park purposes, for the purpose of training and running race horses, reserving access at times to the public for riding and driving on the track. *Bryant v. Logan* (1904) 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011.

Under a statute declaring a certain tract of land to be a public park, and giving the city power to lease the same provided such lease shall not authorize or permit any use or disposition of

such lease, by the people of the city as a public park, the city may lease a portion thereof for hotel purposes, under a lease providing that the free use of the waters or grounds of the park by the public shall not in any manner be restricted or interfered with. *Harter v. San José* (1904) 141 Cal. 659, 75 Pac. 344. In this case the court said: "We are not prepared to say that the public authorities in this case did not have the authority to make the contemplated lease under their general power to control and manage the park. It was some 7 miles from the center of the city. It consisted of 400 acres, only 2½ of which are to be leased. The leased premises were to be kept and maintained in first-class condition, and subject to the rules and regulations of the city authorities. Persons affected with certain diseases are not to be allowed as guests therein. The hotel is to be named the 'San José Mineral Springs,' or such other name as the mayor and common council consent to. It is evident that the city authorities desire to add to the comfort and attractions of the park without expense to the city, and at the same time derive an income from the lease. It is not shown that the contemplated lease will in any way detract from the use of the park by the public. . . . We do not think the contemplated lease in excess of the powers of the city authorities. The park contains mineral springs. The proposed hotel is for the use of the public, where those who desire may get food and rest. It is to be under the supervision of the city. It, if properly conducted, will add to the attractions of the park. It will be no expense, but a profit, to the city."

And it was held in *Atty.-Gen. v. Toronto* (1864) 10 Grant, Ch. (U. C.) 436, that a city had the power, under a statute giving it the power "to alter divert, and stop up roads, streets, squares, etc., or other public communication," to lease a park lot vested by patent in trustees for the benefit of the inhabitants of the city.

Borough authorities have no power to assent to the erection by the United States, as permanent fixtures, of barracks during the Civil War, on property dedicated "to be kept as an open common forever." *Meig's Appeal* (1869) 62 Pa. 28, 1 Am. Rep. 372.

And a park board has no power, under a statute authorizing it to pass ordinances in respect to the "erections and encumbrances" in the city parks, to permit an owner of property abutting on a park driveway to erect side walls of a building so that the entire front of the house projects for more than 3 feet into the park driveway. *Ackerman v. True* (1900) 31 Misc. 597, 66 N. Y. Supp. 140, reversed on other grounds in (1900) 56 App. Div. 54, 66 N. Y. Supp. 6.

A city has no power to permit individuals to make and maintain a baseball park in a public park, if it unreasonably interferes with the right of the public to use the park. *Sherburne v. Portsmouth* (1904) 72 N. H. 539, 58 Atl. 38.

And it was held in *Kurtz v. Clausen* (1902) 38 Misc. 105, 77 N. Y. Supp. 97, that there was no authority vested in the park commissioners or the city to grant to an individual the privilege of placing and maintaining chairs in the public parks, and that equity would grant relief where, as an incident of such privilege, the ordinary park benches were removed from the shady spots to make way for the chairs, and any person who was either unwilling or too poor to pay for a chair would either have to swelter on a free bench in the sun, or seek shade in some other place than in the public parks.

Under a city charter provision requiring the park commissioners to maintain the beauty and utility of all parks, and to execute all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city, a park commissioner cannot grant the privilege of using a park fence for advertising purposes. *Tompkins v. Pallas*

(1905) 47 Misc. 309, 95 N. Y. Supp. 875.

But a city may grant an incorporated horticultural club the privilege of occupying an undeveloped park for a specified period, for the purpose of establishing horticultural gardens which at the end of the specified period are to be turned over to the city. *International Garden Club v. Hennessy* (1918) 104 Misc. 141, 172 N. Y. Supp. 8.

And the park board, having control over the city parks, may grant a privilege for a public stage route, stations, and waiting rooms in a park, where the right to run stages is confined to their operation for the sole purpose of carrying visitors into or out of the park, or from one portion thereof to another. *American Steel House Co. v. Willcox* (1902) 38 Misc. 571, 77 N. Y. Supp. 1010.

And a city has power to grant a license or concession to hold, in a public park, race meets, for short periods of time, for the entertainment of the public. *Nebraska City v. Nebraska City Speed & Fair Asso.* (1922) — Neb. —, 186 N. W. 374.

A charter provision empowering the city to regulate its parks authorizes the city to rent the privilege of selling refreshments, including intoxicating liquors, in a public park. *State ex rel. Wood v. Schweickardt* (1891) 109 Mo. 496, 19 S. W. 47.

And similar statutory authority empowers the city to grant to individuals, for pay, exclusive rights within a public park to operate refreshment and lunch stands, and to rent boats and bathing suits and towels and dressing rooms. *Bailey v. Topeka* (1916) 97 Kan. 327, L.R.A.1916D, 491, 154 Pac. 1014. And it was also held in this case that the action of the city in granting such exclusive rights did not constitute a use of the park for other than public purposes, and was not in conflict with the provisions of the deed of gift by which the city acquired the property, to the effect that it should be used for the benefit of the public, and should be inalienable by deed, gift, lease, or other method; and the court said: "The action of the

city of which complaint is made consists of the granting to individuals, for pay, of exclusive rights within the park to operate refreshments and lunch stands, and to rent boats, and provide suits, towels, and rooms for bathers, at fixed prices. A free dressing pavilion is provided for bathers using their own suits and towels. Apparently there is nothing to prevent anyone from using his own boat on the pond, should he so desire. We see nothing in the conduct referred to that is inconsistent with the public character of the park, or that conflicts with the terms of the gift. The exclusive character of the privilege conferred is not the basis of any legitimate objection. For as no one has a right to engage in the activities referred to except by permission of the city, no one is wronged by the monopoly created. The concessions granted do not amount to the leasing of any part of the park."

And a city has power to permit a pavilion to be erected on land dedicated for use as a public park, which pavilion is to serve the double purpose of a waiting room for street cars and refreshment and shelter room for the public using the park. *Dodge v. North End Improv. Asso.* (1915) 189 Mich. 16, 155 N. W. 438, Ann. Cas. 1918E, 485.

g. Inclosure of land.

See generally, subd. IV. *g*, *infra*.

The board of trustees of a village have a right to inclose with a fence, land dedicated as a square, where it is not shown that the dedicator's intention was that certain streets should extend across the square. *Guttery v. Glenn* (1903) 201 Ill. 275, 66 N. E. 305.

And a village may inclose for the purposes of improvement and ornament a park or square, where the only restriction imposed upon its dedication is that it should not be obstructed by buildings upon the banks of the adjacent stream. *Langley v. Gallipolis* (1853) 2 Ohio St. 107.

And it was held in *State v. Charleston Neck Cross Roads* (1836) 21 S. C. L. (3 Hill) 149, that the commissioners of roads had authority to erect a

been dedicated to the public use as an open square.

A city may permit another to inclose with a suitable fence land dedicated as a public park. *Burnet v. Bagg* (1867) 67 Barb. (N. Y.) 154.

Where land is granted to a town as the town common, to be used as a training field, to lie undivided, and to remain for such use forever, the inclosure of such land by a fence, the leveling of the surface, the planting of trees, the laying out of walks, etc., is not inconsistent with the condition in the grant. *Re Wellington* (1834) 33 Mass. 87, 26 Am. Dec. 631.

But a plat of ground marked "plaza" cannot be fenced in by the city as a park, where the dedicatory's intention, evidenced by the necessity of its use for the proper enjoyment of adjacent property, was that it should remain open. *Sachs v. Towanda* (1898) 79 Ill. App. 439. The court, however, said in this case that "where the owner of a square or plat of ground situated in a city or village dedicates it to the use of the public and calls it a 'plaza,' but does not in any manner designate how it shall be enjoyed, . . . the city or village authorities may assume control of it and maintain it either as an open market place and common, an inclosed park for the pleasure and recreation of the public, or partly inclosed and partly uninclosed."

And a municipality has no power to close up part of land dedicated as a public square "to remain always free from any erection or obstruction." *Re Peck* (1881) 46 U. C. Q. B. 211.

h. Setting out of trees.

A municipality may set out shade trees upon land dedicated as a public park or square. *Guttery v. Glenn* (1903) 201 Ill. 275, 66 N. E. 305; *Burnet v. Bagg* (1867) 67 Barb. (N. Y.) 154.

And where land is granted to a town as the town common, to be used as a training field, the planting of trees thereon is not inconsistent with the condition in the grant. *Re Wellington*

18 A.L.R.—80.

But where a public square in a city is dedicated for use as a site for the county courthouse, jail, clerk's office, and other necessary county buildings and hitching posts and standing room for the horses and wagons of the justices, farmers, and other persons coming to the courthouse from a distance, the city has no power to remove the hitching posts and pavements and to plant the ground in grass and trees. *Frederick County v. Winchester* (1888) 84 Va. 467, 4 S. E. 844.

i. Municipal water supply and sewage.

The city has power to use land sold to it, evidenced by a deed providing that such land shall be improved, dedicated, and forever used by the city as and for a common, park, or boulevard, and for no other purpose, for the construction and maintenance of a system of water pipes, below the surface of the ground, for the purpose of supplying water to the city, and such use of the land does not constitute a breach of such condition in the deed. *Howe v. Lowell* (1898) 171 Mass. 576, 51 N. E. 536.

Nor do temporary acts in driving pipe for experimental purposes connected with the water supply of the city constitute a breach of such condition. *Ibid.*

Where land is purchased in fee by a city by warranty deed containing no reservation, restriction, or limitation upon the title or use, an ordinance declaring the property to be a public park, and the subsequent use of it as such, and the expenditure of public money for its adornment, do not amount to an irrevocable dedication of it for park purposes, so that a part of it may not be thereafter devoted by the city to a reservoir for the storage of water for the city's inhabitants. *Ferry v. Seattle* (1921) — Wash. —, 200 Pac. 336.

And where land purchased by a city for park purposes was deeded to it in fee simple without reservation, the construction of a main trunk sewer through the park was not such a diversion of the uses of the park as

entitled an owner of abutting property to damages; it being, as to him, *damnum absque injuria*. *Caldwell v. Seattle* (1913) 75 Wash. 565, 135 Pac. 470, Ann. Cas. 1915C, 176.

j. Miscellaneous uses.

The devotion of a reasonable portion of a public park to tennis courts, croquet grounds, and children's playgrounds, with suitable appliances for these forms of public amusement and recreation, comes strictly within the proper and legitimate uses for which public parks are created. *Caulfield v. Berwick* (1915) 27 Cal. App. 493, 150 Pac. 646.

And the proper municipal authorities may build wharves upon a narrow strip adjoining a navigable river, which is marked "common" on the plat of the land proprietors, and charge wharfage for the use of such wharves. *Newport v. Taylor* (1855) 16 B. Mon. (Ky.) 699; *Goode v. St. Louis* (1892) 113 Mo. 257, 20 S. W. 1048.

And the use of a portion of a park as part of the state capitol grounds is not inconsistent with its use by the public as a public park, where the proper enjoyment by the public of such part of the park will not, in any manner, be curtailed by such use by the state. *Hartford v. Maslen* (1903) 76 Conn. 599, 57 Atl. 740.

And the use of a part of a public park for agricultural purposes is not inconsistent with the uses for which it was dedicated. *Huff v. Macon* (1903) 117 Ga. 428, 43 S. E. 708.

And a building in a public park may be used temporarily as a pesthouse. *Hessin v. Manhattan* (1909) 81 Kan. 153, 25 L.R.A. (N.S.) 228, 105 Pac. 44. In this case, the court said: "The claim that the use of the park for this purpose operated to divert it to an illegal use does not seem to be well taken. The park is public property, given by a dedication which does not limit its use. It might be used for any public purpose. A pesthouse is a public purpose for which it might be properly used temporarily in an emergency such as existed here."

IV. Power of legislature or state officers.

a. In general.

The legislature has no power to authorize the use of a public park, square, or common for a purpose inconsistent with the purposes for which it was dedicated.

Colorado.—*McIntyre v. El Paso County* (1900) 15 Colo. App. 78, 61 Pac. 237.

Illinois.—*Ward v. Field Museum* (1909) 241 Ill. 496, 89 N. E. 731.

Iowa.—*Warren v. Lyons City* (1867) 22 Iowa, 351.

Kentucky.—*Hopkinsville v. Jarrett* (1914) 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85.

Missouri.—*Cummings v. St. Louis* (1886) 90 Mo. 259, 2 S. W. 130.

New Jersey.—*Fessler v. Union* (1904) 67 N. J. Eq. 14, 56 Atl. 272, affirmed upon opinion below in (1905) 68 N. J. Eq. 657, 60 Atl. 1134.

Ohio.—*Louisville & N. R. Co. v. Cincinnati* (1907) 76 Ohio St. 481, 81 N. E. 983.

Where the proprietors of a town site, in the recorded plat thereof, designate a block of land simply as "square," this designation is sufficient to indicate an intention to dedicate the block to a public use, but is insufficient to designate any particular public use. The legislature so far represents the public that it may, by a proper act, designate and determine to what particular public use such block shall be devoted, if no private rights have intervened. *Daughters v. Riley County* (1910) 81 Kan. 548, 27 L.R.A. (N.S.) 938, 106 Pac. 297.

b. Railroad uses.

See also cases under subd. III. b, *supra*.

The legislature has no power to authorize a railroad company to construct its tracks upon land dedicated to the city as a public park. *Jacksonville v. Jacksonville R. Co.* (1873) 67 Ill. 540.

And it was held in *United States v. Illinois C. R. Co.* (1869) 2 Biss. 174, Fed. Cas. No. 15,437, that the state could not grant to a railroad company for railroad purposes land therein

dedicated by the Federal government as "public ground, forever to remain vacant of buildings."

And the legislature has no power to grant a city the right to convey to a railroad company for railroad purposes land dedicated as a public park, with the restriction that no buildings shall be erected thereon. *Chicago v. Ward* (1897) 169 Ill. 392, 38 L.R.A. 839, 61 Am. St. Rep. 185, 48 N. E. 927. It was held in this case that the vested rights of owners abutting upon the park, fixed by the acts of dedication, the acceptance of the city, and the acquiescence of the public and abutting owners, could not be changed by the legislature granting the city the right to convey such land for railroad purposes, as such action would be an unconstitutional impairment of such rights.

But the legislature has power to authorize the construction of a railroad over land dedicated as "public ground," since its use for a railroad is not inconsistent with the purposes of its dedication. *Chicago, R. I. & P. R. Co. v. Joliet* (1875) 79 Ill. 25.

And it was held in *Codman v. Crocker* (1909) 203 Mass. 146, 25 L.R.A.(N.S.) 980, 89 N. E. 177, a suit by taxpayers against the city, the state transit commission, and the contractor, to enjoin the construction of a tunnel under a common, that the legislature had power to authorize the construction of a tunnel under a common dedicated for the common use of the people as a training field and cow pasture, upon the ground that such use was not a diversion from the purposes of its dedication.

A passenger railway in a park where there are no streets, but only country roads, is not a street passenger railway within the meaning of a state Constitution that no street passenger railway shall be constructed within the limits of any city without the consent of its local authorities, and therefore a statute organizing such park and putting it under the control of a board of park commissioners which authorizes such commissioners to license, without the consent of the city, the construction of a passenger

railway within such park, does not violate such constitutional provision. *Philadelphia v. McManes* (1896) 175 Pa. 28, 34 Atl. 331.

Where the line of a railroad has been laid out in pursuance of legislative authority, a subsequent appropriation for a public park of lands containing a part of the proposed line of railroad, in the absence of an express direction to the contrary, will be deemed to be subject to the right of the railroad company to construct its railroad upon the right of way as originally laid out. *Suburban Rapid Transit Co. v. New York* (1891) 128 N. Y. 510, 28 N. E. 525.

And a New York statute (Railroad Act, § 108, Laws 1890, chap. 565, as amended by Laws 1892, chap. 676) providing that "no street surface railroad shall be constructed . . . in public parks, except in tunnels to be approved by the local authorities having control of such parks," has been held not applicable to a parkway, laid out under statutory authority, which includes lands over which a railroad company has a vested franchise at the time the parkway is laid out. *Coney Island, Ft. H. & B. R. Co. v. Kennedy* (1897) 15 App. Div. 588, 44 N. Y. Supp. 825.

c. Use for buildings.

See also, generally, subd. III. c, *supra*.

The legislature has power to authorize commissioners appointed by statute to erect a courthouse and municipal buildings upon a public square dedicated for buildings for "public concerns," since the legislature is simply appropriating the square to the purposes to which it was dedicated. *Baird v. Rice* (1869) 63 Pa. 489.

And the commonwealth, as against citizens and taxpayers of a county, may authorize the erection of a new and enlarged courthouse upon the site of the old courthouse, situated on land dedicated by the plans of a town as a public square. *Mahon v. Luzerne County* (1900) 197 Pa. 1, 46 Atl. 894. In this case the court said: "The title to spaces left open by the original plans of towns, or by subsequent

general dedication for similar purposes, is in the commonwealth for the benefit of the whole public; and the uniform course of decision has been that central squares, in the laying out of towns, were meant as much, perhaps primarily more, for public buildings than to secure space, and therefore the commonwealth may authorize their occupation in that manner without altering their original use."

The legislature may authorize the construction of a public school in a public park the fee of which was acquired under its authority by a municipal corporation under power of eminent domain, without compensating the municipality for such use. *Higginson v. Treasurer* (Higginson v. Slattery) (1912) 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523.

But where the terms of dedication of land for a park prohibit buildings of any kind, the legislature cannot authorize a museum or other buildings to be erected in such park. *Ward v. Field Museum* (1909) 241 Ill. 496, 89 N. E. 731. The court said: "There was testimony that certain structures are absolutely necessary for the comfort of the public and the proper use of the park, but most of them, such as shelters in case of storms, band stands, lavatories, toilets, and the like, can be provided without the erection of what would properly be characterized as a building. There is no necessity for locating power houses, stables, or things of that kind above the surface of the ground, but whatever the result may be, neither the legislature, nor any municipal corporation under the authority of the legislature, can violate the restriction imposed in the dedication of the property."

d. Use for monuments.

See generally, subd. III. d, supra.

The erection of a soldiers' memorial on a part of land which was formerly a city park, but which had been dedicated by the city to the state for a capitol site, is a proper exercise by the state of the right to control and manage the land as a part of the capitol grounds. *Hartford v. Maslen* (1903) 76 Conn. 599, 57 Atl. 740.

And the suggestion that a certain square was not the proper place for a monument cannot be considered by the court where the legislature has decreed that the monument shall be located in such square with the consent of the city, and the city has consented. *Locke v. Buffalo* (1904) 97 App. Div. 483, 90 N. Y. Supp. 550.

e. Sale.

See generally, subd. III. e, 1, supra.

The legislature has no power to authorize a municipality to sell land dedicated as a public park, square, or common. *Warren v. Lyons City* (1867) 22 Iowa, 351; *Hopkinsville v. Jarrett* (1914) 156 Ky. 777, 50 L.R.A.(N.S.) 465, 162 S. W. 85; *Cummings v. St. Louis* (1886) 90 Mo. 259, 2 S. W. 130; *Le Clercq v. Gallipolis* (1835) 7 Ohio, 217, 28 Am. Dec. 641.

And it was held in *San Antonio v. Lewis* (1855) 15 Tex. 388, that the governor of the province had no authority to authorize a city in the province to sell part of land dedicated to the public for a plaza or square.

The legislature has no power to authorize a county to sell lands dedicated as a courthouse square, and apply the proceeds to the erection of a courthouse. *Franklin County v. Lathrop* (1872) 9 Kan. 453. In this case the court said: "It is claimed that this sale would only be in furtherance of the trust, as by the terms of the law the proceeds are to be applied solely to the erection of a courthouse. A difference in the manner of executing the trust is all that is sought. 'In trust, and for the uses therein named, expressed, or intended, and for no other use or purpose,' is the language of the statute. Under this a specific execution of the trust is essential. It is not a conveyance of land to aid in the erection of a courthouse. It is a conveyance of land to be used as a site for a courthouse. Such use would cease when occupied by an individual as site for residence or store. The use contemplated is not temporary, but permanent."

The Cherokee Nation cannot, any more than any other dedicator, sell to private parties, for private use, land

But the legislature may authorize the discontinuance of parks and the sale by the city of park lands, where the fee to such lands was condemned by the city under legislative authority. *Brooklyn Park v. Armstrong* (1871) 45 N. Y. 234, 6 Am. Rep. 70; *Brooklyn v. Copeland* (1837) 106 N. Y. 496, 13 N. E. 451.

And where reclaimed land was conveyed in fee by the state to a city for use as a park, the legislature has the power to authorize the city to discontinue the park, and sell or exchange the land, and real estate owners in the vicinity cannot enjoin the city from so doing. *Clark v. Providence* (1888) 16 R. I. 337, 1 L.R.A. 725, 15 Atl. 763; *Mowry v. Providence* (1889) 16 R. I. 422, 16 Atl. 511.

And it has been held that, where the space between a street and a river is designated by the state as a public place, the state has the power to authorize it to be sold by the city. *New Orleans v. Hopkins* (1839) 13 La. 326; *New Orleans v. Leverich* (1839) 13 La. 332; *New Orleans v. Hopkins* (1839) 13 La. 333. In the first case the court said: "The change in this space, whenever the public interests should require it, is necessarily a condition resulting from the original destination; and the rights and advantages of situation of the front proprietors were necessarily dependent on and subordinate to this condition. This they knew, or were bound to know, when they acquired the property to which this supposed right or privilege of situation is attached. The right of the sovereign power to change the destination of this space of ground is as complete as the right of the defendant to enjoy his privileges in relation to it, until such change takes place. . . . The destination of this space as a public place was made by the sovereign power when Louisiana was under the dominion of the French monarchy; it was changed by the sovereign authority of the state of Louisiana. The right to make this

front proprietors is necessarily subordinate." It was also held in this case that an act of the legislature sanctioning a sale by the city of lands dedicated by the state as a public place, and providing that the net proceeds of the sale form a part of the sinking fund of the city, was equivalent to an original authorization by the state for the sale of the land by the city.

A municipal corporation may alienate public places with the consent and by the authorization of the sovereign power first obtained, whenever the public interests may require it. *McNeil v. Hicks* (1882) 34 La. Ann. 1090.

And an act authorizing a city to sell lands acquired by it by condemnation proceedings, for use as parks, whenever the park commissioners should decide that it was no longer necessary for such use, does not conflict with the constitutional provision respecting the taking of private property for private use. *Re Rochester* (1893) 137 N. Y. 243, 33 N. E. 320. The court said: "It is claimed that this provision is in conflict with the provisions of the Constitution respecting the taking of private property for public use, as it in fact authorizes the city to take it for a purpose not public. We think the objection is without merit or substance. Of course, the city could not take private property for the purpose of selling it or dealing in it; but having once acquired it for a park, and it becoming, in the course of time, unnecessary or useless for that purpose, by the growth of the city, or other changes in the situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation, and power to that end, conferred by the legislature at any time, or in the act authorizing the taking, cannot invalidate the delegated right to exercise the power of eminent domain."

And in upholding the validity of a sale by a city, under statutory authority, of land dedicated as a public park, the court, in *East Chicago Co. v. East*

whether this statute, authorizing sales of public squares and the investment of the proceeds in other like property, violates any constitutional right of appellees . . . as the owners of property abutting upon the opposite side of a street attiguous to such square or park. The legislature has the power to authorize the discontinuance of parks and the sale of park lands, the fee of which is in the city, and, when in so doing no private property is taken, such legislative authority to surrender or extinguish public rights cannot be questioned. . . . It is inevitable that a tract of ground once intended for and devoted to a particular public use may, from the growth of the city and the changing of conditions, become ill suited to such use. Public convenience, interests, and necessities may make a change of site imperative, and the people most concerned may be practically unanimous in demanding it, and to hold that the legislature may not validly authorize an abandonment or sale of public grounds in any case would be to strip the state of one of the inherent and essential attributes of sovereignty. The owner of private property in the vicinity of such public square, whose means of ingress and egress are not destroyed or affected, has no vested right in the continued use of such property for public purposes. The loss, if any, sustained by such adjacent property owners by the abandonment or relocation of the public square, is not direct, but merely consequential, and is not within the protection of the constitutional provision which forbids the taking of private property without compensation. Counsel for appellees have not pointed out any specific constitutional guaranty which has been violated by the sale and exchange of the park lot in controversy, and we are unable to perceive wherein the constitutional rights of appellees have been violated, but hold the statute authorizing the sale in question valid as against any claims or objections advanced."

It was held in *Crippen v. Ohio*

had power to lay out into lots the portion of land marked as commons on the town plat of the town in which the university is located, and to dispose thereof for the benefit of the university. It appears in this case that Congress had set apart a tract of land for the purpose of endowing a university, and later the territorial legislature of Ohio authorized the laying off in this tract of a town to contain a square for the colleges, lots suitable for house lots, and gardens for a president, professors, tutors, etc., bordering on or encircled by spacious commons, and that later, in confirming the establishment of such towns, the legislature provided that the trustees of the university should have power to alter the plan of such town by extending the house lots into the common.

And where land was patented by the Crown to a city, with a clause providing that the land should be maintained for the purpose of a park for the use of its inhabitants, it was held that the grantors parted with all of their interest, and that the provisional legislature might authorize the city to sell or otherwise dispose of the land. *Kennedy v. Toronto* (1886) 12 Ont. Rep. 211.

f. Lease.

See generally, subd. III. e, 2, *supra*.

The legislature has no power to authorize a municipality to lease land dedicated as a public park, square, or common. *Warren v. Lyons City* (1867) 22 Iowa, 351; *Hopkinsville v. Jarrett* (1914) 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85; *Cummings v. St. Louis* (1886) 90 Mo. 259, 2 S. W. 130; *LeClerc v. Gallipolis* (1835) 7 Ohio, 217, 28 Am. Dec. 641.

And where land is dedicated by a proprietor for a public square, and held in trust for such purpose, the legislature has no power, as against the inhabitants of the town where the land is situated, to authorize a lease by the town of the property for other purposes. *LeClerc v. Gallipolis* (Ohio) *supra*.

And where by an act of the legisla-

ture a reservoir is set apart as a public park and pleasure resort for the people of the state generally, the state board of public works cannot grant a lease of its banks for building purposes that will interfere with the free and uninterrupted use thereof by the people. *Columbus, N. & Z. Electric R. Co. v. Nelson* (1910) 14 Ohio C. C. N. S. 129, 32 Ohio C. C. 431.

But the legislature may authorize land acquired by a municipal corporation in fee for a public park, to be leased for general commercial purposes when it is no longer needed for the purposes for which it was acquired. *WRIGHT v. WALCOTT* (reported herewith) ante, 1242.

And where land is declared to be a public park, in the act incorporating a city, the legislature may authorize the city to lease a part of such park, provided such lease shall not prevent the free use, by the people as a public park, of the land leased. *Harter v. San Jose* (1904) 141 Cal. 659, 75 Pac. 344.

And it was held in *Kennedy v. Toronto* (1886) 12 Ont. Rep. 211, that the provisional legislature might authorize a city to lease land patented by the Crown to the city, with a clause providing that the land should be maintained for the purpose of a park for the use of the inhabitants.

g. Inclosure.

See generally, subd. III. g, supra.

The legislature has power to authorize commissioners whose appointment was provided for by the statute, to inclose lands dedicated as a town common to be used as a training field, to lie undivided and remain for such use forever, and to level off the surface, to plant trees, and to lay out walks. *Re Wellington* (1834) 16 Pick. (Mass.) 87, 26 Am. Dec. 631.

V. Power of eminent domain.

Park property may be devoted to a use which is inconsistent with the purposes of its dedication, by the exercise of the power of eminent domain, the only restriction in such case being that such use must be a public use.

Thus, park property may be condemned for railroad purposes. *Colby v. Toledo* (1901) 22 Ohio C. C. 732, 12 Ohio C. D. 347.

And the legislature may authorize the condemnation of lands dedicated as a park, for the purpose of the construction of a subway under the park. *Prince v. Crocker* (1896) 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446.

But the power of a railroad company to condemn for railroad purposes land dedicated as a public park must be expressly conferred by statute, that is, in direct terms or by necessary implication; and the implication does not arise if the powers expressly conferred upon the railroad company can by reasonable intentment be exercised without the appropriation of land dedicated as a public park. *Re Boston & A. R. Co.* (1873) 53 N. Y. 574. It was held in this case that the legislature had not given the railroad company power to take park land.

And a railroad company not expressly authorized to take any part of public parks cannot condemn a part of a park for its road, where it can efficiently exercise the power of locating and building its road between its termini without invading the park. *Re Milwaukee Southern R. Co.* (1905) 124 Wis. 490, 102 N. W. 401.

And it was held in *Buffalo, L. & R. R. Co. v. Hoyer* (1915) 214 N. Y. 236, 108 N. E. 455, that a piece of ground marked "Public common" on a plat of land in a village was a public park within the meaning of a provision of the New York Railroad Law that no street surface railroads shall be constructed or extended upon grounds in public parks; and that therefore a street surface railroad company organized under such law could not condemn a right of way across such "public common."

The power to condemn park lands for public uses inconsistent with the purposes of their dedication is recognized in a number of cases.

Thus, the power to condemn park lands for a street is recognized in *Re Ashland Street* (1917) 165 N. Y. Supp. 977, where the question was as to whether the city was entitled to

damages for the taking of lands which were being used for park purposes.

And it was held in *United States v. Illinois C. R. Co.* (1869) 2 Biss. 174, Fed. Cas. No. 15,437, that neither the state nor the municipality could divert to railroad purposes, except by the exercise of the right of eminent domain, land dedicated by the Federal government as public ground.

And it was held in *Louisville & N. R. Co. v. Cincinnati* (1907) 76 Ohio St. 481, 81 N. E. 983, that it was not in the power of the legislature, unless in the exercise of the power of eminent domain, to authorize property dedicated for a public common or landing to be used for the purpose of an elevated railroad structure. In regard to the right of the legislature to authorize the condemnation of land dedicated as a public park, the court in this case said: "It may not be improper to call attention to the fact that the right of the legislature to authorize property dedicated to a specific public use to be taken for a different public use in the exercise of the power of eminent domain is not here in question. The right to take it under that power is perhaps just as perfect after it has been dedicated to a public use as it was before such dedication."

And in reference to the construction of a subway under a common, the court, in *Codman v. Crocker* (1909) 203 Mass. 146, 25 L.R.A.(N.S.) 980, 89 N. E. 177, said: "As against the donors and the interest which they undertook to serve, it is plain that, except in the exercise of the right of eminent domain, the common could not be appropriated to a public use entirely inconsistent with the general

character of the use originally intended. Whether it could be taken in the exercise of this right it is unnecessary in this case to decide, as the statute does not purport to take property in the common under the right of eminent domain."

It was held in *Foster v. Buffalo* (1882) 64 How. Pr. (N. Y.) 127, that an act of the legislature authorizing the city to erect upon land dedicated as a terrace a building for the police department did not give the city power to erect such building without condemning the fee or easement in such land held by the abutting owners.

And in *Re Certain Land* (1902) 119 Fed. 453, the court, without holding whether in this particular case the United States could condemn for a postoffice land dedicated as a public park, said that the legislature of the state could authorize the taking of a public park for another public use, and that if, as in this case, there is no express legislative provision, the relative importance of the two uses is to be determined by the court, and if the later use is deemed by the court, under all the circumstances, to be more important than the earlier, the land may be taken for the later use, but if the earlier use is deemed the more important, the later use is forbidden and the earlier continues; that the court doubted if it could be laid down without qualification that the public use of a postoffice was in all cases superior to the public use of a park, but that it was so in the case at bar appeared probable from what appeared incidentally at the argument; but that the issue had not been raised, and could not be determined without a further hearing.

G. V. L.

DAVID P. GRAHAM, Plff. in Err.,

v.

STATE OF OHIO.

Ohio Supreme Court — April 2, 1918.

(98 Ohio St. 77, 120 N. E. 232.)

Homicide — duty to retreat when assailed.

1. If one employed to guard property does not provoke an assault by

one making an attack on the property, but is suddenly and violently assaulted with a deadly weapon, and placed in danger of loss of life or great bodily harm, he is not required to retreat before killing his assailant.

[See note on this question beginning on page 1279.]

Appeal — instruction — right to kill to escape danger.

2. An instruction in a prosecution for murder by one employed to guard property, in shooting a member of a crowd making an attack on the property with deadly weapons, that if accused believed in good faith that he was in imminent danger of death or great bodily harm, and that his only means of escape consisted in taking the life of his assailant, then the jury might find justifiable homicide although in fact he may have been mistaken as to the imminence of the danger, is not reversible error, although it fails to state that the means of escape referred to related to escape

from the impending danger, and not to retreat, where no request was made to make the instruction more specific.

[See 14 R. C. L. 795.]

Homicide — self-defense — right to charge on law of.

3. Although one accused of murder denies the killing, it is proper to charge the jury on self-defense if there is evidence tending to raise that issue.

[See 13 R. C. L. 812.]

Appeal — misconduct of counsel — how available.

4. Misconduct of counsel not excepted to cannot be made available on appeal by affidavit in support of a motion for new trial.

ERROR to the Court of Appeals for Seneca County to review a judgment convicting defendant of manslaughter. Affirmed.

The facts are stated in the opinion of the court.

Messrs. Frank T. Dore and Ralph Sugrue, for plaintiff in error:

There was no evidence to justify a charge that defendant could be found guilty as an aider and abetter.

Hagan v. State, 10 Ohio St. 460; Woolweaver v. State, 50 Ohio St. 277, 40 Am. St. Rep. 667, 34 N. E. 352; Donald v. State, 21 Ohio C. C. 125, 11 Ohio C. D. 483.

It was error for the court to give the charge relating to "self-defense."

Goings v. State, 24 Ohio C. C. N. S. 145; Jordan v. State, 13 Ohio C. C. 471; Marts v. State, 26 Ohio St. 162; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733, 2 Am. Crim. Rep. 251; Toliver v. Com. 104 Ky. 760, 47 S. W. 1082; People v. Manning, 146 Cal. 100, 79 Pac. 856; Com. v. Mitchka, 209 Pa. 274, 58 Atl. 474; Healy v. People, 163 Ill. 372, 45 N. E. 230.

Messrs. Joseph McGee, Attorney General, Russell M. Knepper, John C. Royer, and Calvin D. Spittler for the State.

Per Curiam:

The plaintiff in error, David P. Graham, was indicted and tried for murder in the second degree and found guilty of manslaughter. Briefly stated, the facts attending

the alleged homicide are as follows: Graham and other guards had been employed by a manufacturing company for the protection of their plant and premises. While thus engaged, a crowd composed of boys and men gathered in the vicinity of the plant, and, according to the evidence produced by the defense, marched about its environs in a threatening attitude. The evidence is very conflicting as to the circumstances attending the killing. The evidence of the state tended to prove the assault was unprovoked, while that of the defense purported to show that the alleged mob was making a criminal assault upon the guards and on the premises of the company, when the decedent, Albert Latona, Jr., was killed. The state's case was predicated upon the fact that Latona was killed by a weapon discharged by Graham himself, or by one of the other guards whom Graham was then aiding and abetting in a criminal act, and furthermore, that a conspiracy to make an unlawful criminal assault existed between Graham and his associates.

The errors mainly relied upon in

this court are that the court erred in its instructions upon the trial, and that the state's counsel was guilty of misconduct. In the course of its general charge, the court, after stating to the jury that if they found that the defendant and his associates were employed in guarding the buildings and property of the company, and that the crowd of men and boys was making the attack upon them with deadly weapons, instructed the jury that the defendant had a right to defend himself from such attacks and to employ sufficient force to repel them; and, immediately following, the court used this language: "If you find by a preponderance of the evidence that the defendant, in the careful and proper use of his faculties, believed in good faith that he was in imminent danger of death or great bodily harm, and that his only means of escape consisted in taking the life of his assailants, and that, under the circumstances, he had reasonable grounds for such belief, then you would be warranted in finding that the killing was justifiable on the grounds of self-defense, although in fact the defendant may have been mistaken as to the existence or imminence of danger."

This charge is now assailed upon the claim that under the circumstances detailed the court has, in effect, charged that it was the duty of the defendant to retreat. In the main it embodied the substance of the law declared in *Marts v. State*, 26 Ohio St. 162. It is to be regretted that the court did not elucidate this portion of the charge by the statement that the means of escape referred to related to the escape from the impending danger, as clearly evidenced in the syllabus of

Appeal—Instruction—right to kill to escape danger.

the cited case. However, we do not think the charge as given is so prejudicial as to require a reversal, especially in view of the latter portion of the charge quoted, and in the absence of a request by the defendant to make such charge

more specific. Under the facts detailed, if the defendant did not provoke the assault, but while in the lawful pursuit of his business was suddenly and violently assaulted with a deadly weapon, and placed in danger of loss of life or great bodily harm, under the current of modern authority he was ^{Homicide—duty to retreat when assailed.} not required to retreat. 13 R. C. L. 826; *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733; 2 Am. Crim. Rep. 251; *Beard v. United States*, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324; *State v. Gardner*, 96 Minn. 318, 2 L.R.A.(N.S.) 60, 104 N. W. 971; *Eversole v. Com.* 95 Ky. 623, 26 S. W. 816; *Hammond v. People*, 199 Ill. 173, 64 N. E. 980.

The claim is further made that the court erred in charging the jury that the defendant might be convicted if they found that a criminal assault was made by the defendant or "some person whom the defendant was then and there aiding, abetting, and assisting." This charge is said to be misleading, because of undisputed evidence that Graham was assisting his associate guards in a lawful enterprise, and that from the language employed the jury might infer that his aiding, abetting, and assisting therein would make him criminally liable. The language of the court was unfortunate, in that it did not state that the aiding, abetting, and assisting related to the criminal act. However, in view of other portions of the general charge, especially the state's request No. 5, we do not think the jury could have been misled, for the reason that therein it is clear that the assisting, aiding, and abetting related only to the criminal act, and not to the lawful purpose of assisting his associates in guarding the plant.

The court charged the eighth proposition of the syllabus of the case of *Goins v. State*, 46 Ohio St. 458, 21 N. E. 476, 8 Am. Crim. Rep. 19, detailing under what circumstances a defendant could be found

guilty if he did some overt act producing the homicide. In the case at bar the evidence adduced by the state tended to prove that the defendant, and one or more of the guards, were at the time acting in concert in driving back the alleged mob. If this evidence were true, the jury might have found, under the facts detailed, that an overt act was committed by the defendant in actively aiding his associate or associates there present in making a criminal assault which resulted in the death of Latona. The legal principle involved in the charge is correct, and the only question that arises upon the record is whether such charge should have been given, in view of the testimony disclosed. While the testimony relating to the overt act on the part of Graham is not very strong, we are unable to say in this case that the charge was prejudicial.

In its general charge to the jury the court gave the defendant the benefit of the law relating to self-defense. It is now claimed that in this the court erred, for the reason that the defendant denied the act of firing the shot that killed Latona. It is therefore claimed that the injection of the question of self-defense impliedly admitted that the defendant may have fired the shot that killed the decedent, and was therefore prejudicial error. While it is true that defendant denied the killing, several of the state's witnesses gave testimony tending to show that he fired the shots that killed the decedent. It also appears, both from the cross-examination of the state's witnesses and from the defendant's witnesses, that whatever was done by Graham and his associates on that occasion was done in the lawful defense of their persons. Under that phase of the case, it became the duty of the court to charge the right of self-defense. When the defendant entered his plea of not guilty, he could avail himself of all the defenses which the evidence disclosed. It would be perfectly proper for him to say:

(a) I did not fire the shot.

(b) Whatever I did, I did in my own self-defense. The mere fact that defendant does not admit the killing does not preclude him from this right. Indeed, the defendant may not take the stand at all or offer any evidence in defense. The evidence of self-defense may come wholly from the state; but whether the evidence comes from the defense, or from the state, supporting his lawful right of self-defense, it is the duty of the court to charge that feature of the law. The rule is stated as follows in 13 R. C. L. page 813: "If the defendant denies the killing, and there is no evidence adduced by either party which tends to show that the killing might have been in self-defense, although other evidence shows quite conclusively that the defendant committed the crime, it is not the duty of the court to instruct as to self-defense; but if the evidence tends to raise the issue of self-defense, although the defendant denies the killing, it seems that an instruction based on the theory of self-defense is proper and should be given."

Homicide—
self-defense—
right to charge
on law of.

That the instruction relating to self-defense was properly given is supported by the overwhelming weight of authority. State v. Jackett, 81 Kan. 168, 105 Pac. 689, 19 Ann. Cas. 118, Frazier v. Com. — Ky. —, 114 S. W. 268, and State v. Sloan, 149 Iowa, 469, 128 N. W. 842.

Misconduct of counsel for the state on the trial is also urged as reversible error. The record discloses that these remarks were exceedingly censurable, and of such character that their effect could hardly be avoided by any exception that might have been taken at the time. But the bill of exceptions does not disclose that the misconduct was excepted to on the trial, but was brought into the case only by affidavit attached to the motion for a new trial. This affidavit was made a part of the bill of excep-

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conduct of coun-
sel—how
available.

tions. The procedure took the same character as in the case of *State v. Young*, 77 Ohio St. 529, 83 N. E. 898, which holds that erroneous misconduct of this character cannot be made available by affidavit in support of a motion for a new trial.

Judgment affirmed.

Newman, Jones, Matthias, and

Johnson, JJ., concur. Wanamaker, J., concurs in the judgment.

NOTE.

The duty to retreat before killing one's assailant in self-defense when not on one's property is the subject of the annotation following *BROWN v. UNITED STATES*, post, 1279.

ROBERT B. BROWN, Plff. in Certiorari, v. UNITED STATES OF AMERICA.

United States Supreme Court—May 16, 1921.

(256 U. S. 335, 65 L. ed. 961, 41 Sup. Ct. Rep. 501.)

Homicide — self-defense — duty to retreat.

A person attacked by another with a knife does not, as a matter of law, exceed the bounds of lawful self-defense if he stands his ground and kills his assailant, where he has sufficient reason to believe that he is in imminent danger of death or grievous bodily harm from his assailant.

[See note on this question beginning on page 1279.]

(Mr. Justice Pitney and Mr. Justice Clarke dissent.)

CERTIORARI to the United States Circuit Court of Appeals, Fifth Circuit, to review a judgment affirming a judgment of the District Court for the Southern District of Texas, convicting defendant of murder in the second degree. *Reversed*.

The facts are stated in the opinion of the court.

Messrs. James R. Dougherty, Gordon Boone, W. E. Pope, and H. S. Bonham, for plaintiff in certiorari:

An instruction that plaintiff in error, though in a place where he had a right to be, and though the deceased was making a felonious assault upon him with intent to kill him or do him some serious bodily injury, was obliged to retreat, though without fault on his part, to the ditch or wall, before he could exercise his right of self-defense, and slay the deceased, was erroneous.

Russell, Crimes, p. 508; 3 Co. Inst. p. 55; Fost. C. L. chap. 3, p. 273; 1 East, P. C. 1803, p. 271; 1 Hawk. P. C. 7th ed. p. 172; Bishop, New Crim. Law 1892, §§ 849-851, 951; Beard v. United States, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324; Erwin v. State, 29 Ohio St. 186,

23 Am. Rep. 733, 2 Am. Crim. Rep. 251; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52, 2 Am. Crim. Rep. 318; United States v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; United States v. Outerbridge, 5 Sawy. 620, Fed. Cas. No. 15,978; 2 Whart. Crim. Law, § 1019; Rowe v. United States, 164 U. S. 546, 41 L. ed. 547, 17 Sup. Ct. Rep. 172; Carpenter v. State, 62 Ark. 286, 36 S. W. 905; Pond v. People, 8 Mich. 150; Bostic v. State, 94 Ala. 45, 10 So. 602; Weaver v. State, 19 Tex. App. 547, 58 Am. Rep. 389; Gray v. Combs, 7 J. J. Marsh. 478, 23 Am. Dec. 431; 4 Bl. Com. 180; 1 Hale, P. C. 480; Clark, Crim. Law, 137; 1 Whart. Crim. Law, 10th ed. § 495; State v. Cain, 20 W. Va. 679; State v. Clark, 51 W. Va. 457, 41 S. E. 207.

One who is attacked by another in his place of business, in such a manner

as would cause a person to believe that he was in immediate danger of death or serious bodily harm, is not obligated to retreat, but will be justified in taking the life of his assailant.

Andrews v. State, 159 Ala. 14, 48 So. 858; *Cary v. State*, 76 Ala. 78; *State v. Goodager*, 56 Or. 198, 106 Pac. 638, 108 Pac. 185; *Haynes v. State*, 17 Ga. 465; *Snell v. Derricott*, 161 Ala. 259, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636.

The right to defend one's home, even to the point of slaying one who forcibly intruded therein, or who assaulted the owner therein, does not seem to have depended at the common law entirely on the fact that the slayer was assaulted feloniously; that is, with an intent to kill him.

1 Hale, P. C. 458; *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 341; *Bishop*, New Crim. Law, § 858.

Mr. E. C. Brandenburg also for plaintiff in certiorari.

Messrs. Robert P. Stewart, Assistant Attorney General, and W. C. Heron, for defendant in certiorari:

The common law, in every case where public interests, e. g., aid of justice, were not involved, required the assaulted person to avoid homicide, if he could do so without endangering the life of himself or another.

3 Bracton (1250) Twiss ed. chap. 5, f. 104b, f. 134, 144; 2 Pollock & M. History of Eng. Law, pp. 476; 3 Stephen, History of Crim. Law, pp. 36-41; Beale, Retreat from a Murderous Assault, 16 Harvard L. Rev. 567; Britton (1290) chap. 6, p. 34; Bracton's Note Book, Nos. 1084, 1215; Howel's Case, Kenny, Cases on Criminal Law, 139; Y. B. 30-31, Edw. I. 510, 512 (1302); Fitzherbert, Abr. title Corone, Nos. 284, 287, 305 (1330) translated 16 Harvard L. Rev. 569; Reg. v. Bull, 9 Car. & P. 22; Reg. v. Knock, 14 Cox, C. C. 1; Reg. v. Rose, 15 Cox, C. C. 540; Reg. v. Symondson, 60 J. P. 645; *United States v. Wiltberger*, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; *United States v. Outerbridge*, 5 Sawy. 620, Fed. Cas. No. 15,978; *United States v. Mingo*, 2 Curt. C. C. 1, Fed. Cas. No. 15,781; *United States v. King*, 34 Fed. 302; *United States v. Lewis*, 111 Fed. 630; *Allen v. United States*, 164 U. S. 492, 497, 41 L. ed. 528, 529, 17 Sup. Ct. Rep. 154; *Anderson v. United States*, 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. Rep. 689.

Mr. Justice Holmes delivered the opinion of the court:

The petitioner was convicted of murder in the second degree, committed upon one Hermis at a place in Texas within the exclusive jurisdiction of the United States, and the judgment was affirmed by the circuit court of appeals. 168 C. C. A. 258, 257 Fed. 46. A writ of certiorari was granted by this court. 250 U. S. 637, 63 L. ed. 1183, 39 Sup. Ct. Rep. 494. Two questions are raised. The first is whether the indictment is sufficient, inasmuch as it does not allege that the place of the homicide was acquired by the United States "for the erection of a fort, magazine, arsenal, dockyard, or other needful building," although it does allege that it was acquired from the state of Texas by the United States for the exclusive use of the United States for its public purposes, and was under the exclusive jurisdiction of the same. Penal Code of March 4, 1909, chap. 321, § 272, subd. 3, 35 Stat. at L. 1088, Comp. Stat. § 10,445, 7 Fed. Stat. Anno. 2d ed. p. 890; Constitution, art. 1, § 8. In view of our opinion upon the second point, we think it unnecessary to do more than to refer to the discussion in the court below upon this.

The other question concerns the instructions at the trial. There had been trouble between Hermis and the defendant for a long time. There was evidence that Hermis had twice assaulted the defendant with a knife, and had made threats, communicated to the defendant, that the next time one of them would go off in a black box. On the day in question the defendant was at the place above mentioned, superintending excavation work for a postoffice. In view of Hermis's threats he had taken a pistol with him, and had laid it in his coat upon a dump. Hermis was driven up by a witness, in a cart to be loaded, and the defendant said that certain earth was not to be removed, whereupon Hermis came toward him, the defendant says, with a knife. The defend-

ant retreated some 20 or 25 feet to where his coat was, and got his pistol. Hermis was striking at him, and the defendant fired four shots and killed him. The judge instructed the jury, among other things, that "it is necessary to remember, in considering the question of self-defense, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." The instruction was reinforced by the further intimation that unless "retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm," the defendant was not entitled to stand his ground. An instruction to the effect that, if the defendant had reasonable grounds of apprehension that he was in danger of losing his life or of suffering serious bodily harm from Hermis, he was not bound to retreat, was refused. So the question is brought out with sufficient clearness whether the formula laid down by the court, and often repeated by the ancient law, is adequate to the protection of the defendant's rights.

It is useless to go into the developments of the law from the time when a man who had killed another, no matter how innocently, had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present, like the reference to retreat in 3 Co. Inst. 55, and elsewhere, have had a tendency to ossify into specific rules, without much regard for reason. Other examples may be found in the law as to trespass ab initio (Com. v. Rubin, 165 Mass. 453, 43 N. E. 200), and as to fresh complaint after rape (Com. v. Cleary, 172 Mass. 175, 51 N. E. 746). Rationally, the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not

a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature. Many respectable writers agree that, if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that, if he kills him, he has not exceeded the bounds of lawful self-defense. That has been the decision of this court. *Beard v. United States*, 158 U. S. 550, 559, 39 L. ed. 1086, 1090, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might

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duty to retreat.

not think it possible to fly with safety, or to disable his assailant rather than to kill him. *Rowe v. United States*, 164 U. S. 546, 558, 41 L. ed. 547, 551, 17 Sup. Ct. Rep. 172. The law of Texas very strongly adopts these views, as is shown by many cases, of which it is enough to cite two: *Cooper v. State*, 49 Tex. Crim. Rep. 28, 96 S. W. 1068; *Baltrip v. State*, 30 Tex. App. 545, 549, 17 S. W. 1106.

It is true that in the case of *Beard*, he was upon his own land (not in his house—), and in that of *Rowe*, he was in the room of a hotel; but those facts, although mentioned by the court, would not have bettered the defense by the old common law, and were not appreciably more favorable than that the defendant here was at a place where he was called to be, in the discharge of his duty. There was evidence that the last shot was fired after Hermis was down. The jury might not believe the defendant's testimony that it was an accidental discharge, but the suggestion of the government that this court may disregard the considerable body of evidence that the shooting was in self-

defense is based upon a misunderstanding of what was meant by some language in *Battle v. United States*, 209 U. S. 36, 38, 52 L. ed. 670, 672, 28 Sup. Ct. Rep. 422. Moreover, if the last shot was intentional, and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others, while the heat of the conflict was on, and if the defendant believed that he was fighting for his life.

The government presents a different case. It denies that *Hermis* had a knife, and even that *Brown* was acting in self-defense. Notwith-

standing the repeated threats of *Hermis*, and intimations that one of the two would die at the next encounter, which seem hardly to be denied, of course it was possible for the jury to find that *Brown* had not sufficient reason to think that his life was in danger at that time, that he exceeded the limits of reasonable self-defense, or even that he was the attacking party. But upon the hypothesis, to which the evidence gave much color, that *Hermis* began the attack, the instruction that we have stated was wrong.

Judgment reversed.

Mr. Justice Pitney and Mr. Justice Clarke dissent.

ANNOTATION.

Homicide: duty to retreat when not on one's own premises.

- I. Introductory, 1279.
- II. Duty to retreat generally, 1280.
- III. Assault creating imminent danger:
 - a. Generally, 1283.
 - b. Restricted view, 1287.
- IV. Peril increased by retreat, 1288.

I. Introductory.

The early common law with respect to the duty of a person assailed to retreat is to be found chiefly in the dicta of the text-writers, based on a few cases decided at a time when self-defense did not afford a legal justification, but only ground for a pardon. The law, as thus stated, was, in brief, that a man must "retreat to the wall" before killing in self-defense, except in the defense of his habitation. Of the American development of the doctrine it is well said in *BROWN v. UNITED STATES* (reported herewith) ante, 1276: "Concrete cases or illustrations stated in the early cases in conditions very different from the present, like the reference to retreat in 3 Co. Inst. 55, and elsewhere, have had a tendency to ossify into specific rules, without much regard for reason." Omitting from consideration the defense of the habitation and the performance of official duty, which are not within the scope of the present discussion, the American cases pre-

- V. Effect of previous threats by assailant, 1289.
- VI. Prevention of collateral offense, 1290.
- VII. View that person assailed need not retreat, 1291.

sent several divergent views. In a few jurisdictions it is maintained broadly that a person assailed is not justified in taking the life of his assailant if he can escape from danger by retreat. In other jurisdictions it is held that, if a person is assaulted in a place where he has a right to be, he may stand his ground, meet force with force, and, if need be, kill his assailant. Another line of cases adheres to an intermediate view that, if the assault is felonious, producing imminent peril of death or great bodily harm, there is no duty to retreat therefrom. These views, while essentially variant, have some tendency to overlap, since the cases insisting most strictly on the duty to retreat admit an exception in cases where the nature of the assault and the conduct of the assailant are such that danger would be increased rather than averted thereby, a doctrine differing only in degree from the intermediate view heretofore stated, which is apparently based on the belief that retreat from

State (1919) 203 Ala. 162, 82 So. 192; Caldwell v. State (1919) 203 Ala. 412, 84 So. 272; Pearson v. State (1912) 5 Ala. App. 68, 59 So. 526; Brake v. State (1913) 8 Ala. App. 98, 63 So. 11; Keef v. State (1915) 10 Ala. App. 13, 64 So. 513; Carroll v. State (1915) 12 Ala. App. 69, 68 So. 530; Cole v. State (1917) 16 Ala. App. 55, 75 So. 261; Love v. State (1919) 17 Ala. App. 149, 82 So. 639; Buckner v. State (1919) 17 Ala. App. 57, 81 So. 687; Vaughn v. State (1920) 17 Ala. App. 383, 84 So. 879; King v. State (1920) 17 Ala. App. 536, 87 So. 701. See also Pierson v. State (1847) 12 Ala. 149; Judge v. State (1877) 58 Ala. 406, 29 Am. Rep. 757; DeArman v. State (1884) 77 Ala. 10; Waller v. State (1889) 89 Ala. 79, 8 So. 153; Arp v. State (1892) 97 Ala. 5, 19 L.R.A. 357, 38 Am. St. Rep. 137, 12 So. 301, 9 Am. Crim. Rep. 517; Holmes v. State (1893) 100 Ala. 80, 14 So. 864; Mitchell v. State (1901) 133 Ala. 65, 32 So. 132; Raines v. State (1906) 147 Ala. 691, 40 So. 932; Twitty v. State (1910) 168 Ala. 59, 53 So. 308; Jackson v. State (1912) 177 Ala. 12, 59 So. 171; Russell v. State (1918) 202 Ala. 21, 79 So. 359; Gibson v. State (1916) 15 Ala. App. 12, 72 So. 569; Hutchinson v. State (1916) 15 Ala. App. 96, 72 So. 572; Minor v. State (1917) 15 Ala. App. 556, 74 So. 98; Terry v. State (1917) 15 Ala. App. 665, 74 So. 756; Collins v. State (1919) 17 Ala. App. 186, 84 So. 417, certiorari denied in (1919) 203 Ala. 697, 84 So. 924.

Delaware.—State v. Talley (1886) 9 Houst. 417, 33 Atl. 181; State v. Walker (1887) 9 Houst. 464, 33 Atl. 227; State v. Peo (1889) 9 Houst. 488, 33 Atl. 257; State v. Harmon (1902) 4 Penn. 580, 60 Atl. 866; State v. Powell (1904) 5 Penn. 24, 61 Atl. 966; State v. Brown (1905) 5 Penn. 339, 61 Atl. 1077; State v. Honey (1906) 6 Penn. 148, 65 Atl. 764; State v. Cephus (1906) 6 Penn. 160, 67 Atl. 150; State v. Miele (1909) 1 Boyce, 33, 74 Atl. 8; State v. Primrose (1910) 2 Boyce, 164, 77 Atl. 717; State v. Russo (1910) 1 Boyce, 538, 77 Atl. 743; State v. Reese (1911) 2 Boyce, 434, 79 Atl. 217; State v. Short (1911) 2 Boyce, 491, 82 Atl. 239; State v. Brooks (1912) 3 Boyce, 18 A.L.R.—81.

203, 84 Atl. 225; State v. Brelawski (1912) 3 Boyce, 416, 84 Atl. 950; State v. McKinney (1914) 5 Boyce, 128, 90 Atl. 1067. See also State v. Moore (1910) 1 Boyce, 142, 74 Atl. 1112; State v. Pepe (1910) 1 Boyce, 232, 76 Atl. 367.

Florida.—Danford v. State (1907) 53 Fla. 4, 43 So. 593; Owens v. State (1912) 64 Fla. 383, 60 So. 340. See also Lane v. State (1902) 44 Fla. 105, 32 So. 896.

Georgia.—See Heard v. State (1883) 70 Ga. 597.

Iowa.—State v. Thompson (1859) 9 Iowa, 188, 74 Am. Dec. 342; State v. Mahan (1886) 68 Iowa, 304, 20 N. W. 449, 27 N. W. 249; State v. Donnelly (1886) 69 Iowa, 705, 58 Am. Rep. 234, 27 N. W. 369; State v. Jones (1893) 89 Iowa, 182, 56 N. W. 427; State v. Warner (1896) 100 Iowa, 260, 69 N. W. 546; State v. Dyer (1910) 147 Iowa, 217, 29 L.R.A.(N.S.) 459, 124 N. W. 629; State v. Jackson (1912) 156 Iowa, 588, 137 N. W. 1034; State v. Baker (1912) 157 Iowa, 126, 135 N. W. 1097, 138 N. W. 841; State v. Morton (1914) 166 Iowa, 468, 147 N. W. 925; State v. Gough (1919) 187 Iowa, 363, 174 N. W. 279.

Kentucky.—Connor v. Com. (1904) 118 Ky. 497, 81 S. W. 259; Henson v. Com. (1910) 139 Ky. 173, 129 S. W. 566; Staples v. Com. (1917) 178 Ky. 429, 198 S. W. 1169; Radford v. Com. (1887) 9 Ky. L. Rep. 378, 5 S. W. 343; Arnold v. Com. (1900) 21 Ky. L. Rep. 1566, 55 S. W. 894; Austin v. Com. (1897) 19 Ky. L. Rep. 474, 40 S. W. 905; Stuart v. Com. (1907) 31 Ky. L. Rep. 1843, 105 S. W. 170. See also Sugg v. Com. (1884) 6 Ky. L. Rep. 50 (abstract); Tompkins v. Com. (1903) 117 Ky. 138, 77 S. W. 712. Compare McClurg v. Com. (1896) 17 Ky. L. Rep. 1339, 36 S. W. 14.

New Jersey.—State v. Wells (1790) 1 N. J. L. 424, 1 Am. Dec. 211; State v. Di Maria (1916) 88 N. J. L. 416, 97 Atl. 248, affirmed in (1917) 90 N. J. L. 341, 100 Atl. 1071. See also Brown v. State (1899) 62 N. J. L. 666, 42 Atl. 811, affirmed on other grounds in (1899) 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

New York.—Shorter v. People

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The duty of a person assaulted to retreat is not affected by the fact that it would involve the temporary abandonment of a horse which was in the possession of the assaulted person. *Finch v. State* (1886) 81 Ala. 41, 1 So. 565. To the same effect, see *Springfield v. State* (1891) 96 Ala. 81, 38 Am. St. Rep. 85, 11 So. 250.

A passenger on a street car is not exempt from this duty to retreat before taking the life of a conductor who ejects him from the car, as a street car is not a place of refuge, as one's own residence would be. *Caldwell v. State* (Ala.) supra. See also *Brake v. State* (1913) 8 Ala. App. 98, 63 So. 11.

III. Assault creating imminent danger.

a. Generally.

Where, from the nature of the attack, the assailed person believes, on reasonable grounds, that he is in imminent danger of losing his life or of receiving great bodily harm from his assailant, he is not bound to retreat, but may stand his ground, and, if necessary for his own protection, may take the life of his adversary.

United States.—*United States v. Herbert* (1856) 2 Hayw. & H. 210; *Fed. Cas. No. 15,354a*; *United States v. King* (1888) 34 Fed. 302; *Rowe v. United States* (1896) 164 U. S. 546, 41 L. ed. 547, 17 Sup. Ct. Rep. 172; *North Carolina v. Gosnell* (1896) 74 Fed. 734; and see *BROWN v. UNITED STATES* (reported herewith) ante, 1276.

Arkansas.—*McPherson v. State* (1874) 29 Ark. 225; *Fitzpatrick v. State* (1881) 37 Ark. 238; *Duncan v. State* (1887) 49 Ark. 543, 6 S. W. 164; *Carpenter v. State* (1896) 62 Ark. 286, 36 S. W. 900; *LaRue v. State* (1897) 64 Ark. 144, 41 S. W. 53; *Magness v. State* (1899) 67 Ark. 594, 50 S. W. 554; *Striplin v. State* (1911) 100 Ark. 132, 139 S. W. 1128.

Colorado.—*Enyart v. People* (1919) 67 Colo. 434, 180 Pac. 722.

District of Columbia.—*Marshall v. United States* (1916) 45 App. D. C. 375.

Kentucky.—*Holloway v. Com.* (1875) 11 Bush, 344; *Bohannon v. Com.* (1871) 8 Bush, 481, 8 Am. Rep.

474; *Nunn v. Com.* (1896) 17 Ky. L. Rep. 1211, 33 S. W. 941; *Wilson v. Com.* (1901) 23 Ky. L. Rep. 743, 63 S. W. 738; *Rowsey v. Com.* (1903) 116 Ky. 617, 76 S. W. 409; *Tompkins v. Com.* (1903) 117 Ky. 138, 77 S. W. 712. See also *Marcum v. Com.* (1897) 9 Ky. L. Rep. 253, 4 S. W. 786; *Arnold v. Com.* (1900) 21 Ky. L. Rep. 1566, 55 S. W. 894.

Louisiana.—See *State v. West* (1893) 45 La. Ann. 14, 12 So. 7.

Michigan.—*Pond v. People* (1860) 8 Mich. 150.

Montana.—*State v. Rolla* (1898) 21 Mont. 582, 55 Pac. 523; *State v. Merk* (1917) 53 Mont. 454, 164 Pac. 655. See also *Territory v. Burgess* (1888) 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558.

Nebraska.—See *Willis v. State* (1894) 43 Neb. 102, 61 N. W. 254.

Nevada.—*State v. Kennedy* (1872) 7 Nev. 374; *State v. Grimmer* (1910) 33 Nev. 531, 112 Pac. 273. See also *State v. Harrington* (1877) 12 Nev. 125.

New York.—*Shorter v. People* (1849) 2 N. Y. 193, 51 Am. Dec. 286; *People v. Cole* (1857) 4 Park. Crim. Rep. 35; *People v. Jeina* (1908) 125 App. Div. 697, 110 N. Y. Supp. 83, 22 N. Y. Crim. Rep. 320.

North Carolina.—*State v. Mazon* (1884) 90 N. C. 676; *State v. Blevins* (1905) 138 N. C. 668, 50 S. E. 763; *State v. Lucas* (1913) 164 N. C. 471, 79 S. E. 674; *State v. Gaddy* (1914) 166 N. C. 341, 81 S. E. 608; *State v. Ray* (1914) 166 N. C. 420, 81 S. E. 1087. See also *State v. Kennedy* (1884) 91 N. C. 572.

Ohio.—*Erwin v. State* (1876) 29 Ohio St. 186, 23 Am. Rep. 733, 2 Am. Crim. Rep. 251; *State v. Snelbaker* (1882) 8 Ohio Dec. Reprint, 466, 8 Ohio L. J. 90; *Carr v. State* (1900) 21 Ohio C. C. 43, 11 Ohio C. C. D. 353; *GRAHAM v. STATE* (reported herewith) ante, 1272. See also *Venable v. State* (1885) 1 Ohio C. C. 301, 1 Ohio C. D. 165.

Oregon.—*State v. Gibson* (1903) 43 Or. 184, 73 Pac. 333; *State v. Rader* (1919) 94 Or. 432, 186 Pac. 79.

Rhode Island.—See *State v. Sherman* (1889) 16 R. I. 631, 18 Atl. 1040.

South Dakota.—*State v. Jaukkuri* (1918) 41 S. D. 4, 168 N. W. 1047.

Virginia.—See *McCoy v. Com.* (1919) 125 Va. 771, 99 S. E. 644.

West Virginia.—*State v. Cain* (1882) 20 W. Va. 679; *State v. Evans* (1890) 33 W. Va. 417, 10 S. E. 792; *State v. Zeigler* (1895) 40 W. Va. 593, 21 S. E. 763, 10 Am. Crim. Rep. 463; *State v. Clark* (1902) 51 W. Va. 457, 41 S. E. 204.

Wisconsin.—See *Perkins v. State* (1891) 78 Wis. 551, 47 N. W. 827; *Miller v. State* (1909) 139 Wis. 57, 119 N. W. 850.

It was said in *Marshall v. United States* (1916) 45 App. D. C. 373, that the right of a defendant, when in imminent danger, to take life, did not depend on whether there was an opportunity to escape, and one under such circumstances was not compelled to step aside or flee.

In *Enyart v. People* (1919) 67 Colo. 434, 180 Pac. 722, the court said: "This jury was told, in substance, that, although they might believe that defendant was attending to his own business in his own bank, though he were in no way the aggressor, though he were subjected to a deadly and unprovoked assault by one armed with a loaded pistol and bent upon taking his life, he was obliged to flee, unless it appeared to him, and would have appeared to a reasonable person so situated, that it was more dangerous to run than fight. This is exactly the pernicious application of the common-law doctrine of 'retreat to the wall,' which has been abrogated by the authorities above cited. We cannot sanction a conviction in which this erroneous principle may have played a conspicuous part."

In *McPherson v. State* (1874) 29 Ark. 225, the court said: "A necessity for taking the life of the other is the controlling circumstance which justifies or excuses the act, and, before resorting to such extremity, the party must employ all means within his power, consistent with his safety, to avoid the danger and avert such necessity. We would not, however, be understood as saying that he must have used all possible means, for, in

some cases, the assault may be of so fierce and violent a character that there would be as much, or more, danger in attempting to escape as there would be to stand and repel it; but he must seek such as his safety would reasonably dictate."

So, in *State v. Cain* (1882) 20 W. Va. 679, wherein it appeared that the defendant shot and killed the deceased while they were proceeding homeward in the nighttime, the court stated the rule as follows: "When one, without fault himself, is attacked by another in such a manner, or under such circumstances, as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable grounds to believe, and does believe, such danger is imminent, he may act upon such appearances, and may, without retreating, kill the assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary to avoid the apprehended danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case."

In *State v. Zeigler* (1895) 40 W. Va. 593, 21 S. E. 763, 10 Am. Crim. Rep. 463, it appeared that an altercation took place between the defendant and deceased over a right of way across the defendant's land. The deceased struck the defendant with his fist, and inflicted a blow on the defendant's head with his gun after an unsuccessful attempt to shoot him, when the defendant fired a shot which resulted in the death of the deceased. It was held that under the circumstances the defendant was not required to retreat, and was justified in taking the life of the deceased.

It will be observed that in *BROWN v. UNITED STATES* (reported herewith)

under circumstances which give him reasonable ground to believe that he is in imminent danger of death or grievous bodily harm, is not as a matter of law bound to retreat, but may stand his ground, and, if he kills his assailant, he does not exceed the bounds of lawful self-defense.

Where it appeared that an altercation occurred between the accused and his assailant in the saloon of another, while they were under the influence of liquor, and the accused, while in the act of seeking protection behind the bar, was approached by his assailant, who fired several shots from a pistol which he held in his hand, it was held that under the circumstances the accused was not in duty bound to retreat, but was justified in meeting force with force, and slaying his assailant. *State v. Merk* (1917) 58 Mont. 454, 164 Pac. 655. See to the same effect, *State v. Grimmett* (1910) 33 Nev. 531, 112 Pac. 273, wherein the court said: "The law is well established that where a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, and it is necessary for him to take the life of his assailant to protect his own, then he need not flee for safety, but has the right to stand his ground and slay his adversary."

In *People v. Cole* (1857) 4 Park. Crim. Rep. (N. Y.) 35, the court said: "To justify the prisoner in killing Aaron Cole in self-defense, it is necessary that the prisoner himself should have been attacked; that he should have reasonable ground to suppose that the object of the attack was to kill him, or to do him great bodily harm; that he should have been unable to withdraw himself from this imminent danger, and therefore should have been compelled to kill Aaron Cole to protect himself from the attack."

In *People v. Jeina* (1908) 125 App. Div. 697, 110 N. Y. Supp. 83, 22 N. Y. Crim. Rep. 320, it appeared that the victim of a homicide, after an altercation with a third person, was about to

upon he turned and was advancing on the defendant, when the latter fired a shot which caused deceased's death. It was held that, while it was the duty of the defendant to avoid the necessity of shooting, if possible, yet he was not obliged to turn his back on such imminent danger.

So, in *State v. Jaukkuri* (1918) 41 S. D. 4, 168 N. W. 1047, it appeared that the defendant and his victim became involved in a physical encounter. The defendant withdrew from the struggle, and some time thereafter he saw his assailant approaching him, on a run, with some rocks in his hand. When within a short distance of the defendant the assailant threw one of the rocks, and after the defendant had dodged the rock, he drew his pistol and fired. It was held that under the circumstances the defendant could not have retreated in safety, and that the homicide was justifiable.

And in a case wherein it appeared that the victim of the homicide had beaten the accused in a brutal manner, and on being compelled to desist threatened to shoot him on sight, and, on meeting him shortly thereafter, rushed at the accused with hostile demonstrations, it was held that, if the accused believed that his assailant intended to carry out his threat, he would be justified in killing him without retreating. *State v. Kennedy* (1872) 7 Nev. 374.

In *GRAHAM v. STATE* (reported herewith) ante, 1272, wherein it appeared that the accused was attacked by a crowd of men while in the pursuit of his duty as the guard of a manufacturing company, the court said: "Under the facts detailed, if the defendant did not provoke the assault, but, while in the lawful pursuit of his business, was suddenly and violently assaulted with a deadly weapon and placed in danger of loss of life or great bodily harm, under the current of modern authority, he was not required to retreat."

In *Erwin v. State* (1876) 29 Ohio St. 186, 23 Am. Rep. 733, 2 Am. Crim. Rep. 251, it was held that where a person

in the lawful pursuit of his business, and without fault, is violently assaulted by one who manifestly intends and endeavors to kill him, the person so assaulted, without retreating, although it is in his power to do so without increasing his danger, may kill his assailant, if necessary to save his own life or prevent grievous bodily harm. See also *Venable v. State* (1885) 1 Ohio C. C. 30, 1 Ohio C. D. 165.

In North Carolina, a distinction is made between an assault with felonious intent and an assault without a felonious intent. In the former case a person attacked is under no obligation to retreat, but may stand his ground, and, if need be, may kill his assailant, while in the latter case he must retreat if there is any way of escape open to him. *State v. Blevins* (1905) 138 N. C. 668, 50 S. E. 763. To the same effect, see *State v. Hough* (1905) 138 N. C. 663, 50 S. E. 709.

The rule that one murderously assaulted is not required to retreat before taking the life of the assailant was laid down by the court, in granting a new trial to the defendant, in *State v. Lucas* (1913) 164 N. C. 471, 79 S. E. 674, wherein it appeared that the assailant approached the defendant with an apparent felonious intent, having a knife in his hand, and saying that he was going to kill the defendant. The defendant withdrew a few steps, and, on being struck at by his assailant, shot him with a pistol which he held in his hand. The court said: "It is held for law in this state that, when an unprovoked and murderous assault is made on a citizen, he is not required to retreat, but may stand his ground, and take the life of the assailant, if it is necessary to do so to save himself from death or great bodily harm." To the same effect, see *State v. Ray* (1914) 166 N. C. 420, 81 S. E. 1087; *State v. Blevins* (N. C.) supra. In the latter case it was said: "It has been established in this state by several well-considered decisions that where a man is without fault, and a murderous assault is made upon him,—an assault with intent to kill,—he is not required to retreat, but may stand his ground, and if he kill his

assailant, and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide, and will be so held."

In *United States v. King* (1888) 34 Fed. 302, it appeared that the defendant was proceeding to the defense of a person who was being assaulted, when the assailant, a powerful, aggressive man, turned and advanced rapidly toward the defendant with a knife in his hand, and threatened his life. The defendant stood his ground and shot the assailant. It was held that, in order to support the plea of justifiable homicide, it must appear that the accused retreated as far as he could with safety, and, before he was justified in taking the life of the assailant, he must have had an honest belief, based on reasonable grounds, that he was in imminent danger of death or grievous bodily harm.

In *Rowe v. United States* (1896) 164 U. S. 546, 41 L. ed. 547, 17 Sup. Ct. Rep. 172, it appeared that the victim of the homicide used language which was offensive to the accused, and the accused kicked him lightly, and stepped back against a counter. The victim immediately attacked the accused, cutting him with a knife, and the accused shot and killed him. It was held that if the accused, after he kicked his assailant, withdrew in good faith, and his conduct should have been reasonably so interpreted by the assailant, then the accused was not obliged to retreat, but was entitled to the benefit of a principle which was announced in an earlier case, wherein it was said: "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, or to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and

with such force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life, or to protect himself from great bodily injury."

b. Restricted view.

The rule that one is not bound to retreat if he believes, on reasonable grounds, that his life is in imminent danger, is somewhat restricted in some jurisdictions, and it is held that, although a person believes on reasonable grounds that his life is in imminent danger, he must retreat as far as he reasonably can before taking the life of his assailant. But, if the danger is so imminent that there is no probable means of escape, he is justified in standing his ground, and, if necessary, slaying his assailant.

Alabama.—*Henderson v. State* (1884) 77 Ala. 77; *Blackburn v. State* (1888) 86 Ala. 595, 6 So. 96; *Keith v. State* (1892) 97 Ala. 32, 11 So. 914; *Dorsey v. State* (1894) 107 Ala. 157, 18 So. 199; *Compton v. State* (1895) 110 Ala. 24, 20 So. 119; *Bluett v. State* (1907) 151 Ala. 41, 44 So. 84. See also *Hutcheson v. State* (1910) 170 Ala. 29, 54 So. 119; *Hill v. State* (1915) 194 Ala. 11, 2 A.L.R. 509, 69 So. 941; *Watson v. State* (1916) — Ala. App. —, 72 So. 469. Compare *Beasley v. State* (1913) 181 Ala. 28, 61 So. 259.

Delaware.—*State v. Talley* (1886) 9 Houst. 417, 33 Atl. 181; *State v. Walker* (1887) 9 Houst. 464, 33 Atl. 227; *State v. Warren* (1893) 1 Marv. 487, 41 Atl. 190; *State v. Emory* (1904) 5 Penn. 126, 58 Atl. 1036; *State v. Powell* (1904) 5 Penn. 24; *State v. Brown* (1905) 5 Penn. 389, 61 Atl. 1077; *State v. Cephus* (1906) 6 Penn. 160, 67 Atl. 150; *State v. Honey* (1906) 6 Penn. 148, 65 Atl. 764; *State v. Miele* (1909) 1 Boyce, 33, 74 Atl. 8; *State v. Russo* (1910) 1 Boyce, 538, 77 Atl. 743; *State v. Primrose* (1910) 2 Boyce, 164, 77 Atl. 717; *State v. Reese* (1911) 2 Boyce, 434, 79 Atl. 217; *State v. Short* (1911) 2 Boyce, 491, 82 Atl. 239; *State v. Brooks* (1912) 3 Boyce, 203, 84 Atl. 225; *State v. Brelawski* (1912) 3 Boyce, 416, 84 Atl. 950; *State v. Mc-*

Kinney (1914) 5 Boyce, 128, 90 Atl. 1067. See also *State v. Moore* (1910) 1 Boyce, 142, 74 Atl. 1112; *State v. Pepe* (1910) 1 Boyce, 232, 76 Atl. 367.

Iowa.—*State v. Benham* (1867) 23 Iowa, 154, 92 Am. Dec. 417; *State v. Jones* (1893) 89 Iowa, 182, 56 N. W. 427. Compare *Tweedy v. State* (1858) 5 Iowa, 433.

Pennsylvania.—*Com. v. Ellenger* (1867) 1 Brewst. 352; *Com. v. Ware* (1890) 137 Pa. 465, 20 Atl. 806; *Com. v. Breysessee* (1894) 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824; *Com. v. Herold* (1896) 5 Pa. Dist. R. 623; *Com. v. Mitchka* (1904) 209 Pa. 274, 58 Atl. 474; *Com. v. McKwayne* (1908) 221 Pa. 449, 70 Atl. 809. See also *Com. v. Drum* (1868) 58 Pa. 9; *Abernethy v. Com.* (1882) 101 Pa. 322.

In *State v. Short* (1911) 2 Boyce (Del.) 491, 82 Atl. 239, the court said: "Where one is assaulted upon a sudden affray, and in the judgment of the jury honestly believed, on reasonable and sufficient grounds, that he was in imminent danger of being killed, or of receiving great bodily harm, he would have, in self-defense, the right to use a deadly weapon against his assailant. But, in exercising such right in a manner likely to cause death or great bodily harm to his assailant, he must be closely pressed by him, and must have retreated as far as he conveniently and safely could, in good faith, with the honest intent to avoid the violence and peril of the assault. If these be so sudden, fierce, or urgent as not to allow him to retreat, or to have other probable means of escape, then he may rightfully use a deadly weapon in his defense."

So, in *State v. Emory* (1904) 5 Penn. (Del.) 126, 58 Atl. 1036, it was said: "Neither fear, nor apprehension of death or of great bodily harm, will totally excuse one from killing another, but, to have effect in law, the danger must be imminent and impending at the instant, and must be real, not imaginary. He must have declined the combat, and retreated from his assailant as far as he could do so consistently with his own safety."

And in *Keith v. State* (1892) 97 Ala. 32, 11 So. 914, the court said: "The

law is very careful of human life, and although a person without fault may be in great peril, involving imminent danger to life or limb, the duty to retreat and avoid the danger rests upon him, if he can do so with reasonable safety to himself; but where the peril is great, and the danger to life or limb imminent, and the person is without fault, the law does not require him to increase his danger by putting himself at a disadvantage."

In *Com. v. Breyessee* (1894) 160 Pa. 451, 40 Am. St. Rep. 729, 28 Atl. 824, the court said: "Life may be lawfully taken in self-defense; but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him. It is the duty of one who is assailed, to flee, if flight is possible; and it is only when he is persuaded that he must suffer death or grievous bodily harm at the hands of his assailant, or take the life of his assailant that he may save his own, that he can justify his act as done in self-defense."

The later decisions in Iowa support this view. In *State v. Jones* (1893) 89 Iowa, 182, 56 N. W. 427, wherein it appeared that an altercation occurred between the defendant and his victim, at a time when they were both armed with pistols, which resulted in the death of the latter, the court said: "It may be conceded that, in the earlier adjudications of this court, there is language employed which may be said to lay down the doctrine that one who is assailed with a deadly weapon is not required to flee from his adversary, but may strike and kill in his own defense. See *Tweedy v. State* (1857) 5 Iowa, 433. But in the later utterances of this court,—and it may now be said to be the general rule elsewhere,—the killing of an assailant is excusable on the ground of self-defense, only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing some great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking

of the life of the assailant is not excusable."

In *State v. Borwick* (1922) — Iowa, —, 187 N. W. 460, the giving of an instruction in harmony with the restricted view was held error, not, apparently, because of dissent from the correctness of that view, but because of its inapplicability to the facts of the case, which showed that defendant had no opportunity to retreat.

IV. Peril increased by retreat.

There seems to be no dispute that, if one is assaulted, and the circumstances are such that he believes on reasonable grounds that his peril will be increased by retreating, beyond that to which he will be subjected if he stands and defends himself, he is justified in standing his ground and repelling force with force, even to the taking of the life of his assailant, if necessary.

Alabama.—*Shell v. State* (1889) 88 Ala. 14, 7 So. 40; *Hammil v. State* (1890) 90 Ala. 577, 8 So. 380; *Perry v. State* (1891) 94 Ala. 26, 10 So. 650; *Roden v. State* (1892) 97 Ala. 54, 12 So. 419; *Wilkins v. State* (1893) 98 Ala. 1, 13 So. 312; *Dorsey v. State* (1894) 107 Ala. 157, 18 So. 199; *Washington v. State* (1900) 125 Ala. 40, 28 So. 78; *Pugh v. State* (1902) 132 Ala. 1, 31 So. 727; *Harbor v. State* (1903) 140 Ala. 103, 37 So. 330; *Patterson v. State* (1906) 146 Ala. 39, 41 So. 157; *Bluet v. State* (1907) 151 Ala. 41, 44 So. 84; *Roberts v. State* (1911) 171 Ala. 12, 54 So. 993; *McCutcheon v. State* (1912) 5 Ala. App. 96, 59 So. 714. See also *Hill v. State* (1915) 194 Ala. 11, 2 A.L.R. 509, 69 So. 941; *Watson v. State* (1916) 15 Ala. App. 39, 72 So. 569.

Arkansas.—*Duncan v. State* (1887) 49 Ark. 543, 6 S. W. 164.

Colorado.—*Boykin v. People* (1896) 22 Colo. 496, 45 Pac. 419. See also *Ritchey v. People* (1896) 23 Colo. 314, 47 Pac. 272, 384.

Iowa.—*State v. Thompson* (1859) 9 Iowa, 188, 74 Am. Dec. 342; *State v. Donnelly* (1886) 69 Iowa, 705, 58 Am. Rep. 234, 27 N. W. 369; *State v. Borwick* (1922) — Iowa, —, 187 N. W. 460.

Kentucky. — *Philips v. Com.* (1864) 2 Duv. 328, 87 Am. Dec. 499.

Louisiana. — *State v. Robertson* (1898) 50 La. Ann. 92, 69 Am. St. Rep. 393, 23 So. 9.

Michigan. — *People v. Macard* (1888) 73 Mich. 15, 40 N. W. 784.

Minnesota. — *State v. Gardner* (1905) 96 Minn. 318, 2 L.R.A.(N.S.) 49, 104 N. W. 971.

North Carolina.—*State v. Gentry* (1899) 125 N. C. 733, 34 S. E. 706.

South Carolina.—*State v. Jones* (1912) 90 S. C. 290, 73 S. E. 177.

Thus, in a case wherein it appeared that the victim was approaching the defendant with his gun raised, and with the avowed purpose of shooting him, the defendant was not bound to retreat before using his weapon, if he in good faith believed that by retreating he would increase his exposure to the threatened danger. *People v. Macard* (Mich.) *supra*.

In *Hammil v. State* (1890) 90 Ala. 577, 8 So. 380, the court said: "When one who is without fault in bringing on a difficulty finds himself so menaced by present, impending danger to his life or limb, as that he strikes, and thereby slays his assailant, it is not absolutely necessary to his plea of self-defense that he should have attempted to escape by flight. If it be made to appear that he was so obstructed by obstacles that he could not escape, or that, in attempting to do so, he would probably have increased the peril with which he was menaced, this would relieve him of all duty to attempt it. Flight need not be attempted by one innocently drawn into such peril, if by so doing he increases the danger threatened."

A person assaulted by another who has previously threatened to kill him is not bound to run and escape the assault, where the danger is left still impending, and may, perhaps, be increased by the act of running. *Philips v. Com.* (Ky.) *supra*.

So, where it appeared that the defendant, while in combat, cut his assailant with a knife, thereby causing his death, it was held that a charge which instructed the jury that the defendant could not be acquitted on the

ground of self-defense, if he could have retreated and avoided the necessity of striking the fatal blow, was faulty, as it omitted the qualification as to the increase of peril by attempting to retreat. *Shell v. State* (Ala.) *supra*.

Likewise, where it appeared that the victim of the homicide threatened the defendant's life as he was advancing on him, and that the defendant threw a rock which resulted in the death of his assailant, it was held that a charge which, in substance, asserted that if the defendant believed, and the circumstances were such as to justify a reasonable person in believing, that he was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, he had a right to stand his ground and throw the rock which caused the death, was improperly refused. *McCutcheon v. State* (1912) 5 Ala. App. 96, 59 So. 714.

It is a question for the jury to determine on all the evidence whether the defendant could have retreated without increasing his peril. *Gafford v. State* (1898) 122 Ala. 54, 25 So. 10.

V. Effect of previous threats by assailant.

It has been held in at least one jurisdiction that, where a person has repeatedly threatened to kill another, the latter has a right to bear arms for protection, and if he casually meets his antagonist, and believes him to be armed and ready to execute his threats, he need not retreat, but may act in his defense. *Com. v. Barnes* (1891) 13 Ky. L. Rep. 163, 16 S. W. 457.

So, in a case wherein it appeared that the defendant went to a store to purchase supplies, and found there a person who had threatened his life; whereupon a conflict ensued which resulted in the death of the latter, it was held that the defendant was not under any legal duty to avoid the difficulty, and it was improper, in a prosecution of the defendant for killing the threatener, to permit the prosecution to ask why he did not leave the store and go home when he found his assailant there. *Carnes v. Com.* (1905) 27 Ky. L. Rep. 1205, 87 S. W. 1123.

In *Phillips v. Com.* (1865) 2 Duv. (Ky.) 328, 87 Am. Dec. 499, it appeared that the victim of the homicide made an attempt to shoot the accused, and, on being prevented from doing so, threatened to kill him whenever he saw him, and at times was seen watching for him with the avowed purpose of killing him. On the occasion of the killing, the victim unexpectedly met the accused, and, putting his hand in his pocket indicating an intention to draw his pistol, informed the accused that he intended to execute his threat, when the accused shot and killed him. It was held that the accused was not bound to retreat, since the principles applicable to a mutual encounter with deadly weapons did not apply to a case where the first escape from a threatened assassination probably would not secure the ultimate safety of the accused.

In *Bohannon v. Com.* (1871) 8 Bush (Ky.) 481, 8 Am. Rep. 474, with respect to a similar state of facts, the court said: "The threats of even a desperate and lawless man do not and ought not to authorize the person threatened to take his life; nor does any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme. But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if on such an occasion he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged

to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him." See also *Holloway v. Com.* (1875) 11 Bush (Ky.) 344; *Young v. Com.* (1869) 6 Bush (Ky.) 312.

VI. Prevention of collateral offense.

Where, in the attempt to commit a collateral felony, such as robbery, a person is assaulted and his life put in danger, he is not bound to retreat, but may stand his ground, and kill if necessary to prevent the felony. *Storey v. State* (1882) 71 Ala. 329; *Ragland v. State* (1900) 111 Ga. 211, 36 S. E. 682; *State v. Robertson* (1898) 50 La. Ann. 92, 69 Am. St. Rep. 393, 23 So. 9; *State v. Bonofiglio* (1901) 67 N. J. L. 239, 91 Am. St. Rep. 423, 52 Atl. 712, 54 Atl. 99; *Stoneham v. Com.* (1889) 86 Va. 523, 10 S. E. 238. See also *State v. Burdette* (1919) — S. C. —, 101 S. E. 664.

Thus, it was said in *Ragland v. State* (1900) 111 Ga. 211, 36 S. E. 682, that the rule that a person killing in his own defense is excusable only when the danger is so urgent and pressing that the killing is necessary to save his own life has no application to homicide to prevent the commission of a felony on the person of the slayer. And one may lawfully kill another, without retreating, where the latter is attempting, by surprise or violence, to commit a felony on his person.

In *State v. Bonofiglio* (1901) 67 N. J. L. 239, 91 Am. St. Rep. 423, 52 Atl. 712, 54 Atl. 99, it was said that where an attempt to rob is made, and is actually in process of execution, the person on whom the attempt is being made need not retreat to avoid killing his assailant, even though such means might be resorted to with safety to himself.

Where a person threatens to take by force from the person of another, a weaker man, a watch which he claims to be his, and makes an attack on him for that purpose, the latter is not obliged to retreat, but may repel force by force in the defense of his person

or property, and is justified in killing the assailant when the latter approaches him and raises his hand to seize or strike him. *Stoneham v. Com.* (1889) 86 Va. 523, 10 S. E. 238.

In *State v. Burdette* (S. C.) *supra*, it appeared that the defendant followed his sister and the victim of the homicide to a place on the latter's premises where they had resorted for an immoral and unlawful purpose. While there a quarrel arose, and the victim made a motion as if to reach for his gun, when the defendant shot him. It was held that the fact that the protest of the defendant was calculated to bring on a difficulty did not deprive him of the right of self-defense, in case he was in danger of losing his life or suffering serious bodily harm, and he was not bound to retreat, as it was his duty to use all reasonable means to prevent them from accomplishing their purpose, providing he did not commit a breach of the peace.

VII. View that person assailed need not retreat.

The doctrine of the common law that the right of self-defense did not arise until the assailed person had "retreated to the wall" has been supplanted, in some of the jurisdictions, by the doctrine that if the person assailed is without fault, and in a place where he has a right to be, and put in reasonably apparent danger of losing his life or receiving great bodily harm, he need not retreat, but may stand his ground, repel force by force, and if, in the reasonable exercise of his right of self-defense, he kills his assailant, he is justified.

California.—*People v. Gonzales* (1887) 71 Cal. 569, 12 Pac. 783; *People v. Hecker* (1895) 109 Cal. 451, 30 L.R.A. 403, 42 Pac. 307; *People v. Maughs* (1906) 149 Cal. 253, 86 Pac. 187.

Illinois.—*Hammond v. People* (1902) 199 Ill. 173, 64 N. E. 980.

Indiana.—*Runyan v. State* (1877) 57 Ind. 80, 26 Am. Rep. 52, 2 Am. Crim. Rep. 318; *Fields v. State* (1892) 134 Ind. 46, 32 N. E. 780; *Page v. State* (1894) 141 Ind. 236, 41 N. E. 745. See

also *Creek v. State* (1865) 24 Ind. 151.

Kansas.—*State v. Reed* (1894) 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174. See also *State v. Petteys* (1902) 65 Kan. 625, 70 Pac. 588.

Mississippi.—*Long v. State* (1876) 52 Miss. 23; *McCall v. State* (1901) — Miss. —, 29 So. 1003. See also *Bang v. State* (1882) 60 Miss. 571; *Ellerbe v. State* (1901) 79 Miss. 10, 30 So. 57.

Missouri.—*State v. Hudspeth* (1899) 150 Mo. 12, 51 S. W. 483; *State v. Bartlett* (1902) 170 Mo. 658, 59 L.R.A. 756, 71 S. W. 148. Compare *State v. Dettmer* (1894) 124 Mo. 426, 27 S. W. 1117.

Oklahoma.—*Kirk v. Territory* (1900) 10 Okla. 46, 60 Pac. 797; *Mahaffey v. Territory* (1901) 11 Okla. 213, 66 Pac. 342; *Price v. State* (1908) 1 Okla. Crim. Rep. 384, 98 Pac. 447; *Turner v. State* (1910) 4 Okla. Crim. Rep. 164, 111 Pac. 988; *Fowler v. State* (1912) 8 Okla. Crim. Rep. 130, 126 Pac. 831; *Foster v. State* (1912) 8 Okla. Crim. Rep. 139, 126 Pac. 835. See also *Floyd v. State* (1911) 5 Okla. Crim. Rep. 65, 113 Pac. 212.

Texas.—*West v. State* (1877) 2 Tex. App. 460; *Parker v. State* (1886) 22 Tex. App. 105, 3 S. W. 100; *High v. State* (1888) 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238; *Gonzales v. State* (1889) 28 Tex. App. 130, 12 S. W. 733; *Ball v. State* (1890) 29 Tex. App. 107, 14 S. W. 1012; *Nalley v. State* (1891) 30 Tex. App. 456, 17 S. W. 1084; *Williams v. State* (1891) 30 Tex. App. 429, 17 S. W. 1071; *Lee v. State* (1898) — Tex. Crim. Rep. —, 24 S. W. 509; *Alexander v. State* (1902) — Tex. Crim. Rep. —, 70 S. W. 748; *Voight v. State* (1908) 53 Tex. Crim. Rep. 268, 109 S. W. 205; *Moss v. State* (1910) 59 Tex. Crim. Rep. 68, 126 S. W. 1150; *Renn v. State* (1912) 64 Tex. Crim. Rep. 639, 143 S. W. 167. See also *Williams v. State* (1886) 22 Tex. App. 497, 4 S. W. 64; *Smith v. State* (1894) 33 Tex. Crim. Rep. 513, 27 S. W. 187; *Hunt v. State* (1894) 33 Tex. Crim. Rep. 255, 26 S. W. 206; *Clay v. State* (1902) 44 Tex. Crim. Rep. 129, 69 S. W. 413; *Cooper v. State* (1905) 49 Tex. Crim. Rep. 28, 89 S. W. 1068.

Washington.—*State v. Carter* (1896) 15 Wash. 121, 45 Pac. 745,

State v. Churchill (1909) 52 Wash. 210, 100 Pac. 309; *State v. Bowinkelman* (1911) 66 Wash. 396, 119 Pac. 824. See also *State v. McCann* (1896) 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

Thus, in *Runyan v. State* (1877) 57 Ind. 80, 26 Am. Rep. 52, 2 Am. Crim. Rep. 318, it appeared that the defendant, who was disabled in one arm, procured a pistol to protect himself against a threatened assault, and while standing on a public street, surrounded by an excited crowd, shot and killed his assailant who had rushed up to him and struck him two or three blows. It was held that a charge that, "before a man can take life in self-defense, he must have been closely pressed by his assailant, and must have retreated as far as he safely or conveniently could, in good faith, with the honest intent to avoid the violence of the assault," was erroneous. The court said: "Whatever may have been, or now is, the true rule in such a case, we think the instruction from which we have quoted, whether considered in its separate parts, or taken altogether, laid too much stress on the duty of a party, when assailed, to retreat before attempting to repel force by force, and thus prescribed too rigid a rule as applicable to the case at bar."

In *State v. Bartlett* (1902) 170 Mo. 658, 59 L.R.A. 756, 71 S. W. 148, it appeared that the defendant, an old man, partially crippled, had been threatened at various times by a certain individual, and on one occasion, while walking along the street, was attacked by that individual, who began lashing him with a whip. The defendant ran to his office, but was unable to open the door thereto, and, being pursued by his assailant, who was continually striking him, shot and killed him. It was held that the defendant was not bound to retreat to his office before exercising his right of self-defense, the court saying: "It is true, human life is sacred, but so is human liberty; one is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may ex-

clusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor. And this idea of the non-necessity of retreating from any locality where one has the right to be is growing in favor, as all doctrines based upon sound reason inevitably will, and has found voice and expression elsewhere."

So, in *State v. Hudspeth* (1899) 150 Mo. 12, 51 S. W. 483, it appeared that, on the morning of the homicide, the victim got his gun and swore that he would kill the defendant. Later in the day, while the defendant was standing in the highway in front of a store, the victim went into the store, came out with two scale weights, began cursing the defendant, and was in the act of throwing one of the weights at him, when the defendant shot him. It was held that, under the circumstances, the defendant, being without fault, had the right to act on appearances, and was not required to flee from the public highway in which he was assailed, and it was error for the court to instruct the jury that, "if it reasonably appeared to defendant that he could have escaped the apprehended danger otherwise than by shooting deceased, then it was his duty to have done so, and he cannot be justified on the ground of self-defense."

In *Fowler v. State* (1912) 8 Okla. Crim. Rep. 130, 126 Pac. 831, it appeared that a quarrel arose between the accused and another, over a game of cards, and the latter, threatening to kill the accused, put his hand in his pocket as if to draw a weapon, when the accused shot him. It was held that it was improper to instruct the jury that, if the accused could have avoided the danger and the necessity of killing by retreating, it was his duty to do so, for the reason that, when a person is unlawfully assailed at a place where he has a right to be, he may stand his ground and defend himself.

So, in *Foster v. State* (1912) 8 Okla. Crim. Rep. 139, 126 Pac. 835, it ap-

peared that the victim of the homicide, while in the act of kidnapping a child of the accused, shot at the accused, whereupon the accused shot and killed him. The court said: "The portion of the instruction which required the jury to find that the appellant should have retreated before he could act in self-defense is not the law, and should not have been given. This instruction has been repeatedly condemned. . . . As was said by this court in the case of *Fowler v. State* (Okla.) supra: 'Under the old common law, no man could defend himself until he had retreated, and until his back was to the wall; but this is not the law in free America. Here the wall is to every man's back. It is the wall of his rights; and when he is at a place where he has a right to be, and he is unlawfully assailed, he may stand and defend himself; and cases sometimes arise in which he has the right, when unlawfully assailed, to advance and defend himself until he finds himself out of danger.'"

In *Voight v. State* (1908) 53 Tex. Crim. Rep. 268, 109 S. W. 205, it appeared that an altercation was begun by the person killed with a brother of the defendant, and when the defendant rode up to the scene, he was ordered to alight from the horse he was riding, by the victim, who approached him with one hand behind his back, saying he was going to settle their difficulty then and there. Thereupon the defendant fired the shot which resulted in the death of the assailant. The court said: "This shows the deceased the aggressor. There was nothing left for the appellant and his brother to do, either or both, under the circumstances, except to meet the trouble forced upon them, or ride away, or retreat. This they did not have to do under our law. It is not necessary for a party upon whom a difficulty is sought to be forced, that he run away or retreat. While it might be a better policy, yet the law is not so written. If retreat is applicable under such circumstances, it must be by the party who brings or seeks to bring on the difficulty or provoke it; and, while insulting lan-

guage usually is not considered a provocation, yet that, taken in connection with other circumstances attending the case, may put the aggressive party in such an attitude of producing the occasion and bringing about the difficulty which terminates fatally. At least, he sets in motion the matters that bring on the difficulty, and is to that extent in the wrong, and, if the law of retreat is applicable at this point, it must be to the man who originates the trouble, and not to the party who is defending against it. Under the common law a party must retreat to the wall before killing his adversary or defending himself; but such is not the law of this state. With us, the party in the wrong must do the retreating. Our law is more favorable to the man who is in the right, and places a less burden upon him, in homicide cases, than upon the man who is in the wrong and produces the occasion."

In sustaining a conviction of manslaughter in *Renn v. State* (1912) 64 Tex. Crim. Rep. 639, 143 S. W. 167, the court approved of the following charge given by the trial judge: "One who is unlawfully attacked is not bound to retreat, in order to avoid the necessity of killing his assailant, but has the right to stand his ground, and even to advance on his adversary, and continue to act in self-defense until the danger or apparent danger is past, and to repel the unlawful attack of his assailant with whatever force may reasonably appear to him at the time to be necessary; but when it appears to defendant that such danger, or apparent danger, if any, ceases, then such right ceases."

In a case wherein it appeared that the accused shot his assailant as the latter was rushing toward him with a knife in his hand, threatening to kill him, it was held that it was error for the court to fail to charge that a person unlawfully attacked was not bound to retreat in order to avoid the necessity of killing his assailant. *Nalley v. State* (1891) 30 Tex. App. 456, 17 S. W. 1084.

So, in *Ball v. State* (1890) 29 Tex. App. 107, 14 S. W. 1012, it appeared

that the person killed had made previous threats against the accused, and on meeting him on the street threatened him, and, rushing at him, grabbed him by the throat and threw his right hand in his hip pocket as though to draw a weapon, when the accused shot him. It was held that, in an instruction on the law of self-defense, the jury should have been charged that the accused was not bound to retreat in order to avoid the necessity of killing his assailant.

It was said in *Kirk v. Territory* (1900) 10 Okla. 46, 60 Pac. 797, that where the victim of the homicide sought out the prisoner with a deadly weapon for the purpose of taking his life, or where the prisoner was attacked in a place where he had a right to be, if he did not provoke the assault, or bring on the difficulty, he was not bound to retreat, but could stand his ground, and, if necessary, take the life of his adversary in order to save himself from great bodily harm.

So, the fact that a person expects to be attacked does not deprive him of the right to go to a place where he has a right to go; and going to such place does not deprive him of the right of self-defense, where he is attacked and compelled, in self-defense, to kill his assailant. *People v. Gonzales* (1887) 71 Cal. 569, 12 Pac. 783.

A fortiori, in these jurisdictions, there is no duty to retreat where the assault is felonious and produces imminent danger of death or great bodily harm. *People v. Batchelder* (1864) 27 Cal. 70, 85 Am. Dec. 231; *People v. Ye Park* (1882) 62 Cal. 204; *People v. Hecker* (1895) 109 Cal. 451, 30 L.R.A. 403, 42 Pac. 307; *People v. Cyty* (1909) 11 Cal. App. 702, 106 Pac. 257; *Page v. Smith* (1894) 141 Ind. 236, 40 N. E. 745; *State v. Partlow* (1886) 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14; *Baltrip v. State* (1891) 30 Tex. App. 545, 17 S. W. 1106; *State v. Phillips* (1910) 59 Wash. 252, 109 Pac. 1047; *State v. Meyer* (1917) 96 Wash. 257, 164 Pac. 926. See also *Colondro v. State* (1919) 188 Ind. 533, 125 N. E. 27.

In *People v. Batchelder* (Cal.) *supra*, it appeared that several persons, while attempting to land on an island

which was a part of the public domain, were resisted by those on shore, with the result that one of the party shot and killed one of those on shore. It was held that, if the defendant and his party were attacked by those on shore with deadly weapons and murderous intent, so that their lives were placed in danger, they were not bound to retreat, but could stand their ground and, if need be, kill their assailants.

So, in *State v. Meyer* (1917) 96 Wash. 257, 164 Pac. 926, it appeared that the father of the victim was making a felonious assault on the defendant's housekeeper, when the defendant made an effort to protect her by shooting the assailant in the legs. At that time the son rushed toward the defendant with a pistol in his hand, threatening to take his life, when the defendant shot and killed him. The court said: "If Edward Kramer, Sr., was making a felonious assault on Lillian Abbott, and the defendant was acting in her defense, the deceased did not have the right to advance upon him with a pistol pointed at him. But the defendant had the right, under those conditions to act in his own defense, and in doing so he was not required to retreat, but had the right to stand his ground and repel force with force, even to the taking of life, if, in the light of the attending circumstances, this was apparently necessary to save his own life, or to protect himself from great bodily harm at the hands of the deceased."

Likewise, in a case wherein it appeared that the defendant and his victim had each made threats against the life of the other, and some time thereafter, when they met in a public highway, each grabbed for his gun and shot almost simultaneously, it was held that the duty to retreat before taking life in self-defense had no application, as neither had time to retreat. *State v. Phillips* (1910) 59 Wash. 252, 109 Pac. 1047.

Where one who is assaulted has reasonable grounds to believe that another is about to commit a felony or great bodily injury on him, and that the danger is imminent, he may act on

his fears, and, if necessary, slay his assailant; and where the attack is sudden and imminent he need not retreat, but may be justified in slaying the aggressor, though it afterwards appears that he could have more easily gained his safety by retreating. *People v. Cyty* (1909) 11 Cal. App. 702, 160 Pac. 257. See to the same effect *People v. Hecker* (1895) 109 Cal. 451, 30 L.R.A. 403, 42 Pac. 307; *People v. Ye Park* (1882) 62 Cal. 204.

So, in *People v. Maughs* (1906) 149 Cal. 253, 86 Pac. 187, wherein it appeared that the defendant shot and

killed his adversary in self-defense, at a time when he was attacked by the person killed who had a knife in his hand and threatened to cut his throat, it was held that it was reversible error to instruct the jury that one who is attacked should employ all reasonable means within his power, consistent with his safety, to avoid the necessity for the killing before he is justified in killing a human being in self-defense, as the defendant was entitled to a correct instruction as to his right to stand his ground against such an attack.

L. W. B.

ARTHUR B. LACOUR et al., Liquidators, Appts.,

v.

NATIONAL SURETY COMPANY OF NEW YORK.

Louisiana Supreme Court — May 31, 1920.

(147 La. 586, 85 So. 600.)

Notary public — Liability of surety for embezzlement.

1. The surety on the bond of a notary public is liable for his embezzlement of funds placed in his hands to loan on mortgage, where he forges and duly attests securities which he returns to the lender as evidencing the loan.

[See note on this question beginning on page 1302.]

— regular employment of — effect.

2. The regular employment of a notary public by a building and loan association to attest the securities taken for its loan does not deprive him of his official character, or make him its personal employee, so as to relieve

the surety on his bond as notary from liability for his acts.

Limitation of actions — one-year statute — action on bond.

3. An action on the bond of a notary public to recover funds embezzled by him is not within the one-year Statute of Limitations.

(Monroe, Ch. J., dissents.)

APPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Orleans (Théard, J.) dismissing a suit brought to hold defendant liable as surety on the bond of a notary public. *Judgment annulled and case remanded.*

The facts are stated in the opinion of the court.

Messrs. U. Marinoni, Jr., and F. Rivers Richardson for appellants.

Messrs. Grant & Grant, for appellee:

The defendant surety is in no wise liable for any misappropriation of funds intrusted to Flynn for disbursement to borrowers.

Monroe v. Brocard, 20 La. Ann.

78; Lescouzeve v. Ducatel, 18 La. Ann. 470; Schmitt v. Drouet, 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 So. 396; Nolan v. Labatut, 117 La. 431, 41 So. 718.

The prescription of one year avails the surety for all offenses and quasi offenses committed by the notary.

Taylor v. Graham, 15 La. Ann. 418; Caillouet v. Franklin, 32 La. Ann. 220.

O'Niell, J., delivered the opinion of the court:

Plaintiffs, liquidators of the Prudential Savings & Homestead Society, appeal from a judgment dismissing their suit for \$10,000 indemnity on a bond of a notary public on which the defendant company was surety. The suit was dismissed on an exception of no cause of action; the defendant's contention being that the losses alleged to have been sustained by the homestead society, if such losses were incurred, did not result from any official misconduct of the notary public, but resulted from acts of forgery and embezzlement on his part.

The allegations of the petition, so far as they are pertinent to the question whether plaintiffs have alleged a cause of action, are as follows, viz.:

(2) On the 1st day of April, 1909, the said National Surety Company of New York, then as now doing business in this state under the laws thereof in reference to surety companies made and provided, became the surety for pay of one Thomas D. Flynn, then a notary public of this city, in which bond the said surety company bound itself in solido with the said Thomas D. Flynn to the extent of \$10,000 that the said Thomas D. Flynn should faithfully and impartially perform and discharge all the duties incumbent upon him as a notary public of the parish of Orleans, and in accordance with the laws of the state of Louisiana, which provide that such bond shall secure all persons who may employ such notary public in his said profession, all as will more fully and at large appear by reference to a duly certified copy of the said notarial bond of the said Thomas D. Flynn, signed as surety by the National Surety Company of New York, hereto annexed and made part hereof and marked exhibit A.

"(3) That the said Prudential

Savings & Homestead Society, of which the petitioners are the liquidators (and which society was formerly called the Commonwealth Building & Loan Association, its name having been so changed by amendment to its charter passed before W. Morgan Gurley, notary public, on October 31, 1913, duly recorded in M. O. B. 1119, folio 214), regularly employed the said Thomas D. Flynn as its notary public, he being regularly elected as such, and in his said capacity was authorized and empowered to pass all acts in which the said society should make loans to its stockholders upon the security of the property tendered it by them to secure loans made them, and as such notary public it was his duty to receive the checks for the funds intended to be loaned such borrowers, and to disburse the funds when the loans should be completed, and to turn over to the said society the mortgage notes securing the said loans when completed.

"(4) Petitioner shows that the said Thomas D. Flynn was unfaithful to this trust as such notary public, and became a defaulter, and absconded from this city during the month of March, 1912, and he is at present out of the state of Louisiana and his whereabouts are unknown to petitioners.

"(5) Petitioners show that, while acting as notary public for the said Prudential Savings & Homestead Society, then called the Commonwealth Building & Loan Association, the said Flynn delivered over to the said society, in his capacity as notary public, the following described notes, purporting to be genuine vendor's lien and privilege mortgage notes, viz.: [Here follow a list and description of five promissory notes, each purporting to be secured by mortgage and vendor's lien, and each paraphed by Flynn, as notary public, to identify it with an act of sale supposed to have been passed by him; the total amount of the promissory notes being \$15,700. Then follows a description of two checks, aggre-

gating in amount \$5,400, alleged to have been collected by Flynn on forged indorsements of the name of the payee. The promissory notes and checks are said to be annexed to the petition and made part thereof.]

"(6) Petitioners further show that the transactions mentioned in article 5 are only some of the transactions in which the said Flynn, acting in said capacity of notary public, victimized the said society by reason of his fraudulent acts as notary public, and they reserve the right, should it be held that the said surety on his notarial bond is not liable for any of the losses hereinabove detailed, to supply other losses than those so named.

"(7) Petitioners further show that all of the said notes detailed in article 5 were either forged, or, if not forged, no acts of sale and mortgage whatever were passed and recorded, as certified by the said Flynn to have been so passed, and with which acts said notes purported to be identified, under the official paraph of the said Flynn, as notary public, and because of the said notes not being genuine notes, or because no acts of sale and mortgage whatever having been passed to secure the said notes, the said society wholly lost the amounts hereinabove set forth; it in each instance having parted with the full face value of said note by payment of its funds therefore.

"(8) Petitioners further show that the said Thomas D. Flynn deceived the said society by informing it that the proposed borrowers had signed the said notes representing their respective loans, and that all proper signatures had been obtained to the several acts of transfer and resale, and the said society, not being aware of any of the fraudulent acts of the said Flynn, and in the usual and customary mode of handling said homestead transactions, relying entirely upon his integrity as a notary public, backed by his official bond, accepted the said notes, under his official paraph, in settlement of the purported loans made

said parties, the checks for which loans had been previously turned over to the said Flynn for disbursement in accordance with the custom of passing such homestead acts in this city, all of said checks, however, being made payable to the said respective borrowers."

The two checks, amounting to \$5,400, on which plaintiffs allege that the homestead society lost that amount, by Flynn's forging the indorsement, cashing the checks, and embezzling the proceeds, may be disregarded, because the suit is for only \$10,000, on a bond for that sum, and the mortgage notes, on which plaintiffs allege that the homestead society was defrauded by the notary's false and fraudulent paraphs, amount to more than the sum sued for.

For the purpose of this decision, of course, the allegations of fact made in the petition must be accepted as true. We will therefore refer to the facts stated in the petition as if they had been proven.

The only question to be decided is whether the contract by which Flynn defrauded the homestead society was in his official capacity as notary public, or merely in his individual capacity, in which any other individual might have committed the same frauds. The argument on behalf of the surety company is that the checks on which Flynn forged indorsements, the proceeds of which he embezzled, were received by him as the agent of the homestead society, not as notary public, but as an individual employee of the society. Hence it is argued that, when the homestead society trusted Flynn with the checks, which were made payable to the prospective borrowers from the society, the latter assumed the risk that Flynn might forge indorsements on the checks and cash them and embezzle the proceeds, without resorting to any deceit or malpractice in his official capacity as notary public. The argument, stated briefly, is that the surety company is released from liability for the official

malpractice of the notary public, because the homestead society had voluntarily placed itself in such position, with respect to the notary public, that the latter might have defrauded the society without resorting to any official malpractice. The fallacy of the argument lies in the presumption that the notary public would have defrauded the homestead society if he had not been invested with the official capacity to cover up the fraud by using false certificates on promissory notes supposed to be secured by mortgage. In short, the flaw in the argument lies in the presumption that notaries public are not to be trusted as individuals; that one who trusts a notary public as an individual does so at his risk; and that money intrusted to a notary public in his individual capacity is presumed to be gone beyond recovery, from the moment when the notary public received it as an individual or personal agent. On the contrary, money intrusted to a notary public, whether in cash or in the form of a bank check or other negotiable instrument, to be paid out by the notary in his official capacity and upon his performance of an official act as notary public, remains the property of the person who deposited it with the notary public, and the deposit so made is presumed to be safe. If the depositor be afterwards defrauded of his money by official malpractice of the

Notary public—
liability of
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embezzlement.

notary public, as by
issuing to the de-
positor a false no-
tarial act, it cannot

be said that the depositor's loss occurred as soon as he made the deposit, or before the notary committed the fraudulent official act.

The fact that the notary public in this case was regularly employed as

—regular
employment
of—effect.

notary public by
the homestead soci-
ety did not deprive

him of his official character as notary for the homestead society, or make him merely an individual or personal employee of the society. To hold otherwise would release the

surety on a notary's bonds in almost all cases, because the victims of dishonest notaries public are generally persons who have employed a notary public to perform some official act. Under § 2503 of the Revised Statutes, the bond required of a notary public was "conditioned for the faithful performance of all duties required by law toward all persons who may employ him in his profession of notary." The law, as amended by Act No. 42 of 1890, p. 34, by Act No. 138 of 1896, p. 217, and by Act No. 187 of 1902, p. 367, now makes the bond of a notary public for the parish of Orleans "conditioned as the law directs, for the faithful performance and discharge of his duties as a notary public." Prior to these amendments, there was a doubt as to whether the obligation of a notary's bond should not be confined to those by whom a notary was employed as such. See *Nolan v. Labatut*, 117 La. 444, 41 So. 713. But there has never been any doubt that the obligation of the surety on a notary's bond extended to all persons who might employ the notary public officially.

The exact question presented in this appeal has been decided by this court in at least three cases contrary to the contention of the surety company.

In the case of *Rochereau v. Jones*, 29 La. Ann. 82, it was said: "The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged. And anyone injured by his act has a right of action on the bond against his sureties."

In the case cited the notary public, William McC. Jones, in his individual capacity, sold to the plaintiffs two promissory notes which he, the notary, had forged, and which bore his official paraph, indicating that they were secured by an act of mortgage passed before him. The suit was to recover from the sureties the loss which plaintiffs had sustained by buying the forged and worthless

notes. One of the defenses urged by the sureties was that the plaintiffs had bought the notes from Jones personally and in his individual capacity, and had not employed Jones to perform any official act as notary public. The court answered the argument by referring to Act March 12, 1857, No. 109, declaring the condition of a notary's bond to be "that he shall faithfully perform his duties in that capacity." As to whether the fraud practised by the notary was committed personally or in his official capacity the court said:

"In matters of sales on terms, when notes are furnished by the vendor, what is the duty imposed on the notary? He shall attest each of the notes by putting his name on them, mentioning the date of the act from which the mortgage and privilege are derived, under the penalty of damages. R. C. C. 3384. That attestation, the notary's name, his signature, those distinct and deceitful badges of simulated authenticity, are on the face of the discounted notes. The forgery is not that of an individual, but of the notary; his signature on those notes disguised and concealed the criminal fabrication, justified the conviction of their reality, left no room for suspicion and doubt, and was, as to the form and legal existence of those instruments, the principal, nay the only, cause which induced an acceptance of their transfer. Was not that forgery a violation of his official duty? If not, what would amount to or constitute such a violation?

"Had he not attached his signature to the attestation and his official capacity to his signature, however guilty he would have been, his sureties on his bond would not have been responsible. Had he discounted or sold notes forged by another notary, or by anyone else but himself, he alone would have been liable. But can his sureties be released when the evidence establishes beyond contradiction that it was as a notary he forged the notes, as a notary that he forged the signature of the parties

to the act, and that it was his signature as a notary that gave to those notes that form, that character, without which they could not have been converted into money? The attorneys representing appellants rely on decisions of this court reported in the Sixth and Sixteenth Annuals. Those decisions we adhere to. If interested parties deposit funds with a notary and he fails to account for those funds, his sureties are not liable; and why? Because, as his office is not one of deposit, he was trusted and received the deposit, not as an officer, but as an individual."

The decision in *Rochereau v. Jones*, supra, was cited with approval in the case of *Teutonia Nat. Bank v. Wagner*, 33 La. Ann. 737, in support of the doctrine there announced, which is very appropriate to the case before us, viz.: "The sureties of an officer are liable not only for the acts done by him by virtue of his office, but also for those done under color or by means of the office which he holds."

In the case of *Stork v. American Surety Co.* 109 La. 713, 33 So. 742, Mrs. Stork, a widow, had paid three mortgage notes which had been issued by her husband, and delivered the notes to a notary public to be canceled. The notary issued a receipt for the notes, saying they were received for cancelation, and signing the receipt officially. The notes were paraphed for identification with an act of mortgage that had been passed before another notary public. The notary who received the notes for cancelation did not have them canceled, but sold them to a third party, Spiro, and appropriated the proceeds to his own use. Thereafter Spiro instituted foreclosure proceedings, and the property was seized and sold to satisfy the judgment obtained by him. Plaintiff thereupon brought suit against the surety company on the bond of the notary public who had embezzled her mortgage notes. The surety company urged defenses similar to those urged in the case before us.

This court, by a unanimous opinion and decree, rejected the defenses, saying, with regard to the notary:

"Defendant's principal on the bond was called upon as notary public by plaintiff to perform the duty of canceling the bond. He received her notes and bound himself as notary to see to their cancelation in the office of the recorder of mortgages.

"This would not bind the security on the bond, if, as contended by defendant, the duty was not one of those which a notary could be called upon to perform. . . .

"As a notary in the case at hand, he held evidence of payment of the mortgage. As a notary, he had it in his power to require cancelation. Having failed to discharge the duties he had assumed in that capacity, the condition of his bond was broken. Had he issued a certificate of payment with the note attached, or had he presented the note in person, as he should have done, the mortgage could, and doubtless would, have been canceled by the recorder of mortgages.

"The fact that the notary accepted the notes handed to him to have the mortgage canceled without the authentic deed, but assumed to perform the duty without it—a duty which he could perform with the notes in hand—cannot be construed, in our view, as a cause sufficient to release the security from all liability. . . . This plaintiff may have had too much confidence in this notary, but it does not appear that she was specially negligent. . . .

"Here the unfaithful agent took plaintiff's money, and the absconding notary her notes,—one and the same person. The money taken by him as agent is not claimed, for the very good reason that it was not and could not have been received by the notary as a notary, but by the agent."

It appears from the record in the case last cited that the plaintiff had, besides trusting the notary public with mortgage notes to be canceled, deposited money with him to be in-

vested in mortgage notes. As to the money deposited with the notary for investment by him, the court said that the surety on his bond was not answerable for his having embezzled the funds; but, as to the notes intrusted with the notary for cancelation, the ruling was that he received the notes in his official capacity, and that his surety was answerable for his failure to have them canceled by the recorder of mortgages.

In the case of *Harz v. Gowland*, 126 La. 674, 52 So. 986, the plaintiff had bought from the notary public, Gowland, who acted in his individual and personal capacity, ten promissory notes which had been forged by Gowland, the notary, and had been paraphed by him as if to identify them with an act of sale and mortgage and vendor's lien. No such act of sale or mortgage had been passed. Suit was brought against the notary and his surety in solido for the loss which the plaintiff sustained by the notary's fraudulent dealings. It was held, in a unanimous opinion and decree, that the surety was liable. The court said:

"The question arises whether his surety is liable on its bond. We are of opinion that it is. He, the notary, was acting in his official capacity, and in that capacity called upon the plaintiff and informed him, substantially, of the notes and of their validity, stated where the property mortgaged was situated.

"As relates to the *paraph ne varietur*, there was nothing done or said to place the investor upon inquiry. The *paraph* is the official signature, and evidence of the reality and genuineness of the note on which it is written."

The court then cited with approval *Nolan v. Labatut*, 117 La. 431, 41 So. 713. And, citing and quoting from the *Rochereau Case*, 29 La. Ann. 82, the court said: "It must be borne in mind that in this decision the question rested on the fact that the *paraph* was a deception and a fraud, because the notary knew

that the purported identification was not an identification because of the fraud. The same in substance is the case before us for decision."

The defendant's counsel cite and rely upon the decision in *Lescouzeve v. Ducatel*, 18 La. Ann. 470; *Monrose v. Brocard*, 20 La. Ann. 78; *Schmitt v. Drouet*, 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 So. 396, and *Nolan v. Labatut*, supra.

The doctrine of the case of *Lescouzeve v. Ducatel* must be considered as having been overruled in *Stork v. American Surety Co.*, because the two cases are identically alike. In *Lescouzeve v. Ducatel* the ruling was that the law had not made it the official duty of a notary public to receive money to have a mortgage canceled, and that therefore the surety on the notary's bond was not liable for his neglect or failure to have a mortgage canceled, for the cancelation of which he had received the amount of the mortgage debt from the mortgagor, with instructions to cancel the mortgage.

The case of *Monrose v. Brocard* and the case of *Schmitt v. Drouet* were referred to in the opinion rendered in *Stork v. American Surety Co.* supra, and were declared to be not in conflict with the doctrine there announced. If they were in conflict with the latter decision, therefore, they must be considered as having been thereby overruled.

The decision in *Nolan v. Labatut*, on rehearing, supra, was by a divided court. Two members of the bench as then constituted dissented. The opinion of the majority was that the surety was not liable for the notary's acts of fraud in issuing notes forged by him and paraphed by him as if identifying them with acts of mortgage, because the notes were received by the plaintiff in discharge, or in partial discharge, of the notary's indebtedness as agent, for money which he had previously collected for plaintiff's account. The surety was held liable, however, by unanimous opinion and decree, for a loss of \$600 which plaintiff had sustained by purchasing for

cash from the notary a note for that sum which the notary had forged and falsely paraphed.

In the opinion in *Nolan v. Labatut* the court cited and distinguished from the case then in hand the decision in *Stork v. American Surety Co.* supra, and said that the difference between the two cases was in the facts, and not in the court's views upon the questions of law. The doctrine of the case of *Stork v. American Surety Co.*, therefore, was not overruled. Not being required here to either affirm or disavow all that was said in *Nolan v. Labatut*, it is sufficient to say that the facts in the case before us are more nearly like the facts in *Stork v. American Surety Co.* than like the facts in *Nolan v. Labatut*; for in the case before us the checks which the notary forged and cashed, and embezzled the proceeds of, were not deposited with him to be invested by him as the agent of the plaintiff.

It is argued by counsel for the surety company that the homestead society could not have been defrauded or deceived by the notary public, Flynn, in the manner alleged in the petition, because, in making loans, the homestead society invariably took title from the borrower and immediately resold the property to him. The argument, in other words, is that any officer of the homestead society who received from the notary public promissory notes which the latter pretended were secured by mortgage and vendor's lien must have known whether the acts of sale had really been passed. We are not so sure that the notary public could not have practised a deception or fraud, as well by pretending to have passed an act of sale and resale, as by pretending to have passed an act of mortgage. The argument of the surety company's attorney in that respect is one which may be pertinent when the case shall have been tried upon its merits; but the argument is not applicable to the exception of no cause of action.

Defendant's counsel also filed in

the district court pleas of prescription of one year and of three years, and, from the fact that the judge's decree was "that said exceptions be maintained," the inference is that the pleas of prescription, as well as the exception of no cause of action, were maintained.

We see no merit whatever in the plea of prescription of three years, which applies to an open account; and counsel for the surety company do not insist upon the plea. As to the prescription of one year, it is sufficient to say that this court has at least four times decided that the plea does not apply to a case like this.

In *Brigham v. Bussey*, 26 La. Ann. 676, it was held that an action against the recorder of mortgages and the surety on his bond for damages resulting from his failure of official duty was an action *ex contractu*, not subject to the prescription of one year. The same ruling was made in *Fox v. Thibault*, 33 La. Ann. 32. In *Weintz v. Kramer*, 44 La. Ann. 35, 10 So. 416, it was said:

"The prescription of one year is not applicable to an action brought upon the bond of a notary public for failure to perform the duties incumbent on him."

Limitation of actions—*one-year statute—action on bond.*

The two decisions last cited were quoted with approval in *Gordon v. Stanley*, 108 La. 187, 32 So. 531.

Our conclusion is that the pleas of prescription should have been overruled.

The judgment appealed from is annulled, the exception of no cause of action and the pleas of prescription of one year and of three years are overruled, and it is ordered that the case be remanded to the Civil District Court for further proceedings not inconsistent with the foregoing opinion. The defendant, appellee, is to pay the costs of this appeal. All other costs are to depend upon the final judgment.

Monroe, Ch. J., dissents.

Petition for rehearing denied June 30, 1920.

ANNOTATION.

Liability of notary public or his bond.

- I. In general, 1302.
- II. Wilful misconduct:
 - a. In general, 1303.
 - b. Certifying acknowledgment known to be fraudulent, 1304.
- III. False certificate of acknowledgment, 1306.
- V. Effect of contributory negligence, 1309.

I. In general.

The question under annotation presupposes that the notary has been guilty of misconduct, and the annotation deals merely with the liability, upon that assumption, of the notary himself or the sureties on his bond. It is of course necessary in dealing with that subject to show the nature of the misconduct upon which the liability is predicated, e. g., whether it was failure to pay over money, or a false or fraudulent certificate of acknowledgment,—but the present an-

notation is not concerned with the rules governing the duty of the notary or with the particular facts or circumstances which disclose a breach of duty on his part, it being assumed, as already stated, that the notary had been guilty of misconduct, official or unofficial.

One of the questions thus excluded from the present annotation is dealt with in the annotation on proof of identity, upon which officer certifying to an acknowledgment is justified in acting, in 10 A.L.R. 871.

The liability of the surety of a notary for the latter's act depends upon whether the act complained of was in the line of his duty as notary, or, at least, was done under color of his office; and the apparent conflict in the decisions is, in general, traceable to differences in the powers and duties

of the notary in different jurisdictions. Thus in Louisiana the powers of a notary are more extensive than in most, if not all, other jurisdictions, and so the bond would in that jurisdiction be liable for acts of the notary which in other jurisdictions would be out of the line of the principal's duties or functions as notary, and so not within the scope of the bond.

II. *Willful misconduct.*

a. In general.

Sureties of a notary will be liable for any loss to the one liable on paid notes received for cancelation, where the notary, instead of having them canceled, sells the notes and appropriates the proceeds. *Stork v. American Surety Co.* (1903) 109 La. 713, 33 So. 742. The wrong of the notary for which the plaintiff seeks to hold security bound was, the court said, unquestionably a wrong committed in discharge of the duties of his office, since the notary fixed his official signature to the receipt and undertook to obtain the cancelation with which a notary may, we think, be intrusted.

Although the act of a notary public having the jurisdiction of justice of peace, in demanding and collecting a sum of money from a garnishee before judgment rendered condemning the indebtedness in the hands of the garnishee to the payment of the demand under which it was attached, was not an official duty, and so, in the absence of statute, the notary's failure to pay over the money would impose no liability on his sureties, yet the sureties are liable under a statute which provides that the official bond of officers is made "obligatory on the principal and sureties thereon . . . for the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of, those duties imposed, by law." *Mason v. Crabtree* (1882) 71 Ala. 479. The court said: "A justice of the peace or notary public, having the jurisdiction of a justice, is a bonded officer,

and as such has authority to collect money on claims placed in his hands for collection. . . . Under the averments of the complaint, if the notary had rendered judgment against the railroad company, condemning its indebtedness to the payment of a judgment against Mason, he would have had authority to receive the money and to give the railroad company a lawful discharge therefrom. He pretended he had rendered such judgment, and thereby pretended he had authority to receive the money. This, if true, was a wrongful act, committed under color of his office, and rendered him and his sureties liable for the restitution of the money."

On the other hand, where a notary does a thing which the law does not authorize him to do, although he does so *eo nomine* in his capacity of a notary public, the surety is not responsible. *Schmitt v. Drouet* (1890) 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 So. 896. And so the sureties of a notary are not liable for a notary's attestation that a prolongation of debts has been allowed by an act before him, when in fact no such act had been made, there being no law authorizing a notary, or making it a duty incumbent upon him, to write officially on any note, or alter any certificate, that a prolongation of payment of a debt had been allowed by an act before him. The court stated that it may be that, had the plaintiff employed the notary to draw up the acts of prolongation and had them signed by the proper parties, and had he prepared them, forging the signatures of the appearers thereto, thereby lulling the creditors into security and preventing them from taking steps to enforce recovery in some way, the surety might be in danger; but the reason would have been that the notary employed to draw up the act had failed to perform a duty incumbent upon him, and required of him by his employer, and had prevented the creditor from having recourse to law to secure his rights; but this is not the case presented, which is simply one in which a surety is sought to be held because his principal, the notary, has done.

acts which the law did not authorize or compel him to perform, and which were therefore not incumbent upon him.

Again, in the early Louisiana case of *Lescouzeve v. Ducatel* (1866) 18 La. Ann. 470, an action against a notary and his sureties for the recovery of money deposited with the notary, and not delivered by him, it was held that there could be no recovery against the sureties, as the law had not made it an official duty of a notary to receive money. And in *Monrose v. Brocard* (1868) 20 La. Ann. 78, where the facts were analogous to those in the *Ducatel Case*, the sureties were relieved for the same reason.

It will be observed that the reported case (*LACOUR v. NATIONAL SURETY Co. ante*, 1295) states that *Lescouzeve v. Ducatel* (La.) *supra*, was overruled by *Stork v. American Surety Co.* (1903) 109 La. 713, 33 So. 742, and that *Monrose v. Brocard and Schmitt v. Druet* (La.) *supra*, were referred to in the opinion in the *Stork Case* as not in conflict with the doctrines there announced; and the court in the *LACOUR CASE* adds that if they were in conflict with the *Stork Case* they must be considered as having been thereby overruled.

In *Nolan v. Labatut* (1906) 117 La. 431, 41 So. 713, which is sufficiently set forth and distinguished in the reported case (*LACOUR v. NATIONAL SURETY Co. ante*, 1295) it was held that sureties of a notary cannot be held liable for the wrongful diversion of funds received by the notary for investment. The court distinguished *Stork v. American Surety Co.* (La.) *supra*, stating that in the *Stork Case* there was a diversion of mortgage notes received for cancellation, and that it was within the official duties of a notary to receive mortgage notes for cancellation, while it was no part of the official duty of a notary to receive money for investment.

Upon the ground that sureties are never held beyond the strict terms of their agreement, it was held in *Norton v. Title Guaranty & S. Co.* (1917) 176 Cal. 212, 168 Pac. 16, that the bond of a notary public who does notarial

work for one, and in addition thereto acts as his agent and legal adviser, is collateral security for the notary's official conduct only, and not for his general course of action as agent and legal adviser.

So, too, in *Heidt v. Minor* (1891) 89 Cal. 115, 26 Pac. 627, where a notary public, who also acted as a real estate agent and broker, affixed a false certificate of acknowledgment of execution to a mortgage forged by himself, and received from the mortgagee, for delivery to the mortgagor, the sum of money purporting to be secured by such mortgage, which sum he appropriated to his own use, and absconded, the sureties on his official bond, conditioned that he should well and faithfully perform all the duties of his office as required by law, were held not liable for the money which he thus fraudulently obtained outside the line of his official duty, they being only liable for the loss sustained by the lender through the official misconduct of the notary in certifying falsely to the acknowledgment. The court stated that it is no part of the duty of a notary public to receive money from or for anybody; that, while it was misconduct, it was not official misconduct, fraudulently to obtain it, and it is only against his official misconduct that the sureties consented to indemnify persons injured thereby.

b. Certifying acknowledgment known to be fraudulent.

Sureties of a notary are liable to one damaged by the notary's certifying a fraudulent acknowledgment to a deed of trust forged by himself. *State ex rel. Matter v. Ogden* (1915) 187 Mo. App. 39, 172 S. W. 1172.

And so they are liable for damages caused by his attesting mortgage notes which he himself has forged. *Rochereau v. Jones* (1877) 29 La. Ann. 82.

And they are liable whether the false certificate is valid or invalid, if made in apparent conformity to legally constituted authority, but in excess or perversion thereof, and injury results therefrom, because in such a case the act is done by color of the

office. *State ex rel. Matter v. Ogden (Mo.) supra.*

So, too, a notary public who, in the absence of any pretended grantor, makes a false certificate of acknowledgment of a deed, the ostensible grantors in which are fictitious persons, is liable on his official bond to one injured thereby. *State v. Plass (1894) 58 Mo. App. 148.*

Where a notary public forged a note and mortgage, and falsely certified to an acknowledgment of the mortgage by the mortgagors named therein and claiming to be their agent, delivered the papers, and received the money loaned thereon, which was lost to the lender, the misconduct of the notary public, in his official capacity in making the false and fraudulent certificate, was the proximate cause of the mortgagee's loss, and the sureties on the notary's official bond, conditioned that he should duly and faithfully discharge the duties pertaining to his office, are liable for such loss. *People use of Doran v. Butler (1889) 74 Mich. 643, 42 N. W. 273.*

A notary is liable for knowingly certifying falsely to the acknowledgment of a forged instrument without the appearance before him of the party purporting to have signed it or anyone impersonating him. *Lesser v. Wunder (1879) 9 N. Y. Week. Dig. 56.*

And the surety upon the official bond of a notary public is liable to the person defrauded where the notary public forged the names of persons to mortgages, and then certified under the notarial seal that "the parties so signing," etc., were the identical persons whose names were attached to the instrument and who negotiated the mortgages. (*Com. use of Irwin v. Barrett (1879) 6 W. N. C. (Pa.) 385.*)

Also the sureties of a notary are liable to anyone injured by the notary's paraphing a forged note. *Nolan v. Labatut (1906) 117 La. 431, 41 So. 713; Harz v. Gowland (1910) 126 La. 674, 52 So. 986.*

But sureties of a notary are not liable for the misappropriation by a notary public who acted also as the agent for a money lender, of money placed

in his hands to loan, and who sent to the lender thereof notes and deeds of trust forged by him with names of fictitious persons and bearing his certificate of acknowledgment, as the damages which the lender sustained were not due to any official misconduct of the notary, but were the result of his own gross negligence and of the criminal conduct of his agent in his individual capacity. *State v. Boughton (1894) 58 Mo. App. 155.*

And where a notary acting also as a real estate agent sold real property for a client upon a contract, and thereafter, falsely representing that his client would discount the balance of the price for immediate payment, received such balance from the purchaser without authority, and subsequently delivered to him a deed forged by himself and bearing his notarial certificate of acknowledgment by the grantor, the grantee cannot recover against the surety on the official bond of the notary for the loss sustained, as neither the notary's certificate nor any official misconduct on his part was the proximate cause thereof. *People use of Young v. Nederlander (1913) 177 Mich. 434, 143 N. W. 753, Ann. Cas. 1915C, 1026.*

And in *Ware v. Brown (1869) 2 Bond, 267, Fed. Cas. No. 17,170*, in holding that the purchaser of a leasehold interest in land from one to whom it was conveyed by an instrument bearing a forged signature and a false certificate of acknowledgment has no right of action against the notary public who knowingly and corruptly made the false certificate, the court said: "If this action was prosecuted by . . . the person directly defrauded by the acts alleged against the defendant in his official character as a notary public, there would be no question that it would be sustained, and that he could recover to the extent of any loss or injury he may have suffered. But it is a very different question whether this plaintiff has a right of action. . . . There was no privity between the plaintiff and the parties implicated in the fraudulent acts alleged. He then had no interest in the property, and there could have

been no intention to defraud or injure him. . . . It was the obvious duty of the plaintiff to have inquired into the validity of [his vendor's] title, and I see no reason why the doctrine of caveat emptor does not apply."

III. *False certificate of acknowledgment.*

The scope of the present annotation excludes any consideration of the duty and care of the notary in respect to the taking and certifying of acknowledgments, and is concerned merely with his liability or that of his bond, assuming that he has been guilty of a breach of duty in that regard. The "proof of identity upon which an officer certifying an acknowledgment is justified in acting" is treated in the annotation in 10 A.L.R. 871.

"A notary who affixes his official signature and seal to a certificate of acknowledgment without examining it to ascertain whether the facts recited are true is guilty of negligence; and he is liable on his official bond for damages arising therefrom. . . . But a mere mistaken conclusion as to the identity of the grantor imposes no legal liability on the defendant officer. If, however, he takes the acknowledgment of one who is not personally known to him, relying simply on the introduction of a third person instead of exacting the oath of identification prescribed by the statute, he and his sureties may be held answerable if it turns out that the acknowledging party was an impostor." 1 R. C. L. p. 310.

The functions of a notary public are not to be lightly assumed. A certificate of acknowledgment is an act which must, in the nature of things, be relied on with confidence by men of business. Those buying or taking security by way of liens on real estate ought not to be required to look with suspicion on such a certificate, or compelled to take proof of its recital as to the notary's personal acquaintance with the acknowledger. *Figurs v. Fly* (1916) 187 Tenn. 358, 193 S. W. 117.

If the notary has no acquaintance with the person who appears as the affiant, it is his business, before certi-

fying officially to the identity of such person, to require such proof of his identity as would satisfy a reasonably careful and prudent man in the situation of the officer. Any less care than this would be in defect of a faithful performance of the duties of the office, and would subject the notary to liability on his bond for the resultant damages. *State ex rel. Gardner v. Webb* (1914) 177 Mo. App. 60, 164 S. W. 184.

A notary and his sureties are liable to a legatee for the loss of a legacy due to the annulment of a will because the notary who executed it failed to state that the attesting witnesses were residents of the parish where the same was executed. *Weintz v. Kramer* (1892) 44 La. Ann. 35, 10 So. 416. It was contended that the notary's liability was governed by the section of the Revised Statute which provides that the notary's bond shall be "conditioned for the faithful performance of all duties required by law toward all persons who may employ him in his profession as notary," and therefore, as plaintiff did not employ this notary, and the petition does not so allege, it sets forth no breach of the bond and no cause of action thereon. The court said that, with reference to notaries in the parish of New Orleans, at least the section of the Revised Statute governed which exacts a bond conditioned "for the faithful performance of his duties." The court added that if the contentions of defendant were well founded there would be no liability under the notary's bond for any fault or misconduct, however gross, in that most important of all notarial functions, the confection of testaments since no one could be injured by the nullity of the testament except the legatees, and as they are not the persons who employed the notary, they would have no recourse.

So, too, a notary's sureties are liable to a mortgagee or party injured for the consequent damages if the notary, in certifying to the acknowledgment of a mortgage, negligently omits to state either that the party acknowledging was known to him, or was

identified by the testimony of a witness examined for that purpose, in consequence of which the record of the mortgage was held not to impart notice to subsequent encumbrancers, and the debt was lost, where the official bond conditions that he shall "well and truly perform and discharge the duties of a notary public according to law," and by statute it is provided that each notary has power to take and certify the acknowledgment or proof of conveyances, and that "for any misconduct or neglect of duty in any of the cases in which any notary public, appointed under the authority of this state, is authorized to act," etc., "he shall be liable on his official bond to the parties injured thereby for all damages sustained." *Fogarty v. Finlay* (1858) 10 Cal. 239, 70 Am. Dec. 714.

But in *Henderson v. Smith* (1885) 26 W. Va. 829, 53 Am. Rep. 139, an action by one who had loaned money on a trust deed which was void by reason of the fatally defective certificate of acknowledgment, against the notary who made the certificate and negligently omitted essential words, the court said: "This defect is apparent upon the face of the certificate; and it might therefore be regarded, as insisted by the defendant in error, that the loss sustained by the plaintiff was not the direct result of the negligence of the defendant, but that the proximate cause of the loss was the negligence and want of care on the part of the plaintiff or his attorney in having the deed so defectively acknowledged placed upon the record, and paying or loaning the money upon it."

A notary and his sureties will be liable for the loss sustained by a false acknowledgment to a deed. *Kleinpeper v. Castro* (1909) 11 Cal. App. 83, 103 Pac. 1090; *Homan v. Wayer* (1908) 9 Cal. App. 123, 98 Pac. 80; *Joost v. Craig* (1901) 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840; *Bellport v. Harkins* (1919) 104 Kan. 543, 180 Pac. 220; *State use of Kleinsorge v. Meyer* (1876) 2 Mo. App. 413; *Harrington v. Vogle* (1919) 103 Neb. 677, 173 N. W. 699; *Peterson v. Mahon* (1914) 27 N. D. 92, 145 N. W. 596; *Figuers v. Fly*

(1916) 187 Tenn. 358, 193 S. W. 117; *Brittain v. Monsur* (1917) — Tex. Civ. App. —, 195 S. W. 911.

But a notary is not liable for certifying to the identity of a person though such person be not the person whom he is represented and believed to be, where he is identified by another person known to the notary, and whom he has no reason to suspect of wrongdoing. *Howcott v. Talen* (1913) 133 La. 845, 49 L.R.A. (N.S.) 45, 63 So. 376. The court stated that so long as he exercises the precautions of an ordinarily prudent business man in certifying to the identity of the persons who came before him, it may be doubted whether he has any other function to discharge.

And in *Brown v. Rieves* (1919) 42 Cal. App. 482, 184 Pac. 32, where one had forged both the signatures of the owners of property to a deed to himself under an assumed name and also the acknowledgment of the notary thereto, and thereafter, under such assumed name, deeded the property to another, acknowledging the signature before a notary, it was held that the notary and his sureties were not liable for the taking of the acknowledgment under an assumed name, since the party actually appeared before the notary, and was introduced to the notary under such assumed name by one with whom the notary had been acquainted for a long time. The court said that it conclusively appeared that the very individual who signed and acknowledged the deed, and who was referred to therein, regardless of the name under which he had transacted business with others, did actually appear before the notary, and, this being true, the notarial certificate of acknowledgment spoke the truth, and was not false. The court added that had the party come to the notary alone with the deed already signed, accompanied by no one whom the notary knew, and had asked him to acknowledge the same, another question would be before them. The court distinguished *Joost v. Craig* (1901) 131 Cal. 504, 82 Am. St. Rep. 374, 63 Pac. 840, as a case where the certificate was in fact false.

And in *Bellport v. Harkins* (1919) 104 Kan. 543, 180 Pac. 220, it was held that there will be no liability for an unintended falsity of a notarial certificate, if the notary has reasonable grounds for believing that the man who seeks his notarial services is the one whom he represents himself to be.

In Virginia the taking of an acknowledgment is considered a judicial act, and so a notary public is not liable for taking and certifying within his jurisdiction and in good faith a void acknowledgment to a deed. See *Snead v. Atkinson* (1917) 121 Va. 182, 92 S. E. 835.

A notary will be liable for any loss which is the result of his false certificate of acknowledgment to a mortgage. *Hatton v. Holmes* (1893) 97 Cal. 208, 31 Pac. 1131; *Wilson v. Gribben* (1911) 152 Iowa, 379, 132 N. W. 849; *Blaes v. Com.* (1906) 29 Ky. L. Rep. 908, 96 S. W. 802; *People ex rel. Curtiss v. Colby* (1878) 39 Mich. 456; *Barnard v. Schuler* (1907) 100 Minn. 289, 110 N. W. 966; *State ex rel. Heitkamp v. Ryland* (1901) 163 Mo. 280, 63 S. W. 819; *Kangley v. Rogers* (1915) 85 Wash. 250, 147 Pac. 898.

And although the certificate of acknowledgment to the mortgage was not made until after the assignment, the notary who subsequently made it, before the recording of the mortgage, is liable to the assignee for the falsity of the certificate, whereby the record was not sufficient notice to a subsequent purchaser, and the lien of the mortgage was lost. *Wilson v. Gribben* (1911) 152 Iowa, 379, 132 N. W. 849, *supra*. And it was further held in this case that the failure of the assignee of a mortgage to have the assignment to him duly recorded was not the cause of loss sustained by him by reason of the falsity of the certificate of acknowledgment to the mortgage, where the record of the mortgage was insufficient notice to a subsequent purchaser, and the lien on the mortgage was lost, and so did not bar his right of action against the notary and his sureties.

In *Scotten v. Fegan* (1883) 62 Iowa, 236, 17 N. W. 491, action against sureties for damages resulting from false certificate of acknowledgment to a

mortgage, it was held that demurrer to the complaint was properly sustained, since it was not alleged that the notary did knowingly misstate any material fact, the statute providing that "any officers who knowingly misstate a material fact in" a certificate of acknowledgment "shall be liable for all damages."

A notary and his bond are liable for any loss sustained as the result of a false certificate of acknowledgment to a deed of trust. *Anderson v. Aronsohn* (1919) 181 Cal. 294, 10 A.L.R. 866, 184 Pac. 12; *State ex rel. Covenant Mut. L. Ins. Co. v. Balmer* (1898) 77 Mo. App. 463; *State v. Grundon* (1901) 90 Mo. App. 266; *State ex rel. Savings Trust Co. v. Hallen* (1912) 165 Mo. App. 422, 146 S. W. 1171, later appeal in (1917) — Mo. App. —, 196 S. W. 1067; *State ex rel. Haitz v. American Surety Co.* (1920) 203 Mo. App. 71, 217 S. W. 317.

And a notary will be liable for damages resulting from false certificates of affidavits. *State ex rel. Gardner v. Webb* (1914) 177 Mo. App. 60, 164 S. W. 184.

In the following cases it was held that there was no liability on the part of the notary or his bond, as the false certificate was not the proximate cause of the loss. *American Surety Co. v. First Nat. Bank* (1919) 203 Ala. 179, 82 So. 429; *Smith v. Maginnis* (1905) 75 Ark. 472, 89 S. W. 91; *Coffin v. Bruton* (1906) 78 Ark. 162, 95 S. W. 462; *Riverside Portland Cement Co. v. Maryland Casualty Co.* (1920) — Cal. App. —, 189 Pac. 808; *Oakland Bank of Savings v. Murfey* (1886) 68 Cal. 455, 9 Pac. 843; *McAllister v. Clement* (1888) 75 Cal. 182, 16 Pac. 775; *Hatton v. Holmes* (1893) 97 Cal. 208, 31 Pac. 1131; *Mahoney v. Dixon* (1904) 31 Mont. 107, 77 Pac. 519; *Ellis v. Hale* (1920) 58 Mont. 181, 194 Pac. 155; *State Nat. Bank v. Mee* (1913) 39 Okla. 775, 136 Pac. 758.

In an action for damages against a notary public charged with negligently taking and certifying a false acknowledgment of a deed of trust executed by a forger and impostor, where the plaintiff had given evidence tending to prove that the real owner of

the land described, who is named in the instrument as the grantor, did not execute or acknowledge the deed, the burden of the evidence is on the defendant to prove that the person who appeared before him and acknowledged the instrument answered the description of the grantor named, as set forth in the deed. *State ex rel. Mackey v. Thompson* (1899) 81 Mo. App. 549.

And in *Clapp v. Miller* (1916) 56 Okla. 29, 156 Pac. 210, 11 N. C. C. A. 581, it was held that where the evidence shows that an acknowledgment was false the notary has the burden to show that he exercised that degree of care and diligence that the law requires of him.

But in *Com. v. Haines* (1881) 97 Pa. 228, 39 Am. Rep. 805, it was held that in an action to hold a notary public and his bondsman liable for making a false certificate, the plaintiff has the burden to prove a clear and intentional dereliction of duty. The basis of the decision in the Haines Case is that a notary public, in certifying to an acknowledgment or an affidavit, acts in a judicial capacity, and his liability is to be determined upon principles applicable to judicial officers.

In *Ehlers v. United States Fidelity & G. Co.* (1915) 87 Wash. 662, 152 Pac. 518, in affirming a judgment against a surety company which was surety on a notary's bond, it was held that it was a question for the jury as to whether a notary exercised reasonable care in taking the acknowledgment of an impostor who is merely introduced to him by a man who bears a good reputation in the community, in view of the statute requiring that a notary, in the taking of an acknowledgment, must know the identity of the person appearing before him as the party described in and who executes the instrument.

IV. Effect of contributory negligence.

One is not guilty of contributory negligence in relying on a notary's certificate as being true, and that the persons therein mentioned appeared before him, and acknowledged the in-

strument. *State ex rel. Matter v. Ogden* (1915) 187 Mo. App. 39, 172 S. W. 1172.

But where a notary public made a false certificate of acknowledgment to a mortgage signed by an impostor, but the mortgagee himself met the latter, and, in an action on the official bond of the notary, testifies in effect that he relied upon his own judgment in everything connected with the loan except the question as to title shown by the abstract, the court cannot properly direct a verdict for the plaintiff. *People use of Cook v. Cole* (1905) 139 Mich. 312, 102 N. W. 856.

So, too, a notary and his bondsmen are not liable for damages for alleged negligence in certifying the acknowledgment to a mortgage, although the person signing and acknowledging the mortgage was falsely impersonating the owner of the land mortgaged, where such person was introduced to the notary by the agent of the mortgagee, by the name contained in the mortgage as the name of the owner and the mortgagor of the land, and signed thereon by the person making the acknowledgment. *Overacre v. Blake* (1889) 82 Cal. 77, 22 Pac. 979. The court stated that the party executing the mortgage having been introduced to the notary by the plaintiff through her agent duly acting for her in that behalf, she being the party to whom the mortgage was being given, and most likely of all persons to know with whom she was dealing, and the notary then seeing the person so introduced execute the mortgage by signing it with the name so given him by the agent of plaintiff, and said agent witnessing the signature, it cannot lie in the mouth of the plaintiff to say that the notary was guilty of negligence in certifying that such person was known to him to be the person who executed the same. The court added that not only the doctrine of contributory negligence, but the doctrine of estoppel, also applied to close the mouth of plaintiff from asserting any claim against the sureties of the notary in such a case.

And it was held in *State v. Plass* (1894) 58 Mo. App. 148, where a no-

tary public had made a false certificate of acknowledgment of a deed in which the ostensible grantor was a fictitious person, and no one of the name stated had any interest in the property described, which the deed purported to convey, that the negligence of one parting with money on the faith of the deed, in failing to have the title examined, deprives him of the right to recover any substantial damages on the official bond of the notary, though the latter, for his failure to comply with the law in certifying to the acknowledgment in case he did not personally know the identity of the party making it before him, is liable on his bond for at least nominal damages, where it is provided by statute that a notary's bond may be sued upon by any person injured without limiting the right of action to one who has sustained pecuniary injury,—the notary by making the false certificate having violated an official obligation to the person relying thereon which was enjoined upon him by law, and having given such person a cause of action against him and his sureties, although no pecuniary damage can be shown to have resulted from his wrong. And to the same effect are *State ex rel. Scruggs v. Packard* (1918) 199 Mo. App. 53, 201 S. W. 953;

State ex rel. Dominick v. Farmer (1918) — Mo. App. —, 201 S. W. 955.

In *State ex rel. Scruggs v. Packard* (Mo.) *supra*, the court has distinguished *State ex rel. Heitkamp v. Ryland* (1901) 163 Mo. 280, 63 S. W. 819; *State v. Grundon* (1901) 90 Mo. App. 266; and *State ex rel. Covenant Mut. L. Ins. Co. v. Balmer* (1898) 77 Mo. App. 463, as cases where the property was in fact owned by the one whom the notary negligently and untruthfully certified had acknowledged the instrument, so that but for the untruthful certificate there would have been no loss, and therefore the notary's act undoubtedly was the proximate cause of the loss, and so the surety was held liable, while in the instant case the property was not in fact owned by the one falsely stated in the certificate to have acknowledged the instrument. And the court further distinguished *State ex rel. Savings Trust Co. v. Hallen* (1912) 165 Mo. App. 422, 146 S. W. 1171, later appeal in (1917) — Mo. App. —, 196 S. W. 1067, as a case where the wife who, through the notary's negligence, falsely appeared in the certificate to have acknowledged the deed, in fact owned the property, and it was conceded to be worth the amount of the recovery over and above the genuine encumbrance. J. H. B.

FERDINAND NEY, Plff. in Err.,

v.

JOSEPH H. HAUN.

Virginia Supreme Court of Appeals—November 17, 1921.

(— Va. —, 109 S. E. 438.)

Carrier — transfer man as common carrier — limited territory.

1. A transfer man licensed to do business in a particular city where he is a common carrier is not such carrier with respect to a load of goods which he specially contracts to transport between two other cities.

[See note on this question beginning on page 1316.]

— what constitutes common carrier.

2. To constitute one a common carrier in a particular instance the carriage must be over a route or within a territory over or within which there has been a general undertaking by the

person,—a holding of himself out as undertaking,—to carry goods for the public generally, as a business, over that route or within that territory.

[See 4 R. C. L. 546; 1 R. C. L. Supp. 1159, 1160.]

ERROR to the Circuit Court for Rockingham County (Haas, J.) to review a judgment in favor of defendant in an action brought to recover damages for injury to plaintiff's furniture while in defendant's possession for transportation. Affirmed.

Statement by Sims, J.:

This is an action of trespass on the case in assumpsit instituted by Ney, the plaintiff in error, as plaintiff in the court below against Haun, the defendant in error, as defendant in the court below, to recover alleged damages to a certain victrola and other articles of furniture which the defendant undertook for hire to carry for the plaintiff from the city of Harrisonburg, Virginia, to the city of Washington, District of Columbia, by means of an automobile truck, the furniture being badly broken to pieces en route by the overturning of the truck.

There was a trial by jury, and a verdict and judgment for the defendant.

The evidence is conflicting on the subject of whether the accident was caused by the negligence of the defendant, and there was testimony to the effect that the accident was not caused by any negligence of the defendant; so that upon that issue the verdict could not be disturbed by the court.

The plaintiff, however, contended before the trial court, and urges before us, that the defendant was a common carrier with respect to the undertaking of carriage in question, and was therefore liable as an insurer, under the doctrine, applicable at common law, fixing the liability of a common carrier in such case. And upon that subject the plaintiff asked the court to instruct the jury, as follows: "The court instructs the jury that, if they believe the said defendant, Haun, contracted with the said plaintiff, Ney, to transport his furniture from Harrisonburg, Virginia, to the city of Washington, and that the said property was injured or destroyed while in the possession of the said Haun, through no fault on the part of said Ney, then the jury must find for the plaintiff such damages as from

all the evidence in the case they may believe him entitled to."

The court refused to give such instruction. That action of the court is by the plaintiff assigned as error.

The evidence in the case bearing on the question of whether the defendant was a common carrier with respect to the undertaking of carriage involved is uncontroverted, and is as follows:

The defendant testified: "That he was a licensed transfer man under the laws of Virginia with his place of business at Bridgewater, Rockingham county; that he had no license to do business in the city of Harrisonburg; that on a former occasion he had hauled a load of potatoes to Washington for a brother of the plaintiff, and that was the only time he ever hauled to Washington until he took the plaintiff's furniture."

In regard to the undertaking of carriage involved in the instant case, the defendant testified: "That he was called (by the plaintiff by telephone) from Bridgewater to Harrisonburg for the purpose of contracting for the hauling of the load of furniture from Harrisonburg to the city of Washington, and that he (defendant) agreed to haul the same for the sum of \$45."

Mr. Charles A. Hammer, for plaintiff in error:

Defendant was a common carrier.

6 Am. & Eng. Enc. Law, 2d ed. pp. 251, 253; Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466; Heyman v. Stryker, 116 N. Y. Supp. 638; Merritt v. Old Colony & N. R. Co. 11 Allen, 80; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; Benson v. Oregon Short Line R. Co. 35 Utah, 241, 136 Am. St. Rep. 1052, 99 Pac. 1072, 19 Ann. Cas. 803; Caye v. Pool, 108 Ky. 124, 49 L.R.A. 251, 94 Am. St. Rep. 348, 55 S. W. 887; Johnson Exp. Co. v. Chicago, 136 Ill. App. 368; Hastings Exp. Co. v. Chicago, 135 Ill. App. 268;

Farley v. Lavary, 107 Ky. 523, 47 L.R.A. 383, 54 S. W. 840; Gates v. Bekins, 44 Wash. 422, 87 Pac. 505; Snelling v. Yetter, 25 App. Div. 590, 49 N. Y. Supp. 917; Atlanta Baggage & Cab Co. v. Mizo, 4 Ga. App. 407, 61 S. E. 844; Herring v. Utley, 53 N. C. (8 Jones, L.) 270; Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765; Beckman v. Shouse, 5 Rawle, 179, 28 Am. Dec. 653; Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 464; 10 C. J. Carriers, p. 49, § 25; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Story, Bailm. § 495; United States v. Simpson, 257 Fed. 860; Sullivan v. Williams, 107 Misc. 511, 176 N. Y. Supp. 710; Gurley v. Armstead, 148 Mass. 267, 2 L.R.A. 80, 12 Am. St. Rep. 555, 19 N. E. 389; Johnson Exp. Co. v. Chicago, 136 Ill. App. 368; Carlton v. Boudar, 118 Va. 521, 4 A.L.R. 1480, 88 S. E. 174.

Mr. H. W. Wyant, for defendant in error:

Defendant in this transportation operated as and was a private carrier, and not a common carrier, and therefore, in the absence of negligence, is not liable for his failure safely to carry and deliver plaintiff's property to him in Washington.

Michie, Carr. § 1, pp. 1, 2; Johnson v. Pensacola & P. R. Co. 16 Fla. 623, 26 Am. Rep. 731; Vinkestone v. Ebdon, 1 Salk. 249, 91 Eng. Reprint, 219; Brind v. Dale, 8 Carr. & P. 207; Fish v. Chapman, 2 Ga. 353, 46 Am. Dec. 393; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; 1 Hutchinson, Carr. §§ 35, 47; Chicago, M. & St. P. R. Co. v. Wallace, 30 L.R.A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; Atlantic City v. Dehn, 69 N. J. L. 233, 54 Atl. 220; Piedmont Mfg. Co. v. Columbia & G. R. Co. 19 S. C. 353; Bassett v. Aberdeen Coal & Min. Co. 120 Ky. 728, 88 S. W. 318, 18 Am. Neg. Rep. 422; Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 435; Samms v. Stewart, 20 Ohio, 69, 55 Am. Dec. 445; Carlton v. Boudar, 118 Va. 521, 4 A.L.R. 1480, 88 S. E. 174.

Sims, J., delivered the opinion of the court:

The sole question presented for our decision in the instant case is the following:

Was the defendant, Haun, although a common carrier of goods

in Bridgewater, such carrier from Harrisonburg to Washington, at the time of the undertaking of carriage involved in this action?

This question must be answered in the negative.

It appears from the uncontroverted evidence in the case that the carriage of goods by the defendant from Harrisonburg to Washington was not the habitual business of the defendant, but a casual undertaking merely. He did not pursue the business of carrying goods over that route as a public employment. He

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had never held himself out as undertaking to carry goods for the public generally between those places.

By the great weight of authority one of the essential requisites to constitute a person a common carrier of goods in a particular instance is that the carriage in question must be over a route or within a territory over or within which there has been a general undertaking by the person—a holding of himself out as undertaking—to carry goods for the public generally—as a business, over that route or within that territory.

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Hutchinson, Carr. 3d ed. §§ 47, 49, 60; 1 Michie, Carr. §§ 1 and 2; 6 Am. & Eng. Enc. Law, 2d ed. pp. 251-253; 10 C. J. p. 41; and authorities cited by these textbooks, too numerous to be cited here. The dominant and controlling factor, which is the test of the nature of the employment and which fixes the carriage as that of a common carrier, is the public profession, the public undertaking; and that undertaking fixes also both the character of the articles undertaken to be carried and the extent of the territory covered by the business. It is true that the undertaking need not be express. It may be implied from conduct. But, if the undertaking is to be implied from conduct, it must be evidenced, as said in Fish v. Chapman, 2 Ga. 349, at page 354,

46 Am. Dec. 393, "by a series of acts, by his known habitual continuance in this line of business."

As said in Hutchinson on Carriers, supra, § 60: "Must Undertake to Carry by Customary . . . Route.—Common carriers . . . undertake to carry . . . only . . . over the route to which their business is confined. Thus common carriers . . . cannot be required to carry . . . by a route to which his business does not extend. And even if a carrier should, in a particular instance, undertake by a special contract to carry goods by unusual and exceptional . . . routes, his liability would be based upon his contract, and not by the ordinary rules governing common carriers."

(This is, of course, not applicable in cases where the common-law rule has been changed by statute; but there is no such statute bearing upon the case before us.)

As said, however, by the same authority last cited in another place (§ 49): "What circumstances will be sufficient to invest the employment of the carrier in particular cases with the character of a public one, and what profession or course of dealing on his part will be considered as enough to constitute him a common carrier, instead of a private carrier for hire, is, however, sometimes a question of no little difficulty, and has given rise to a considerable diversity of opinion and controversy. The criterion by which it is to be determined whether he belongs to the one class or the other is generally considered to be whether he has held himself out or has advertised himself in his dealings or course of business with the public as being ready and willing, for hire, to carry particular classes of goods for all those who may desire the transportation of such goods *between the places between which he professes in this manner his readiness and willingness to carry*. If he has done so, he is, of course, to be regarded as a common carrier; but, if not, he will be treat-

ed only as a private carrier for hire." (*Italics supplied.*)

As shown by this authority, such is the rule in England and in a large majority of the American courts. To the same effect, see Carleton v. Boudar, 118 Va. 521, 525-527, 4 A.L.R. 1480, 88 S. E. 174.

The textbook last cited thereupon proceeds, in §§ 50-53, and notes, with a review of the minority holding of certain cases in Pennsylvania, Tennessee, and New Hampshire, which is referred to as the Pennsylvania rule, and which denies the necessity for any public profession or undertaking in order to impose upon the carrier the character and consequent liability of a common carrier, and which holds that one who has never assumed the character of a public carrier, whose contract to carry may be confined to one particular instance, or pro hac vice, as it is termed, may assume thereby all the responsibilities of a common carrier, if he has occasionally accepted the goods of others for transportation for hire. These holdings are not considered sound by the learned author of the textbook last cited, and we concur in that view. In the leading case of Fish v. Chapman, supra, 2 Ga. at page 355, there is also a disapproval of the Pennsylvania rule, where it is said that there can be little doubt that that holding "is opposed to the principles of the common law and its rule wholly inexpedient,"—citing numerous authorities.

The case of Farley v. Lavary, 107 Ky. 523, 47 L.R.A. 383, 54 S. W. 840, among the authorities relied on for the plaintiff, does not rest upon the Pennsylvania rule. It is, however, peculiar in its facts. In that case the inception of the carriage was within the city, the corporate limits of which were the territorial limits of the usual business of the carrier; almost the whole route of the carriage was within such limits; but the contract of carriage and the carriage involved in that action in fact extended somewhat beyond the

was whether the carrier was acting as a common carrier and liable as such while carrying the goods outside of the city limits. The court, on the single authority of *Ireland v. Mobile & O. R. Co.* 105 Ky. 400, 49 S. W. 188, 453, applied the doctrine there laid down as applicable to railroad companies, and held that the contract was made by the carrier in his capacity of a common carrier, and was in effect a contract to carry for the whole distance in the capacity of a common carrier. We feel that we are not called upon to approve or to disapprove of the holding in that case, as its facts are entirely dissimilar to those of the case before us.

In conclusion we will say that, while we have no disposition whatever to relax the established rules

express or implied, constitutes a common carrier, or to relieve common carriers from any of the duties or responsibilities imposed upon them by law, we have no disposition to extend those rules so as to embrace within them those who, according to the majority view of the courts on the subject, are not common carriers.

The case will be affirmed.

NOTE.

The question whether persons or corporations engaged in local transportation of goods are common carriers is the subject of the annotation following *W. N. STEVENSON & Co. v. HARTMAN*, post, 1316.

Weir, 129 App. Div. 307, 114 N. Y. Supp. 426, 199 N. Y. 540, 92 N. E. 1084; Robinson v. Cornish, 34 N. Y. S. R. 695, 13 N. Y. Supp. 577; New York C. & H. R. R. Co. v. Sheeley, 57 N. Y. S. R. 766, 27 N. Y. Supp. 193; Allen v. Sackrider, 37 N. Y. 341; Anderson v. Fidelity & C. Co. 228 N. Y. 475, 9 A.L.R. 1544, 127 N. E. 584; Hutchinson, Carr. 2d ed. § 85; Fish v. Clark, 49 N. Y. 122; O'Rourke v. Bates, 73 Misc. 414, 133 N. Y. Supp. 392.

Mr. Charles Frankel for respondent.

Hiscock, Ch. J., delivered the opinion of the court:

This action was brought to recover the value of merchandise delivered by plaintiff to defendant, a cartman, for transportation within the city of New York. After the goods had been delivered to him and placed upon his cart he was temporarily called away, and while thus absent some thief drove his cart away and stole the merchandise.

It was established, we think, that if defendant received these goods as an ordinary bailee he was not guilty of any neglect of duty which made him responsible for the value thereof. On the other hand, it is practically conceded by him that if he received the goods as a common carrier he has not offered any excuse or defense which relieves him from responsibility for their value. It has thus far been held as matter of law that he was not a common carrier, and was not liable for the value of the merchandise. The decisive question, therefore, presented for our consideration, is whether this conclusion was correct. We do not think that it was.

Defendant was a public cartman, duly licensed under an ordinance of the city of New York. Under this ordinance and the license which he took out thereunder he became engaged in the business of public, that is, general, carting. He was privileged, in the case of certain bulky articles, to make a special contract for his compensation, but otherwise he was compelled to carry such articles as might be intrusted to him under a regular scale of prices.

So far as appears, his time was devoted to this business of carting.

He had a regular stand upon one of the streets of the city, whereof the only purpose could be to invite and accept such business as might be offered to him by anyone who desired his services. Much stress is laid upon the fact that the bulk of his business came from certain classes of merchants in the neighborhood of the stand which he occupied, but to our mind this means nothing more than that naturally those who sought and employed his services were the ones near by, who knew of his location, rather than those in some distant part of the city, who knew nothing of him, and whose convenience would not be served by hiring him. There is nothing to indicate that his customers were controlled or classified by any other test or rule than that of mere proximity and convenience.

The business which he carried on is fairly described by him in his evidence, some of which may be quoted as follows:

Q. Are you located at any particular place or have you a stand at any particular place?

A. I stand at Fifteenth street and Sixth avenue.

Q. Where are your customers?

A. They are around in that particular neighborhood. . . .

Q. Where do you truck merchandise to?

A. To the piers and city deliveries.

Q. You make deliveries all over the city?

A. Yes, sir. . . .

Q. Do you have any special routes? Not exactly special routes—it all depends on the goods you have for delivery?

A. Yes, sir.

Q. How many deliveries do you make in a day—any special number?

A. Sometimes twenty, sometimes fifteen, and sometimes thirty.

Q. That depends?

A. It depends on what I pick up from certain people.

Q. When you get a truckload full, you start off to deliver?

A. Yes, sir.

Q. And you wait until you have a truck full before you start delivering; is that correct?

A. Yes, sir, I take all that I can possibly get from all the people, and when they give me their goods and when I get a truck full, I go around and make deliveries.

As we have indicated, it seems to us perfectly clear that the business thus described was that of a common carrier of goods. Defendant was either a private carrier, carrying occasionally for some particular person under some particular arrangement, or he was a common carrier engaged in the general business of carrying goods

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generally for those who desired his services. It seems plain that his case is not fitted by the former description, but that he comes within the latter definition. *Anderson v. Fidelity & C. Co.* 228 N. Y. 475, 9 A.L.R. 1544, 127 N. E. 584; *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; *Allen v. Sackrider*, 37 N. Y. 341.

According to these views, we think the judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

Hogan, McLaughlin, Crane and Andrews, JJ., concur.

Chase and Cardozo, JJ., dissent.

ANNOTATION.

Persons or corporations engaged in local transportation of goods as common carriers.

- I. In general, 1316.
- II. One carrying for special customer, 1317.
- III. One contracting out conveyance, 1317.
- IV. One who carries as an occasional occupation, 1317.
- V. One who carries on single occasion, 1318.
- VI. Necessity for fixed rates, 1318.
- VII. Necessity for fixed routes or regular trips, 1319.
- VIII. Necessity for fixed stand, 1319.

I. In general.

It will be observed that the annotation is confined to the question of status as a common carrier, and is not concerned with the rights, duties, or responsibilities dependent upon or resulting from that status.

The question whether one is a common carrier can sometimes be known only by particular proof of how his business was conducted and what profession he made to the public regarding it. *Thompson v. New York Storage Co.* (1902) 97 Mo. App. 135, 70 S. W. 938; *Campbell v. A. B. C. Storage & Van Co.* (1915) 187 Mo. App. 565, 174 S. W. 140.

The test is not whether he is carrying on a public employment, or wheth-

- IX. Discrimination as to goods, 1319.
- X. Discrimination as to patrons, 1319.
- XI. Effect of special contract for carrying, 1320.
- XII. Common carrier within particular statute or ordinance, 1321.
- XIII. Cartmen, draymen, and truckmen, 1322.
- XIV. Storage and moving companies; warehousemen, 1323.
- XV. Transferrers of baggage, 1323.
- XVI. Transferrers between railroads, 1324.

er he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons, indifferently, who send him goods to be carried. *Robinson v. Cornish* (1890) 34 N. Y. S. R. 695, 13 N. Y. Supp. 577; *Nugent v. Smith* (1875) L. R. 1 C. P. Div. (Eng.) 19.

So, whether a party is a common carrier or not depends upon the facts, and when there is a question whether the carrier is a private or a common carrier it is to be determined by the facts relating to, first, whether the business is a public business or employment, and whether the service is rendered to all indifferently; second,

whether one has held himself out as so engaged so as to make him liable for refusal to accept the employment offered; and along these lines may go the question as to whether the contracts under which the business is accepted are made on the basis of a private or public carriage. This last, however, is only a circumstance which may be looked at in arriving at a conclusion on the two above-mentioned questions. For if one, by reason of the circumstances, is a common carrier as to the goods in question, he cannot, by any special contract, change his status as such, or exempt himself from the responsibilities growing out of that relation. If, however, the above questions be answered in the affirmative, then he is a common carrier, with all the rights and responsibilities flowing from that status or relation. *Campbell v. A. B. C. Storage & Van Co. (Mo.) supra.*

If one is a common carrier in fact, it makes no difference whether he solicits the particular employment or is solicited to accept it. *Haynie v. Baylor (1857) 18 Tex. 498.*

So, too, it is not the extent of the business or the number of trips performed, but the readiness to carry for all, that determines whether one is a common carrier. *Verner v. Sweitzer (1858) 32 Pa. 208.*

And in order to constitute one a common carrier the mode of transporting the goods which he employs is immaterial. *Arkadelphia Mill. Co. v. Smoker Merchandise Co. (1911) 100 Ark. 37, 139 S. W. 680.*

And it is not necessary that the carrier devote himself exclusively to the business of carrying. *Jackson Architectural Iron Works v. Hurlbut (1899) 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665.*

One once a common carrier is no more liable in that character than any other person if it be conclusively shown that he has abandoned the business. *Satterlee v. Groat (1828) 1 Wend. (N. Y.) 272.*

II. One carrying for special customer.

A cartman carrying goods for particular customers at prices fixed in

each case by specific contract is not a common carrier. *Faucher v. Wilson (1895) 68 N. H. 338, 89 L.R.A. 431, 38 Atl. 1002.*

One who carries for a particular person only is not a common carrier. *Ingate v. Christie (1850) 3 Car. & K. (Eng.) 61.*

III. One contracting out conveyance.

One who rents teams and wagons with drivers to certain firms and corporations under time contracts, which are exclusively within the control and under the direction of the users, is not a carrier, not being engaged in carrying, hauling, or transporting goods, but merely in leasing the paraphernalia and men constituting the means by which such hauling is accomplished, and so the vehicles are not "public carts" within the meaning of an ordinance regulating and licensing "public carts." *Chicago v. A. M. Forbes Cartage Co. (1901) 1 Ill. C. C. 473.*

Also one who keeps horses and wagons which are engaged by various firms under monthly contracts for hauling goods, each wagon being kept exclusively for the firm contracting for it, the men operating the wagons being employed by the owner, but being under the direction and control of the contracting firm, the wagons not being kept at the public stands for licensed vehicles, and never being used for odd jobs, but only under the monthly contracts, does not come within the purview of an ordinance making it unlawful for any person to keep drays and wagons for hire for the transportation of goods without first obtaining a license. Such an owner is not a common carrier; he does not hold himself out as ready to serve any person who may have goods to transfer, and his business is not such as would authorize the council to prescribe the compensation which he is entitled or required to receive from his patrons. *McCauley v. State (1909) 83 Neb. 431, 119 N. W. 675.*

IV. One who carries as an occasional occupation.

If one is accustomed to undertake

for hire to transport the goods of those who choose to employ him, though it be not his constant or usual, but only an occasional, occupation, he is a common carrier; at least, whenever he holds himself out in any way to the public as a carrier, or undertakes, as a matter of business and profit, the transportation of goods. *Haynie v. Baylor* (1857) 18 Tex. 498.

A planter whose wagons are engaged in hauling his crop to market, and who also is in the habit of taking loads of goods back on the return trip when he can get them, is to be regarded in law as a common carrier. *Harrison v. Roy* (1860) 39 Miss. 396.

So, too, in *Chevallier v. Straham* (1847) 2 Tex. 115, 47 Am. Dec. 639, one whose principal business was farming, but who, during a part of the time, and during the season of hauling, ran his wagon whenever he could get a chance, was held to be a common carrier and liable as such for loss of goods. The court stated that it considered *Gordon v. Hutchinson* (Pa.) cited *infra* under V., quite decisive of that point.

But in *Samms v. Stewart* (1851) 20 Ohio, 69, 55 Am. Dec. 445, it was held that a farmer who was accustomed to haul produce to a neighboring city, and who often carried return loads of freight for local merchants, was not a common carrier, since he did not hold himself out to the world as such, although it was shown that when about to go to the city he had frequently asked the local merchants for return loads. The court stated that *Gordon v. Hutchinson* (Pa.) cited *infra*, under V., was opposed to the current of authority on the subject.

V. One who carries on single occasion.

One who undertakes to carry a load of goods for another, not for the sake of profit, but as a matter of accommodation, is not a common carrier. *Haynie v. Baylor* (1857) 18 Tex. 498.

One who undertakes for hire to haul the goods of another by wagon upon a single occasion is not a common carrier thereof. *Fish v. Chapman* (1847) 2 Ga. 349, 46 Am. Dec. 393; ——— v. *Jackson* (1792) 2 N. C. (1 Hayw.) 14.

So, too, a person, not a common carrier, who sends his servant with a wagon to transport goods belonging to a particular person from one place to another, with special instructions not to take the goods of any other person for transportation, is not liable as a common carrier in case of loss or embezzlement of goods of another taken for transportation in violation of such orders. *Satterlee v. Groat* (1828) 1 Wend. (N. Y.) 272.

One who contracts to tear down a house and haul the materials to another place is, in such hauling, a private, and not a common, carrier. *McBurnie v. Stelsly* (1906) 29 Ky. L. Rep. 1191, 97 S. W. 42.

However, a farmer who, being about to go to another place, solicited a local merchant to give him a return load, was held in *Gordon v. Hutchinson* (1841) 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464, liable as a common carrier with respect thereto. The court stated that it considered a wagoner who carries goods for hire to be a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment.

VI. Necessity for fixed rates.

Truckmen, wagoners, cartmen, porters, and other persons who undertake to carry goods for hire for the public generally and as a common employment in a city, are common carriers, and the fact that they have no regular tariff for their charges, but fix a special price for each job, does not change the relation. 4 R. C. L. 558.

So, a corporation with a number of branch offices in a large city, which is engaged in transporting parcels, boxes, and packages for wholesale houses, department stores, and factories, and delivering them throughout the city, is a common carrier, notwithstanding it has no particular rate or schedule charges, but deals with each customer separately, and so is subject to an ordinance requiring license for every express wagon, furniture van, dray, or other vehicle used for conveying goods within the city for hire. *Johnson Exp. Co. v. Chicago* (1907) 136 Ill. App. 368. And to the same

effect, see *Hastings Exp. Co. v. Chicago* (1907) 135 Ill. App. 268.

But see *NEY v. HAUN* (reported herewith) ante, 1310, which holds that to constitute one a common carrier in a particular instance, the carriage must be over a route within a territory over or within which there has been a general undertaking by the person—a holding of himself out as undertaking—to carry goods for the public generally as a business over that route or within that territory.

VII. Necessity for fixed routes or regular trips.

It is not necessary, in order to constitute a common carrier one who has undertaken to carry, that he make regular trips or between fixed termini. *Campbell v. A. B. C. Storage & Van Co.* (1915) 187 Mo. App. 565, 174 S. W. 140; *Liver Alkali Co. v. Johnson* (1872) L. R. 7 Exch. (Eng.) 267.

VIII. Necessity for fixed stand.

The status of common carrier of one carrying on the business of carting is not altered by the circumstance that none of his vans stand in any of the public express stands. *Culver v. Lester* (1901) 21 Can. L. T. O. N. 295, 37 Can. L. J. 421; *Hastings Exp. Co. v. Chicago* (1907) 135 Ill. App. 268.

So, too, an express company may be a common carrier although it does not solicit business or have stands for its wagons upon the streets of the municipality, but makes special contracts for the carriage of all the goods it hauls, and does not carry for all who apply, or at the rates fixed by ordinance. *Hastings Exp. Co. v. Chicago* (Ill.) supra.

IX. Discrimination as to goods.

It is not necessary that the carrier carry all kinds of goods; if he profess to carry only a certain kind, this does not take from him his status as a common carrier; but, of course, before he can be held liable as such, the goods in question must be such as he professes to carry. *Campbell v. A. B. C. Storage & Van Co.* (1915) 187 Mo. App. 565, 174 S. W. 140.

And in *Parmelee v. Lowitz* (1874)

74 Ill. 116, 24 Am. Rep. 276, an action to recover the value of articles in a trunk delivered by the appellee to appellant to be carried for him from the depot to appellee's residence, in affirming a judgment in the court below in favor of appellee, the court held that appellant was a common carrier and as such was bound to carry the trunk and its contents safely, though it was not such as was usually carried by him as baggage; there being no fraud or deception practised by the appellee as to the contents of the trunk, the appellant not inquiring as to said contents, and the appellee not being under a special obligation to make the contents known.

To charge one as carrier for loss of goods which are of considerable bulk and weight, there must be shown either a special contract and undertaking to carry the particular goods, or a general usage to carry that kind of goods. *Tunnel v. Pettijohn* (1886) 2 Harr. (Del.) 48.

X. Discrimination as to patrons,

The mere fact that one holding himself out as a common carrier does discriminate between patrons, accepting some and rejecting others, does not absolve him from liability as a common carrier for the loss of goods which he undertakes to carry. *Lloyd v. Haugh & K. Storage & Transfer Co.* (1909) 223 Pa. 148, 21 L.R.A. (N.S.) 188, 72 Atl. 516. The court said that to claim that one is not a common carrier because he persistently disregards the duty to carry for all who may apply, and arbitrarily chooses whom he will serve, notwithstanding he has invited the public generally to apply, is to make a public duty determinable by the pleasure of the individual, and not by principle or law.

So, too, that one carrying on the business of cartage is a private carrier is not shown by proof that in some instances he refused to undertake the work of a carrier for those applying, where he did so only where he had too many engagements, or his men or horses were worn out or overworked by the engagements he had.

hold goods of another is not a common carrier, where he does not hold himself out to the public as such. *O'Rourke v. Bates* (1911) 73 Misc. 414, 133 N. Y. Supp. 392.

And a furniture mover who was admittedly not a common carrier, who did not hold himself out as ready to carry for anyone who should apply, but, before carrying, requested to inspect the furniture and make a special contract as to its carriage, was held in *Watkins v. Cottell* [1916] 1 K. B. (Eng.) 10, 85 L. J. K. B. N. S. 287, 114 L. T. N. S. 333, 32 Times L. R. 91, 60 Sol. Jo. 404, not thereby to take upon himself the liability of a common carrier.

A storage and moving company, in agreeing for a stipulated consideration well and safely to remove household effects from point to point in a city, is a bailee for hire, and does not by such contract assume the liability of a common carrier. *Jaminet v. American Storage & Moving Co.* (1904) 109 Mo. App. 257, 84 S. W. 128.

And in *Thompson v. New York Storage Co.* (1902) 97 Mo. App. 135, 70 S. W. 938, it was held that in contracting to haul two loads of household goods from one dwelling to another for a sum in excess of the usual charge on account of overloading the vans, the corporation, engaged in storing and moving goods for hire, did not become a common carrier so as to entitle it to a carrier's lien on the goods for its charge. The court said that, while the testimony was meager, it thought that defendant was a private carrier or bailee for hire, and was not bound to serve everyone without discrimination.

A town cartman who lets carts by the day or job is not a common carrier. *Brind v. Dale* (1837) 8 Car. & P. (Eng.) 207, 2 Moody & R. 80.

XII. Common carrier within particular statute or ordinance.

Those engaged in the business of draymen or truckmen for the transportation of goods and merchandise within a city are common carriers, and so subject to reasonable public regulations. *Lawson v. Judge of Re-*

corder's Ct. (*Larson v. Connolly*) (1913) 175 Mich. 375, 45 L.R.A. (N.S.) 1152, 141 N. W. 623.

In *Neal v. Deans* (1913) 14 Ga. App. 100, 80 S. E. 293, one who was a regular drayman was held to be a common carrier, and as such liable for injury to a piano that he contracted to carry, under a Code provision that one who pursues the business constantly or continually for any period of time, or any distance, of transportation, is a common carrier, and, as such, bound to use extraordinary diligence.

One licensed under a municipal ordinance regulating the fees of expressmen, and requiring them to serve the first who may apply to them, who holds himself out as willing to carry for anyone who may employ him, is a common carrier. *Culver v. Lester* (1901) 21 Can. L. T. O. N. 295, 37 Can. L. J. 421.

Transfer companies are common carriers within the constitutional provision prohibiting a common carrier from acquiring or operating by purchase, leave, or otherwise, any parallel line or competing business. *Fields v. Holland* (1914) 158 Ky. 544, L.R.A. 1915C, 365, 165 S. W. 699.

One who holds himself out to the public as ready to undertake for hire or reward to transport household goods from place to place is a common carrier, and entitled as such to a lien on goods for his charges, and so is not guilty of larceny by bailee in retaining them for that purpose. *Com. v. Shepherd* (1916) 62 Pa. Super. Ct. 102.

But a local storage or express and baggage transfer line is not a common carrier within the meaning of § 2, subdivision 9, of the New York Public Service Consolidation Law, so as to prevent its being the agent, with authority to stipulate for the usual terms of transportation, of one who orders it to take certain trunks to a railroad station and express them to certain points. *Walker v. Taylor*, (1919) 186 App. Div. 544, 174 N. Y. Supp. 520.

And in *Chicago v. Mayer* (1919) 290 Ill. 142, 124 N. E. 842, it was held that one engaged in the moving and ex-

press business in a city was not a common "carrier" within the meaning of the Public Utility Act which provided that "the term 'common carrier' when used in this act includes all . . . express companies . . . and every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees or receivers appointed by any court whatsoever owning, operating or managing any such agency for public use in the transportation of persons or property within the state," as it is evident from the statute that the legislature intended only to put within the jurisdiction of the public utility commission companies organized to carry on a large and extensive business as common carriers, and so it was subject to an ordinance regulating moving operations and the rates to be charged therefor.

See also cases under III.

XIII. Cartmen, draymen, and truckmen.

Cartmen or truckmen employed to carry goods from one part of a city to another are to be regarded as common carriers if they undertake to carry goods for hire for the public generally and as a common employment in the city. *Hinchliffe v. Wenig Teaming Co.* (1916) 274 Ill. 417, 113 N. E. 707.

And see *W. N. STEVENSON & Co. v. HARTMAN* (reported herewith) ante, 1314, which held to be a common carrier, a duly licensed cartman who had a regular stand upon a public street to accept such business as might offer, although the bulk of his business came from a certain class of merchants in the neighborhood of his stand.

And see supra, under VII., *Campbell v. A. B. C. Storage & Van Co.* (1915) 187 Mo. App. 565, 174 S. W. 140. Also, supra, under VIII., *Culver v. Lester* (1901) 21 Can. L. T. O. N. 295, 37 Can. L. J. 421, and *Hasting Exp. Co. v. Chicago* (1907) 135 Ill. App. 268. See also cases cited supra under XI.

But in *Brind v. Dale* (1837) 8 Car. & P. (Eng.) 207, 2 Moody & R. 80, Lord Abinger, at nisi prius, expressed

the opinion that a town cartman who had carts for hire, and who let them out by the hour, day, or job, would not become a carrier.

And see supra, II., *Faucher v. Wilson* (1895) 68 N. H. 338, 39 L.R.A. 431, 38 Atl. 1002. Also supra, under III., see *Chicago v. A. M. Forbes Cartage Co.* (1901) 1 Ill. C. C. 473, and *McCauley v. State* (1909) 83 Neb. 431, 119 N. W. 675. Also supra, under IX., see *Tunnel v. Pettijohn* (1836) 2 Harr. (Del.) 48. Also supra, under X., see *Wolf Thread Co. v. Rosenbusch*. (1920) 180 N. Y. Supp. 94, and *Belfast Rope-work Co. v. Buskell* [1918] 1 K. B. (Eng.) 210, 8 B. R. C. 783, 118 L. T. N. S. 310, 34 Times L. R. 156, 87 L. J. K. B. N. S. 740, 23 Com. Cas. 162.

A drayman employed by one to transfer household goods to a freight station is a common carrier. *Benson v. Oregon Short Line R. Co.* (1909) 35 Utah, 241, 136 Am. St. Rep. 1052, 99 Pac. 1072, 19 Ann. Cas. 803.

So, too, persons who engage in the business of transporting goods from place to place in a city in drays or transfer wagons may be common carriers. *Arkadelphia Mill. Co. v. Smoker Merchandise Co.* (1911) 100 Ark. 37, 139 S. W. 680.

And in *Gisbourn v. Hurst* (1710) 1 Salk. 249, 91 Eng. Reprint, 220, it was held that one who undertook to carry in his wagon for hire the goods of all persons, indifferently, was a common carrier, and so the goods were privileged from distress for rent due by the owner of the wagon.

A public truckman engaged in the business of transporting for hire the goods of such as choose to employ him is a common carrier, and as such liable for loss of goods delivered him for transportation. *Heyman v. Stryker* (1909) 116 N. Y. Supp. 638.

So, too, one keeping a large number of horses and trucks, and advertising himself as a general truckman whose specialty is the moving of heavy machinery, is a common carrier. *Jackson Architectural Iron Works v. Hurlbut* (1899) 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665. The court said: "Truckmen, wagoners, cartmen, and porters who undertake to carry goods

for hire as a common employment in a city . . . are common carriers. It is not necessary that the exclusive business of the parties shall be carrying, . . . but the circumstance that the defendants had no regular tariff of charges for their work, but that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed, and commensurate with the carrier's responsibility as such. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him; and everyone who undertakes to carry for compensation the goods of all persons, indifferently, is, as to liability, to be deemed a common carrier."

One doing business as a "transfer company," with a large number of horses and vehicles, who transports freight and packages from point to point in a city for all who may choose to employ and pay him therefor, is a common carrier. *Caye v. Poole* (1900) 108 Ky. 124, 49 L.R.A. 251, 94 Am. St. Rep. 348, 55 S. W. 887. And see *Johnson Exp. Co. v. Chicago* (1907) 136 Ill. App. 368, *supra*, VI.

Also in *Arkadelphia Mill. Co. v. Smoker Merchandise Co.* (1911) 100 Ark. 37, 139 S. W. 680, a transfer company was held to be a common carrier, and so liable as such for loss by fire of goods in its possession, where shown to have been engaged in the carriage business as an habitual employment, and held itself out to the public to transfer goods from place to place indiscriminately for hire, and was under obligation to carry goods for all who chose to employ it as a carrier.

A driver of a slide with oxen, who made a business of transporting for hire from anyone who applied to him, was held in *Robertson v. Kennedy* (1834) 2 Dana (Ky.) 431, 26 Am. Dec. 466, to be a common carrier, and liable as such for loss of goods.

XIV. *Storage and moving companies; warehousemen.*

A company engaged in the moving and storage of goods for the public at large is a common carrier. *Gates v. Bekins* (1906) 44 Wash. 422, 87 Pac. 505.

A storage and moving company that holds itself out as engaged in the general business of moving for all who choose to employ it is, as to that part of its business, a common carrier, and as such liable for loss due to the van becoming on fire while goods are being transported. *Collier v. Langan & T. Storage & Moving Co.* (1910) 147 Mo. App. 700, 127 S. W. 435. The court distinguished *Thompson v. New York Storage Co.* (1902) 97 Mo. App. 135, 70 S. W. 938, as a decision based on the particular facts in that case, and also distinguished *Jaminet v. American Storage & Moving Co.* (1904) 109 Mo. App. 257, 84 S. W. 128, as a case of the construction of a specific contract, the decision being based on a ground other than what constitutes a common carrier.

And see *supra*, X., *Lloyd v. Haugh & K. Storage & Transfer Co.* (1909) 223 Pa. 148, 21 L.R.A.(N.S.) 188, 72 Atl. 516.

A warehouseman who, upon receiving payment of his storage charges, agrees to deliver to the owner stored goods by a specified hour, thereby becomes a common carrier, and is liable as such if the goods are destroyed by fire before the arrival of the hour fixed for delivery. *Snelling v. Yetter* (1898) 25 App. Div. 590, 49 N. Y. Supp. 917, appeal dismissed in (1900) 163 N. Y. 601, 57 N. E. 1124.

But it was held in *Armfield v. Humphrey* (1882) 12 Ill. App. 90, that a warehouseman does not become a common carrier by merely moving as an incident of storage, household goods from a dwelling to its warehouse.

XV. *Transferrers of baggage.*

A city expressman who makes it a business to solicit from the public the carriage of trunks and packages from place to place for hire is, to all intents and purposes, a common carrier. *Richards v. Westcott* (1858) 2 Bosw.

United States to the Federal courts.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. ed. 834, 11 A.L.R. 1145, 40 Sup. Ct. Rep. 438; *Southern P. Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596; *The C. Vanderbilt*, 86 Fed. 785; *The Seguranca*, 58 Fed. 908; *The Gilbert Knapp*, 37 Fed. 209; *Roberts v. The Windermere*, 2 Fed. 722.

The hydro-aeroplane, when afloat, navigating the waters, is a vessel, and is within the admiralty jurisdiction.

28 *Harvard L. Rev.* p. 200; 3 *California L. Rev.* 143; *Charles Barnes Co. v. One Dredge Boat*, 169 Fed. 895.

Mr. E. C. Aiken, with Mr. Charles D. Newton, Attorney General, for respondent:

The state industrial commission had jurisdiction, and was not ousted therefrom by the jurisdiction of the Federal courts.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596; *The Crawford Bros.* 215 Fed. 269; *The Big Jim*, 61 Fed. 503; *The Osceola*, 189 U. S. 153, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; *Chelentis v. Luckenbach S. S. Co.* 247 U. S. 372, 62 L. ed. 1171, 38 Sup. Ct. Rep. 501, 19 N. C. C. A. 309; *Richardson v. Harmon*, 222 U. S. 96, 56 L. ed. 110, 32 Sup. Ct. Rep. 27.

Cardozo, J., delivered the opinion of the court:

Claimant was employed in the care and management of a hydro-aeroplane which was moored in navigable waters at Gravesend bay, Brooklyn. The plane traveled between Brooklyn, New York, and Miami, Florida. While moored in these navigable waters, it began to drag anchor and drift toward the beach, where it was in danger of being wrecked. Claimant waded into the water to turn the plane about, and was struck by the propeller. The question to be determined is whether he was injured by a vessel. If he was, the jurisdiction of the admiralty excludes the jurisdiction of the commission. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 11 A.L.R. 1145, 40 Sup. Ct. Rep. 438. If he was not, em-

ployment and injury suffice to justify an award. The latest of man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. Riding at anchor is a new craft which would have mystified the Lord High Admiral in the days when he was competing for jurisdiction with Coke and the courts of common law. 1 Holdsworth, *History of Eng. Law*, 321, 322; Mears, *Admiralty Jurisdiction*; 2 *Anglo-American Legal Essays*, 354.

We think the craft, though new, is subject, while afloat, to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of the admiralty. Any structure used, or capable of being used, for transportation upon water, is a vessel. Comp. Stat. title 1, chap. 1, § 3, 9 Fed. Stat. Anno. 2d ed. p. 391; *Charles Barnes Co. v. One Dredge Boat (D. C.)* 169 Fed. 895. All that remains is to ascertain the uses and capacities of the structure to be classified. The conclusion might be more dubious if the word "vessel" had been interpreted grudgingly and narrowly. The fact is that it has been interpreted liberally and broadly. It includes a canal boat drawn by horses (*The Robert W. Parsons (Perry v. Haines)*, 191 U. S. 17, 30, 48 L. ed. 73, 78, 24 Sup. Ct. Rep. 87); a bath-house upon floats (*The Public Bath [D. C.]* 61 Fed. 692); a raft (*The Mary [D. C.]* 123 Fed. 609); a scow (*The Sunbeam*, 115 C. C. A. 370, 195 Fed. 468; *George Leary Constr. Co. v. Matson [C. C. A.]* 272 Fed. 461); a dredge (*Charles Barnes Co. v. One Dredge Boat*, supra; *Saylor v. Taylor*, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476; *Ellis v. United States*, 206 U. S. 246, 259, 51 L. ed. 1047, 1054, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589); a temporarily sunken drill boat (*Eastern S. S. Corp. v. Great Lakes Dredge & Dock Co.* 168 C. C. A. 13, 256 Fed. 497); anything upon the water where movement is predominant rather than fixity or permanence (*Cope v. Vallette Dry Dock Co.* 119 U. S. 625,

30 L. ed. 501, 7 Sup. Ct. Rep. 336; *Berton v. Tietjen & L. Dry Dock Co.* [D. C.] 219 Fed. 763, 774; *The Mac*, L. R. 7 Prob. Div. 126, 51 L. J. Prob. N. S. 81, 46 L. T. N. S. 907, 5 Asp. Mar. L. Cas. 555; *The Mudlark*, L. R. [1911] Prob. 116, 80 L. J. Prob. N. S. 117, 27 Times L. R. 385; *The Whitton*, L. R. [1896] Prob. 42, 57, 65 L. J. Prob. N. S. 17, 73 L. T. N. S. 698, 44 Week. Rep. 263, 8 Asp. Mar. L. Cas. 110, affirmed in [1897; H. L.] A. C. 337, 66 L. J. Prob. N. S. 99, 76 L. T. N. S. 663). A hydro-aeroplane, while in the air, is not subject to the admiralty (*The Crawford Bros.* [D. C.] 215 Fed. 269), or so, at least, we may assume, because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction. A hydro-aeroplane, while afloat upon waters capable of navigation, is subject to the admiralty, because location and function stamp it as a means of water transportation. Such a plane is, indeed, two things—a sea plane and an aeroplane. To the extent that it is the latter, it is not a vessel, for the medium through which it travels is the air. *The Crawford Bros.* supra. To the extent that it is the former, it is a vessel, for the medium through which it travels is the water. If a sea plane, incapable of flight, breaks its moorings and causes injury to man or ship, there will be a remedy against the offending res. If, moving upon the water, it becomes disabled, and is rescued on the high seas by a ship, it will be subject to a lien for salvage. We think the jurisdiction of the admiralty is not less where the structure found afloat is sea plane and aeroplane combined. It is true that the primary function is then movement in the air, and that the function of movement in the water is auxiliary and secondary. That is, indeed, a reason why the jurisdiction of the admiralty should be excluded when the activities proper to the primary function are the occasion of the mischief. It is no reason for the exclusion of jurisdiction when the

mischief is traceable to the function that is auxiliary and secondary. Collision does not cease to be collision and a peril of the sea because the structure is amphibious. We cannot even say that the chance that the peril will be encountered is so remote as to be negligible. The records of the Navy Department show that there have been times, in transatlantic flights, when planes, abandoning the air, moved for days upon the water. The cause might be lack of fuel or other disability. Even in the absence of such causes, there must always, for at least some space, be movement upon the water before there is ascent into the air. Jurisdiction cannot vary as the distance is short or longer. That would require us to say that the plane, by keeping to the water, could transform itself into a vessel, but would leave us helpless to define the point at which transformation would be suffered. From such embarrassments of definition there is but one avenue of escape. It is found in the conclusion that the plane is a vessel, and hence within the jurisdiction of the admiralty, when it is in fulfilment of its functions as a traveler through water, and has put aside its functions and capacities as a traveler through air.

**Workmen's
compensation
—injury by
hydro-aeroplane.**

The conclusion to which we are thus led is in accordance with the practice of the government, so far as practice has developed. The Treasury Department of the United States requires sea planes or hydro-planes to be registered as vessels. The same department has held that in navigating the water they are subject to the rules of the road. It has also held them to be vessels within the meaning of the Tariff Law (Act Oct. 3, 1913, § 4-J, subds. 5 and 6 [U. S. Comp. Stat. §§ 5309, 5310, 2 Fed. Stat. Anno. 2d ed. p. 885]; Treasury Decision No. 36,156). Rulings not dissimilar have been made by the Department of Commerce. A libel against a hydro-aeroplane has been filed in the

United States district court for the southern district of New York, and process issued thereon. American Bar Asso. 1921, Report of the Special Committee on the Law of Aviation, pp. 7, 24.

The order of the Appellate Division and the award of the Commis-

sion should be reversed, and the claim dismissed, with costs against the Industrial Commission in the Appellate Division and in this court.

Hiscock, Ch. J., and Hogan, Pound, McLaughlin, Crane, and Andrews, JJ., concur.

ANNOTATION.

Jurisdiction of admiralty over aircraft, or combined air and water craft.

The reported case (REINHARDT v. NEWPORT FLYING SERVICE CORP. ante, 1324) holds that an injury by a hydro-aeroplane while it was moored in navigable waters was by a vessel within the admiralty jurisdiction, and that, therefore, the injury could not be compensated for under a state workmen's compensation act. (See, in that connection, annotation in 11 A.L.R. 1155, and the annotation to *Berry v. M. F. Donovan & Sons*, — A.L.R. —.) The court calls attention to the fact that the government departments require sea planes or hydro-aeroplanes to be registered as vessels, and hold that in navigating the water they are subject to the rules of the road. It was also stated that a hydro-aeroplane is two things — a sea plane, as which it is the subject of admiralty jurisdiction, and an aeroplane, as which it does not come within such jurisdiction, since it is not a vessel. This appears to be the first case which has considered the question of the jurisdiction of admiralty over a combined air and water craft. One case has been disclosed, however, which has passed upon the question as to an aircraft.

In the case just referred to (*The Crawford Bros.* (1914) 215 Fed. 269) it was decided that admiralty had no jurisdiction of a libel in rem for repairs to an aeroplane. The court here said: "This is a libel in rem for repairs to an aeroplane. The matter is before the court upon exceptions by an intervening libellant, asserting a salvage claim for having salvaged the aeroplane after it had fallen into the waters of Commencement bay,—the same being navigable

waters of Puget Sound,—while on a flight over said bay. The intervening libellant expressly avers that he does not wish to enforce his maritime lien for salvage. The exception is that the court has no jurisdiction in the matter. It is conceded, by counsel for libellant, that there is no precedent for this proceeding, but it is contended that, as jurisdiction in admiralty has, in the past, been extended to meet the needs of commerce and the questions arising therefrom, in the face of this new need, the jurisdiction should grapple with the questions arising out of navigation of the air, and not await legislative action. Familiar instances of the growth or evolution of the admiralty jurisdiction are pointed out: The adoption of navigability as the test of jurisdiction, rather than confining it to the ebb and flow of the tide; its extension to include steam vessels upon their advent, holding floating elevators, dry docks, rafts, submarine vessels subject to the jurisdiction; the giving of a maritime lien for personal injuries, as well as one to the stevedore. The progress thus shown, it is asserted, warrants the court in assuming jurisdiction of this cause. In 1909 an International Juridic Committee on Aviation was organized at Paris. The committee on January 16, 1910, decided upon the outline of a legal Code of the Air, which has since been in course of elaboration, and progress upon which is regularly reported in the committee's review. The committee itself consists of jurists, lawyers, and legal students in France and French colonies, several of the states of

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DAVID JONES, Appt.,
v.
CONTINENTAL CASUALTY COMPANY.

Iowa Supreme Court — September 29, 1920.

(— Iowa, —, 179 N. W. 203.)

Insurance — loss of foot — meaning of “at ankle.”

1. Amputation of the foot immediately in front of the ankle joint and heel, between the cuneiform and scaphoid, and through the cuboid bones, is within an accident policy insuring against severance of the foot at or above the ankle.

[See note on this question beginning on page 1339.]

— construction of policy.

2. A strained or unreasonable construction of the language of an insur-

ance policy should not be indulged, where there is no real ambiguity.

[See 14 R. C. L. 931, 932.]

APPEAL by plaintiff from a judgment of the District Court for Lee County (Hamilton, J.) in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

Statement by Preston, J.:

Action at law to recover upon an accident insurance policy. Trial to a jury. At the close of plaintiff's evidence, the trial court sustained defendant's motion for a directed verdict in his favor. Plaintiff appeals.

Mr. E. C. Weber, for appellant:

The policy of insurance should be most favorably construed in favor of the plaintiff.

Meyer v. Fidelity & C. Co. 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328; Kirkpatrick v. Aetna L. Ins. Co. 141 Iowa, 74, 22 L.R.A.(N.S.) 1255, 117 N. W. 1111; Simpkins v. Hawkeye Commercial Men's Asso. 148 Iowa, 551, 126 N. W. 192.

An insurance policy is to be interpreted according to its true character and purpose, and in the sense in which the insured had reason to suppose it was understood.

Sneck v. Travelers' Ins. Co. 88 Hun, 94, 34 N. Y. Supp. 545; Lord v. American Mut. Acci. Asso. 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293.

Severance “at or above the ankle” should be construed according to the ordinary and fair meaning of the words used, and not in an anatomical or technical sense.

Sheanon v. Pacific Mut. L. Ins. Co. 18 A.L.R.—84.

77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799; 1 C. J. § 8, p. 417.

The provision in the policy, “loss, as used with reference to hand or foot, means complete severance at or above the wrist or ankle,” is reasonably susceptible to two constructions, and the one most favorable to the insured should be adopted.

Peterson v. Modern Brotherhood, 125 Iowa, 563, 67 L.R.A. 631, 101 N. W. 289; Young v. Travelers Ins. Co. 80 Me. 244, 13 Atl. 896.

It was a question for the jury whether the amputation (or severance) was at or above the ankle.

Moore v. Aetna L. Ins. Co. 75 Or. 47, L.R.A.1915D, 264, 146 Pac. 151, Ann. Cas. 1917B, 1005; 1 C. J. 467; Beber v. Brotherhood of R. Trainmen, 75 Neb. 183, 121 Am. St. Rep. 782, 106 N. W. 168; Sheanon v. Pacific Mut. L. Ins. Co. supra.

Messrs. George R. Sanderson, J. M. C. Hamilton, Manton Maverick, and M. P. Cornelius, for appellee:

Where a policy of accident insurance promises payment for the loss of either foot, by complete severance at or above the ankle, there can be no recovery for loss of a foot where it appears through undisputed evidence that a substantial portion of the foot remains.

Wiest v. United States Health &

men v. Walsh, 89 Ohio St. 15, 103 N. E. 759; Continental-Casualty Co. v. Bows, 72 Fla. 17, 72 So. 278; Hardin v. Continental Casualty Co. — Tex. Civ. App. —, 195 S. W. 653; Peterson v. Modern Brotherhood, 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289; Bingham v. Clubb, 42 Tex. Civ. App. 312, 95 S. W. 675.

Where the only promise to pay for the loss of a foot by a policy of accident insurance is a promise to pay for the loss of the foot by complete severance at or above the ankle, such a provision is valid. Where it is proved that a substantial portion of the foot below the ankle remains, the insured cannot recover and there is no occasion for the application of the doctrine of strict construction.

Mady v. Switchmen's Union, 116 Minn. 147, 133 N. W. 472; Stoner v. Yeomen of America, 160 Ill. App. 432; Newman v. Standard Acci. Ins. Co. 192 Mo. App. 159, 177 S. W. 803; Metropolitan Casualty Ins. Co. v. Shelby, 116 Miss. 278, 76 So. 839.

Before a court can consider the applicability of the doctrine of strict construction, it must first be sure that there is a real ambiguity as to the intention of the contracting parties. If a consideration of the entire instrument indicates that there is no ambiguity, then no question of construction can arise. Courts should not and will not conjure up a fanciful uncertainty by torturing the plain words of a policy, and, having by this means evolved an imaginary ambiguity, construe the same against the insurance company.

Mitchell v. German Commercial Acci. Co. 179 Mo. App. 1, 161 S. W. 362; McKinney v. General Acci. F. & L. Assur. Co. 128 C. C. A. 449, 211 Fed. 951; Blume v. Pittsburgh Life & T. Co. 183 Ill. App. 295; John Church Co. v. Aetna Indemnity Co. 13 Ga. App. 826, 80 S. E. 1093; Leshner v. United States Fidelity & G. Co. 239 Ill. 502, 88 N. E. 208; Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; Standard Life & Acci. Ins. Co. v. McNulty, 85 C. C. A. 22, 157 Fed. 224; Delaware Ins. Co. v. Greer, 61 L.R.A. 137, 57 C. C. A. 188, 120 Fed. 916; Perry v. Provident L. Ins. & Invest. Co. 99 Mass. 162; Perry v. Standard Life & Acci. Ins. Co. 59 Tex. Civ. App. 50, 125 S. W. 374; Continental Casualty Co. v. Ogburn, 175

101 Tex. 102, 105 S. W. 35.

While it is true that a policy of insurance should be construed favorably to the insured in cases of doubt or ambiguity, this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured.

Tigg v. Register Life & Annuity Ins. Co. 152 Iowa, 723, 133 N. W. 322; Currie v. Continental Casualty Co. 147 Iowa, 281, 140 Am. St. Rep. 300, 126 N. W. 164; Peterson v. Modern Brotherhood, 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289; Hall v. Hardaker, 61 Fla. 267, 55 So. 977; Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922.

Preston, J., delivered the opinion of the court:

Plaintiff's foot was accidentally crushed under a car wheel. He had an accident policy in defendant company. Amputation was necessary, and the severance was at the point indicated by the line in the cut here shown:

EXHIBIT 6

By the policy defendant promised to pay plaintiff "indemnity for loss of life, limb, limbs, sight, or time, resulting from a personal bodily injury, all in the manner and to the extent hereinafter provided. . . . For loss of either foot, the principal sum of \$1,000." A later provision in the policy reads: "'Loss,' above used with reference to hand or foot, means complete severance at or above the wrist or ankle." The petition is in two counts. In the first plaintiff claimed that he received an

injury to his foot to the extent that amputation was necessary, and that he lost the use of his foot. In the second count he claimed he received an injury to his foot, and that it was amputated and severed at the ankle, and that he lost the use of said foot. He asks judgment on both counts in the total sum of \$1,000. The answer is in general denial.

Plaintiff testified that he could bear his weight on this leg, but cannot use it; it gets weak and turns over; cannot get around without a crutch, only a few steps. The surgeon who made the amputation testified that the operation is what is called the "Forbes operation;" that means the line of separation between the cuneiform and scaphoid, and through the cuboid.

"Cuboid bone was severed. The scaphoid is located back towards the heel, and the cuneiform bones are in front, or towards the toes. There are three cuneiform bones. The bones right above the line and on the side of the great toe where it was amputated is the scaphoid, and the cuboid is on the side of the little toe. Half of that remains and half was removed. The tarsus bones are all the bones of the foot back of the metatarsus, and contain what is known as the talus, or astragalus; the talus, or astragalus, being known as one of the tarsal bones. The amputation of Mr. Jones's foot was probably an inch from the talus or astragalus. In my opinion, for the purpose of having an artificial foot for Mr. Jones, it would have been better if the amputation would have been made above what is commonly known as the 'ankle joint.' Because of the amputation as made, the function of the foot has been diminished."

The amputation of the foot has changed the relation of the bones. One half of the arch is removed, and the portion of the arch remaining must tip a little so the heel hits back a little as he puts his weight on it. In my opinion, he could

walk without a crutch or cane. The calcaneum, or the os calcis, is one of the tarsal bones, and the astragalus rests upon it. Articulation of the astragalus with the leg bone is what forms the ankle joint.

Q. If there is a tipping back and forth of the heel bone, would it not affect the astragalus?

A. The weight of the body might fall on a slightly different surface.

Q. That would not be the natural condition of the astragalus?

A. No, sir.

The cuboid attaches to the os calcis and the forepart of the two small metatarsals; the astragalus, os calcis, scaphoid, cuneiform, and cuboid bones are known as the "tarsal bones." The foot consists of twenty-six bones; seven in the tarsus, called the "astragalus," the os calcis, the scaphoid, the cuboid, and three cuneiform bones, and there are five metatarsals and fourteen phalanges.

The motion to direct a verdict was on these grounds:

"(1) Because the plaintiff's petition states no cause of action.

"(2) Because the plaintiff has failed to prove facts entitling him to recover in this action.

"(3) Because the policy of insurance upon which plaintiff brings this action contains the provision that "loss," as above used with reference to hand or foot, means complete severance at or above the wrist or ankle;" and the plaintiff has failed to allege or prove a complete severance of his foot at or above the ankle.

"(4) Because the evidence shows that the severance or amputation was made below the ankle.

"(5) Because the evidence shows that a substantial portion of plaintiff's left foot still remains attached to plaintiff's body."

1. It may be conceded at the outset that the provision in the policy in question is valid, and that the court will not make a contract for the parties; and further, that, if the language employed is plain and unambiguous, the language used

insurance—construction of policy. construction of the language used, where there is no real ambiguity, should not be indulged. On the other hand, it is conceded by counsel for either party that if the policy is reasonably susceptible of two constructions, and there is doubt as to the meaning, and therefore an ambiguity, the same is to be construed strictly against the company. These propositions are so well settled that we shall not enter into any extended discussion of the cases, but simply cite some of them. On the several propositions before set out appellee cites the following: *Mitchell v. German Commercial Acci. Co.* (1913) 179 Mo. App. 1, 161 S. W. 362; *McKinney v. General Acci. F. & L. Assur. Co.* (1914) 128 C. C. A. 449, 211 Fed. 951; *Blume v. Pittsburgh Life & T. Co.* (1913) 183 Ill. App. 295; *John Church Co. v. Aetna Indemnity Co.* (1913) 13 Ga. App. 826, 80 S. E. 1093; *Leshner v. United States Fidelity & G. Co.* (1909) 239 Ill. 502, 88 N. E. 208; *Imperial F. Ins. Co. v. Coos County* (1894) 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Standard Life & Acci. Ins. Co. v. McNulty* (1907) 85 C. C. A. 22, 157 Fed. 224; *Delaware Ins. Co. v. Greer* (1903) 61 L.R.A. 137, 57 C. C. A. 188, 120 Fed. 916; *Perry v. Provident Life Ins. & Invest Co.* 99 Mass. 162; *Perry v. Standard Life & Acci. Ins. Co.* (1910) 59 Tex. Civ. App. 50, 125 S. W. 374; *Continental Casualty Co. v. Ogburn* (1912) 175 Ala. 357, 57 So. 852, Ann. Cas. 1914D, 377; *Continental Casualty Co. v. Wade* (1907) 101 Tex. 102, 105 S. W. 35; *Hall v. Hardaker*, 61 Fla. 267, 275, 55 So. 977; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 223, 49 So. 922; *Tigg v. Register Life & Annuity Ins. Co.* 152 Iowa, 723, 133 N. W. 322; *Currie v. Continental Casualty Co.* 147 Iowa, 281, 140 Am. St. Rep. 300, 126 N. W. 164, *Peterson v.*

It may be conceded, too, that the language used in the policy is a part of the promise, and that to authorize a recovery the loss must fall within the promise.

2. It is further contended by appellee, where a policy of accident insurance promises payment for the loss of either foot by complete severance at or above the ankle, there can be no recovery for loss of a foot where it appears, from the undisputed evidence, that a substantial portion of the foot remains. On this proposition they cite: *Wiest v. United States Health & Acci. Ins. Co.* 186 Mo. App. 22, 171 S. W. 570; *Brotherhood of R. Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759; *Continental Casualty Co. v. Bows*, 72 Fla. 17, 72 So. 278; *Hardin v. Continental Casualty Co.* — Tex. Civ. App. —, 195 S. W. 653; *Peterson v. Modern Brotherhood*, 125 Iowa, 562, 67 L. R.A. 631, 101 N. W. 289; *Bigham v. Clubb*, 42 Tex. Civ. App. 312, 95 S. W. 675. Also the following cases to the same point, and to the further point that under such circumstances there is no occasion for the application of the doctrine of strict construction. *Mady v. Switchmen's Union*, 116 Minn. 147, 133 N. W. 472; *Stoner v. Yeomen of America*, 160 Ill. App. 432; *Newman v. Standard Acci. Ins. Co.* 192 Mo. App. 159, 177 S. W. 803; *Metropolitan Casualty Ins. Co. v. Shelby* 116 Miss. 278, 76 So. 839.

We may say in passing that it is possible, and some of the cases hold, that there may be a loss of a foot without any severance; that is, the loss of the use of the foot. But it may be conceded that under the policy in the instant case there must have been a severance. There was a severance. Under the terms of the policy such severance must have been at or above the ankle. We shall spend no time in discussing the question as to whether the severance in this case was above the ankle, because it is not necessary

that there should be such severance in order to authorize a recovery. If there was a loss of the foot by a severance at the ankle, it is sufficient. Whether the severance was at the ankle we shall consider later. It should be borne in mind, however, that the promise in this policy is to pay for the loss of a foot, and the later provision in the policy defines, or attempts to define, the meaning of such term.

We shall notice some of appellee's cited cases, and those most strongly relied upon to sustain its contention. In the *Wiest Case*, *supra*, the policy provided for the payment of the principal sum for the loss of one hand, which was stipulated to mean loss by severance at or above the wrist joint. The plaintiff's injury necessitated amputation of the thumb and first three fingers, and a large portion of the palm, leaving only the little finger and a part of the palm supporting it. The little finger and the portion of the palm remaining were permanently paralyzed and of no use or service. Plaintiff lost the entire use of his hand as completely as if it had been severed at the wrist joint. The question was whether, plaintiff having suffered the total loss of the use of the hand, he was entitled to recover without proof of the actual, physical severance thereof at or above the wrist joint. The court said in part:

"But here the policy provides that the loss of a hand shall mean loss by severance at or above the wrist joint. Not only is it provided that the loss of such member shall be by physical severance thereof, but the extent of such loss is made exact and definite by locating the precise point at or above which such severance shall take place. . . .

"In the instant case, had the provision of the policy agreeing to indemnify plaintiff in the amount of the principal sum of the policy for the 'loss of one hand' stood entirely alone, and unaffected by any other provision thereof, beyond doubt plaintiff would have been entitled to

recover, having lost the entire use of his hand. However, the very next paragraph of the policy provides, in unmistakable terms, what shall be meant by the 'loss of one hand,' to wit, the loss thereof by severance at or above the wrist joint. Plaintiff has not suffered a loss of his hand by severance at or above the wrist joint, and, if effect is to be given to the last-mentioned provision, plaintiff's case must fail.

"If any ambiguity or uncertainty of meaning could be said to inhere in the pertinent provisions of the policy, it would readily be resolved in favor of the insured and against the insurer. Such is the well-established and wholesome doctrine with respect to the construction of insurance contracts. . . .

"If it appears that the portions of the policy under consideration, when read and construed together, were at all ambiguous or of doubtful import, we should not hesitate in the least to 'blandly' resolve such ambiguity or doubt in favor of the insured. Indeed, the policy should, if possible, be construed so as to effectuate the insurance, and not to defeat it; for the indemnity is the very object and purpose of the contract, for which the insured has paid a consideration. See *Stix v. Travelers Indemnity Co.* 175 Mo. App. 171, 157 S. W. 870.

"But it appears that that defendant has chosen apt language to indicate that it does not agree to indemnify the insured for the loss of a hand, unless such loss shall consist in the actual physical severance of the hand at or above the wrist joint. It is by no means likely that the policyholder so understood, or that he would knowingly have accepted the policy with such restrictive limitations upon his right to recover the indemnity for the loss of a hand or foot; but we can find the intention of the parties only from the language employed in the contract, having regard to the rules of interpretation which may be applied to contracts of this character. We cannot

disregard it altogether; for, however great may be our inclination or duty to protect a policyholder against intricate or obscure technical provisions designed for the avoidance of liability on the part of the insurer, we cannot make a contract for the parties. The stipulation in question, as we have said, follows immediately that portion of the policy providing for specific losses, in the same type in which the body of the policy is printed. Its meaning appears to be plain and unmistakable. It pointedly defines what shall constitute the 'loss of a hand.' "

It will be noticed that in that case the severance was to be at the joint. This, we think, fixes the point more definitely than would have been the case if it had been omitted. It should be said, however, that some, though not all, the definitions of "ankle," say it is the joint connecting the foot and the leg. This feature will be taken up later in the opinion. Though the court in that case "blandly," or, perhaps, strictly speaking, positively, states that the policy fixes the severance at the precise point at or above which the severance shall take place, we have grave doubt whether the use of the words "at the ankle" does fix an exact, definite, or precise point. It will be observed that in the Wiest Case the question of the meaning of the word "at," and whether it does fix a precise point, is not discussed, but only asserted. A careful reading of that case shows, we think, that the court was interpreting the contract more especially with reference to the question whether there was a loss of the hand without a severance, as distinguished from a loss with a severance.

In *Brotherhood of R. Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759, the provision of the policy was for the severance of an entire hand at or above the wrist joint, etc. Plaintiff's thumb was amputated,

permanently disabled from using the hand to perform any manual service. Construing the pleadings in that case, the court held that no severance was alleged, and the court held that there was no amputation or severance of an entire hand at or above the wrist joint, and that there was no ambiguity. The language of the policy in that case is more precise and definite than in the case at bar, in that the words "entire" and "joint" are used.

In the *Bows Case*, 72 Fla. 17, 72 So. 278, a case against this defendant and under a policy like the one now in controversy, where the policy provided for the loss of either hand by complete severance at or above the wrist, it was shown that the ends of the metacarpal bones were disjointed and separated, or, in a sense, severed from the carpals. This left the thumb sticking out so far that there was no place to get the muscles of the thumb attached to anything, and one bone of the wrist was removed so the thumb could be set further back to bring the muscles down, and thus get an attachment for the muscles, and give him some use of the thumb. The court, discussing the question whether there was a complete severance of plaintiff's hand at or above the wrist, held that there was not such a severance, and denied a recovery. The question was whether there had been a severance within the meaning of the policy. The opinion in that case cites the *Wiest*, *Walsh*, and other cases cited by appellee.

The *Hardin Case*, — Tex. Civ. App. —, 195 S. W. 653, was on a policy issued by this defendant, where the claim was for the loss of a hand by complete severance at or above the wrist. It was shown by the evidence: "That the appellant's hand was amputated, so that all the phalanges or finger bones were gone, except the proximal one half of the first phalange of the thumb; all of the fifth metacarpal bone is

except the proximal heads of bone, and that there remain of the hand the proximal heads of the second, third, and fourth metacarpals, the proximal half of the first phalange of the thumb, all of the first metacarpal, and all of the rest of the bones of the hand. It was agreed upon the trial of the case between the parties that the human hand is composed of scaphoid, semilunar, cuneiform, pisiform, trapezium, trapezoides, os magnum, and the unciform bones and five metacarpal bones and fourteen phalanges."

The trial court found as a fact, from the evidence, that plaintiff's hand was not completely severed at the wrist in contemplation of the provision of the policy. The appellate court held that the finding had sufficient support in the evidence, and that the evidence shows that not all of the hand was severed, and that it does not show that the entire hand was severed at the wrist. The court interpolated the word "entire," which is not in the policy. No discussion of the meaning of the word "at."

Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso. 122 Mich. 548, 48 L.R.A. 86, 80 Am. St. Rep. 598, 81 N. W. 326, is cited in the *Bows Case* and by appellee herein. In that case it was held substantially that the amputation of a person's foot so as to leave all of the heel, and substantially all of the hollow of the foot, and a part of the ball, does not give a right to the full amount of the insurance on the ground that the full use of the foot is lost, under a by-law of the association providing for full payment in case of "amputation of a limb (whole hand or foot)," as the word "whole" applies to the foot, as well as to the hand, and the injury insured against is not the loss of the use of a hand or foot, but the amputation of a limb that should include a whole hand or whole foot. More of the foot remained there than in the instant case. The pivot-

struck to mean a whole foot as well as a whole hand. The foregoing cases are more nearly in point than some of the others cited, but for the reasons indicated they are not quite "gray horses" or "spotted mules" with the case at bar. The other cases will be referred to more briefly.

In the *Mady Case* the question was whether there was a total disability under a policy providing for a physical separation of the loss of four fingers of one hand, at or above the third joint, and so on, where, after the amputation, the entire first finger and the thumb remained attached to, and a part of the hand. It was held that the evidence showed a loss of but approximately 50 per cent in the usefulness of the index finger, and he was allowed only a part of the recovery instead of as for total disability.

In the *Stoner Case*, where it was provided for the loss of a hand by severance at or above the wrist, it was held that the loss of the use was not sufficient to establish liability.

The *Bigham Case* arose out of an election contest. The statute exempted those from payment of poll tax who have lost a hand or foot. The evidence showed that the party had lost three fingers and part of the forefinger, but had not lost the palm and thumb. The court said that the loss of the members is what constitutes the exemption, and not the maiming of them; that a man may lose the use of a limb and not lose the limb.

In the *Newman Case* the court said that the point of severance is stipulated in the contract, and must be enforced as made. The stipulation was for the loss of the thumb and index finger by severance at or above the metacarpophalangeal joints.

In the *Shelby Case* the loss of the use of a hand was not within the provision of the policy providing for severance at or above the wrist, since severance means the removal

mough of the flesh of the hand was left to cover the bones of the wrist. A hardened callous, but no more than good surgery would require for protection of the bones of the wrist. The court said that substantially nothing remains of plaintiff's hand but a worse than useless fragment. The court held that the language used was reasonably susceptible of two interpretations, and that the doubt should be resolved in favor of the insured. The court said further: "Let us consider the relations of the parties and the object which plaintiff had in view when he took out this policy. He had a good hand, against losing the use of which he desired to insure. If he had been told the intent and meaning of the policy was such that, if, in case of a necessary amputation, the surgeon should leave some useless shred of his hand to be a source of annoyance and inconvenience, and thereby his policy would be practically worthless, does any sane person believe for a moment he would have taken out the policy? The substance of what he sought was insurance against the possible loss of his hand as a useful member of his body. Substantially he has lost his hand by removal at the wrist. In view of all the decisions, it is apparent that the words 'by removal at or above the wrist' were introduced as a safeguard against possible fraud, and to prevent a recovery in cases where there had been no substantial removal of the injured member; but here the hand, as a hand, is gone. Practically the plaintiff has no hand."

The court refers to the Sneek Case as sustaining its conclusions. In the Sneek Case the provision was against loss by severance of one entire hand. The court quotes from the Sneek Case as follows: "To require the insured to submit to a strictly literal interpretation of the contract prepared for him by the insurer, without regard to the purpose of the contract or the understanding thereof by the parties, would be to hold that only in case of

the severance of the entire hand, in a most accurately anatomical or technical sense, could the insured recover under the clause of the policy. We do not believe that such a conclusion is required in the present case. The term 'entire hand' is to be taken in its general acceptance and ordinary meaning. In construing this contract the law does not require an injury which comes within a strictly accurate and technical definition of the words employed, but one which reasonably, fairly, and practically comes within the meaning of the terms employed in their general and usual meaning and acceptance. In a contract of insurance providing for indemnity for the loss of a limb, the compensation to be paid is not merely for the physical pain of its amputation, but principally for the deprivation of its use as a member of the body. It would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that, in the use of the language above referred to, the 'entire hand,' as a part of the human structure, is considered in connection with the use to which it is adapted, and the injury which the loss of such would entail? Is it not also fair to assume that this was regarded by the parties as the sense in which the contract was to be understood, and was one of the considerations which influenced the insured to enter into the contract?"

We think the Oregon Case is the better authority, and we are inclined to follow it. The Sheanon Case is not so nearly in point. The provision there provided indemnity for the loss of two entire feet. The court held that the loss of the use of the feet authorized a recovery, though there was no amputation.

There are some other considerations, however, which appear to us

worthy of consideration, and seem not to have been considered in any of the cases, and that is the construction of the word "at" in the term "at or above the ankle," and what constitutes the ankle. One definition of ankle is: The joint which connects the foot with the leg; the tarsus. Webster's Dict. Another: Tarsus, the ankle; the bones or cartilages are part of the foot between the metatarsus and the leg, consisting, in man, of seven short bones. Webster's Dict.; Elements of Physiology, by R. T. Brown, M. D. Another: The bones of the tarsus, or the ankle, are seven in number. 1 Enc. Britannica, 9th ed. p. 830. Another: The ankle joint is formed by the tibia and fibula above and the astragalus below. 1 New International Enc. pp. 783, 784.

The joint which connects the foot with the leg; by extension, the slender part of the leg between the calf and the ankle joint. 8 New National Enc.

The joint connecting the foot at the leg; also the prominence on either side of it. (2) The part of the leg near the ankle joint. Standard Dict.

The joint by which the foot is united to the leg. 1 American Encyclopædic Dict.

The ankle is the joint which connects the foot with the leg; the slender part of the leg between the joint and the calf. New Eng. Dict. (Murray, Oxford).

The ankle is a perfect ginglymus or hinged joint. The bones which enter into its formation are: The lower extremity and internal malleolus of the tibia and the external malleolus of the fibula above, and the upper and lateral articular surfaces of the astragalus below. Human Anatomy, Morris, P. Blackeston's Son & Co. 266 (1898).

"Foot." (1) "The extremity of the leg below the ankle; the part of the leg which treads on the ground in standing or walking, and on which the body is supported. (2) The foot consists of many bones, viz., seven bones of the tarsus (q.

v.), five metatarsal bones, and the phalanges of the toes. Essentially they are homologous with those of the hand." 2 American Encyclopædic Dict.; 1 Hand Atlas of Human Anatomy, Spalteholz, 147-151.

Foot: "The segment of the limb of a vertebrate animal upon which the body rests in standing; the part below the ankle (pes) in man, or below the ankle or wrist (manus or pes) in other vertebrates. The human foot consists of three parts: The ankle or tarsus, the instep or metatarsus, and the toes or phalanges." Standard Dict. 20th Century ed.

These definitions of "ankle" differ. Some give it as the lower part of the leg. If this is accurate, why may it not be said to be the upper part of the foot? Some of the definitions say it is the joint. The joint, perhaps, would be more definite than the ankle, but even "joint" does not necessarily mean the exact point of articulation. Other definitions say it is the tarsus, or that part of the foot between the metatarsus and the leg, consisting of seven short bones. It was some of these seven bones that were severed, or divided, in plaintiff's foot. Can it be said that any of these definitions fix a definite or precise point, or place, when used in connection with the words "severance at the ankle?" It is very clear to us that none of them do so. Under these definitions, what is the ankle? What do the words "at the ankle" mean? Can it be said reasonably that it is plain that there is no doubt or ambiguity as to the precise point where the severance must be, so that the language used is not susceptible of two constructions? Clearly not. The language could have been made more precise and specific. For instance, it could have provided that the severance should be at the articulation of the lower end of the leg bones and the bone or bones upon which they rest, or in some such language. The use of the words "at or above" indicates quite clearly that no definite or precise point of severance was fixed. It could be at or

above. From some of the definitions, the point of severance in this case—that is, the bones that are severed—are a part of the ankle. If such bones at the point of severance are a part of the ankle, then clearly the severance was at the ankle. If the bones severed are a part of the ankle, they are *in* the ankle, and if in the ankle, it is, of course, at the ankle. Furthermore, we find that the word “at” is a preposition of extremely various use. Being less restricted as to relative positions, it may, in different constructions, assume their office, and so become equivalent to “in,” according to the context, or “in or near,” “near,” “close to,” etc. 5 C. J. 1420, 1422.

We do not hesitate to say that, since the bones severed and the point of severance were a part of the ankle, the severance was at the ankle. Plaintiff was insured against the loss of his foot. He did lose his foot by severance, and the severance was at the ankle.

—loss of foot—
meaning of “at
ankle.”

As has been said, the use of the words “at or above” negated the thought of a precise point, and we find that the use of the word “at” usually negatives the idea that precision or an exact coincidence is intended, either of place or time. It is a word of great relativity and elasticity of meaning, and is somewhat indefinite, shaping itself easily to varying contexts and circum-

stances. It is not a word of precise and accurate meaning, or of clean, clear-cut definition, and it has been said that the connection furnishes the best definition. The word is not definitely locative when applied to the place or location of an object, and, so used, is less definite than “in” or “on,” having a much wider signification, and it may include all that “in” would include, and less than “in and near.” Its primary idea, as applied to place, is “nearness,” and it is commonly used as the equivalent of “near.” 5 C. J. 1422 to 1427. See also *Old Ladies Home v. Hoffman*, 117 Iowa, 716, 89 N. W. 1066.

Of course the word may, under some circumstances, indicate a definite point of time or place.

We reach the conclusion that under the evidence plaintiff lost his foot, and the use of it, by severance at the ankle; at least, it was a question for the jury. We hold that the words used as indicating the point of severance are, at the most, ambiguous; and that to carry out the purposes intended—that is, to pay indemnity for the loss of plaintiff's foot—it could be properly found that the severance was at the ankle. It follows that the court erred in directing a verdict for the defendant. The judgment is reversed and the cause remanded.

Weaver, Ch. J., and Evans and Salinger, JJ., concur.

ANNOTATION.

Loss or mutilation of member, or loss of sight, contemplated by indemnity provisions of accident insurance policy.

- I. Provisions against loss of hands or feet, generally, 1339.
- II. Provisions against loss of “entire” members, or members “at or above” certain points, 1341.
- III. Express provisions as to severance, amputation, or physical separation, 1341.
- IV. Provisions against loss of arm, 1345.
- V. Provisions as to breaking arm or leg, 1345.
- VI. Provisions against loss of eyesight, 1346.

As to what amounts to loss of member within the meaning of Workmen's Compensation Act, see annotation to *McLean v. American R. Exp. Co.* post, 1350.

I. Provisions against loss of hands or feet, generally.

In some of the early forms of accident insurance policies there was a provision for indemnity in the event of the loss of hands or feet. It was

contended by the insurers that under these policies a recovery could not be had where there had been no amputation or severance from the body of the injured member. The courts, however, have, as a rule, refused to give this meaning to such provisions, and have held that under them a recovery may be had if the insured, by reason of his injury, has been deprived of the use of the member. *Supreme Ct. of Honor v. Turner* (1901) 99 Ill. App. 310; *Theorell v. Supreme Ct. of Honor* (1904) 115 Ill. App. 313; *Sisson v. Supreme Ct. of Honor* (1904) 104 Mo. App. 54, 78 S. W. 297; *Lord v. American Mut. Acci. Asso.* (1894) 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293; *Sheanon v. Pacific Mut. L. Ins. Co.* (1890) 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799.

Thus, it has been held that there was a loss of a hand where a load of gunshot passed through the palm of the insured's hand, tearing the muscles of the thumb and injuring the abductor muscles, and destroying all practical use of the hand for laboring purposes. *Supreme Ct. of Honor v. Turner* (Ill.) supra.

And in *Sisson v. Supreme Ct. of Honor* (1904) 104 Mo. App. 54, 78 S. W. 297, where the policy provided for the payment of indemnity in case of the loss of a hand, the question whether there had been a loss warranting a recovery was held for the jury, there being evidence that the hand was crushed so that it was of no practical use, although the whole hand was not removed.

In *Modern Order of Praetorians v. Taylor* (1910) 60 Tex. Civ. App. 217, 127 S. W. 260, where the policy provided for the payment of a certain sum if a member "shall lose a foot or hand by accident," it was held that there need not be a severance of a foot or hand, but that a loss of the member must be permanent, and that a total paralysis of a foot, depriving the insured of the use of it temporarily, would not justify a recovery.

In *Brotherhood Locomotive F. & E. v. Aday* (1911) 97 Ark. 425, 34 L.R.A.

(N.S.) 126, 134 S. W. 928, it was held that an insured was entitled to recover on a benefit certificate insuring him against permanent disability for performing manual labor on account of permanent paralysis of either extremities, where one hand was paralyzed so that it compelled him to abandon his calling, and there was no way of restoring it to usefulness except by an operation which he had no means to secure.

And in *Theorell v. Supreme Ct. of Honor* (1904) 115 Ill. App. 313, under a policy providing for indemnity in case of the loss "of both feet, both hands, or both eyes," the question whether there had been a loss of both feet warranting a recovery was held for the jury, where there was evidence that insured, while working at his trade as a carpenter, fell and received injuries resulting in paralysis of his lower limbs, so that he was unable to stand without support, although he was able to move about with crutches.

In *Lord v. American Mut. Acci. Asso.* (1894) 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293, under a policy providing for a certain indemnity in case of injuries resulting in the "loss of one or both hands" causing immediate total disability, it was held a question of fact for the jury whether an injury resulting in the tearing off of three fingers, and a part of the other, and cutting the hand, and destroying the joint of the thumb, was the loss of one hand causing immediate and total disability.

But in *Stevens v. People's Mut. Acci. Ins. Asso.* (1892) 150 Pa. 132, 16 L.R.A. 446, 24 Atl. 662, under an accident policy excluding liability for injuries resulting directly or indirectly from disease, and insuring against disablement by "loss of one hand or foot," it was held that no recovery could be had where the insured's foot was not injured, but, by reason of an injury to his back, he was able to use it only when he wore a plaster jacket, which prevented the injury to his back affecting the use of his foot.

And in *Nashelman v. Grand Lodge,*

P. O. W. (1918) 209 Ill. App. 637, it is stated in the abstract of the decision that to recover under an accident policy for the loss of a hand, through sustaining a fracture in falling, the plaintiff must show that the injury resulted in a total loss of the usual functions of the hand.

II. Provisions against loss of "entire" members, or members "at or above" certain points.

For cases in which these terms are used in a provision which expressly includes the severance, or amputation, see *infra*, III.

Under a provision for indemnity in case of the loss of "two entire feet," there was held to be a loss within the meaning of the provision, where there was an entire destruction of the use of both of a person's feet by paralysis, caused by accidental pistol wounds in the back. *Sheanon v. Pacific Mut. L. Ins. Co.* (1890) 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799.

But it has been held that a recovery for the loss of one hand cannot be had under a policy providing for an indemnity for the "loss of one entire hand and one entire foot, or of two entire hands or two entire feet," since such policy provides for an indemnity in case of loss of two limbs,—and not of one limb, or part of two limbs. *Gentry v. Standard Life & Acci. Ins. Co.* (1896) 6 Ohio S. & C. P. Dec. 114.

In *Fidelity & C. Co. v. Hart* (1911) 142 Ky. 25, 133 S. W. 996, an accident policy provided that if the insured should contract any disease which should result, independently of all other causes, in permanent paralysis, whereby the insured should entirely lose the use of both hands, or both feet, or of one hand and one foot, and on account of either of the conditions be permanently unable to engage in any work or occupation for wages or profit, a specified indemnity should be paid upon the filing of a satisfactory proof of the continuance for fifty-two consecutive weeks of such paralysis; and another clause provided that written notice, as early as might be rea-

sonably possible, must be given of disability for which a claim was to be made, with full particulars, and that affirmative preliminary proofs of paralysis must be furnished within fourteen months from the date of the beginning of paralysis. The insured in this case claimed to recover because of the entire loss of the use of his left hand and foot, caused by a stroke of paralysis, and it was held that, in order to recover the indemnity, the paralysis must have deprived the insured of the capacity to labor so as to earn wages for fifty-two consecutive weeks, but that it need not have been a total paralysis of the limbs at the beginning, but that it was only necessary that within fifty-two weeks of its beginning it should have resulted in such total paralysis, and that this condition should have been permanent.

In *Gahagan v. Morrissey* (1897) 6 Pa. Dist. R. 135, where the insured had lost the use of a hand, although he was employed by the company for which he was working when insured, in another line of work, it was held that, under a provision that any member suffering "the loss of a hand at or above the wrist joint" should be considered totally disabled, the entire loss of the use of a hand might fairly be regarded as coming within the terms of the policy, and that it did not necessarily apply only to cases of an amputation of the hand.

But in *Stoner v. Yeoman of America* (1911) 160 Ill. App. 432, it was held that the insured had not suffered the "loss of a hand at or above the wrist," where he had lost his third and little finger, and injured the knuckle joint of the middle finger, but had at least half of the hand left, since it was held that he had not lost a hand at or above the wrist.

III. Express provisions as to severance, amputation, or physical separation.

The later forms of policies expressly provide for indemnity in case of the severance, amputation, or physical separation of a member, and under these provisions recovery has

generally been denied, where there was no severance of the injured member from the body. *Continental Casualty Co. v. Bows* (1916) 72 Fla. 17, 72 So. 278; *Metropolitan Casualty Ins. Co. v. Shelby* (1917) 116 Miss. 278, 76 So. 839; *Wiest v. United States Health & Acci. Ins. Co.* (1914) 186 Mo. App. 22, 171 S. W. 570; *Newman v. Standard Acci. Ins. Co.* (1915) 192 Mo. App. 159, 177 S. W. 803; *Brotherhood of R. Trainmen v. Walsh* (1913) 89 Ohio St. 15, 103 N. E. 759; *Chevaliers v. Shearer* (1905) 27 Ohio C. C. 509; *Eminent Household, C. W. v. Hancock* (1915) — Tex. Civ. App. —, 174 S. W. 657; *Hardin v. Continental Casualty Co.* (1917) — Tex. Civ. App. —, 195 S. W. 653.

Thus, in *Metropolitan Casualty Ins. Co. v. Shelby* (1917) 116 Miss. 278, 76 So. 839, where an accident policy provided for the payment of a certain sum if the insured should "sustain the loss of one hand by severance at or above the wrist," it was held that no such loss had occurred, although the insured's left hand, as a result of an accidental injury, had become paralyzed and atrophied so that it was of little use. The court said: "Without dispute, the hand was not severed at or above the wrist; in fact it was not severed at all. The evidence does show that plaintiff had lost the use of his hand to a great extent, but his hand is still there. He had simply lost the use of his hand to a great extent. Among the definitions given by Mr. English in his *Law Dictionary* of the word 'severance' is 'removing anything from the realty, as trees, crops,' etc. The same author defines 'sever' as 'to put apart.' The *Revised Encyclopedic Dictionary* defines 'severance' this way: 'The act of severing, dividing, or separating; the state of being severed; the state of being disjoined or separated.' All of the standard dictionaries give similar definitions."

And in *Wiest v. United States Health & Acci. Ins. Co.* (1914) 186 Mo. App. 22, 171 S. W. 570, where the policy expressly defined "loss of member" as "loss by severance at or above the

wrist joints or ankle joints," it was held that there was not a "loss of a hand" within the meaning of the policy, where the insured met with an accident which necessitated the removal of all the hand, except the little finger and a portion of palm which were paralyzed and of no use. The court said: "In the instant case, had the provision of the policy agreeing to indemnify plaintiff in the amount of the principal sum of the policy for the 'loss of one hand' stood entirely alone and unaffected by any other provision thereof, beyond doubt, plaintiff would have been entitled to recover, having lost the entire use of his hand. However, the very next paragraph of the policy provides, in unmistakable terms, what shall be meant by the 'loss of one hand,' to wit, the loss thereof by severance at or above the wrist joint. Plaintiff has not suffered a loss of his hand by severance at or above the wrist joint; and if effect is to be given to the last-mentioned provision, plaintiff's case must fail. If any ambiguity or uncertainty of meaning could be said to inhere in the pertinent provisions of the policy, it would readily be resolved in favor of the insured and against the insurer. Such is the well-established and wholesome doctrine with respect to the construction of insurance contracts. As is said by Lamm, J., in *Mathews v. Modern Woodmen* (1911) 236 Mo. 342, 139 S. W. 151, Ann. Cas. 1912D, 483: 'It is a just and settled rule that the restrictive terms of insurance contracts shall be taken most strongly against the insurer. The doctrine of *contra proferentem* is strictly applied with unaccommodating vigor, and . . . ambiguities are blandly resolved in favor of the insured.' If it appeared that the portions of the policy under consideration, when read and construed together, were at all ambiguous or of doubtful import, we should not hesitate in the least to 'blandly' resolve such ambiguity or doubt in favor of the insured. Indeed, the policy should, if possible, be construed so as to effectuate the insurance, and

not to defeat it; for the indemnity is the very object and purpose of the contract, for which the insured has paid a consideration. See *Stix v. Travelers Indemnity Co.* (1913) 175 Mo. App. 171, 157 S. W. 870. But it appears that the defendant has chosen apt language to indicate that it does not agree to indemnify the insured for the loss of a hand, unless such loss shall consist in the actual physical severance of the hand at or above the wrist joint. It is by no means likely that the policyholder so understood, or that he would knowingly have accepted the policy with such restrictive limitations upon his right to recover the indemnity for the loss of a hand or foot; but we can find the intention of the parties only from the language employed in the contract, having regard to the rules of interpretation which may be applied to contracts of this character. We cannot 'blandly' construe the troublesome provision out of the contract, and disregard it altogether; for, however great may be our inclination or duty to protect a policyholder against intricate or obscure provisions, designed for the avoidance of liability on the part of the insurer, we cannot make a contract for the parties. The stipulation in question, as we have said, follows immediately that portion of the policy providing for specific losses, in the same type in which the body of the policy is printed. Its meaning appears to be plain and unmistakable. It pointedly defines what shall constitute the 'loss of a hand' so as to entitle the assured to the indemnity provided therefor. Under the circumstances it cannot well be said to constitute a 'snare to the unwary,' such as is denounced in *La Force v. Williams City F. Ins. Co.* (1891) 43 Mo. App. 530. See also *Stark v. John Hancock Mut. L. Ins. Co.* (1913) 176 Mo. App. 574, 159 S. W. 758. Nor do we perceive any ground upon which plaintiff may properly be relieved from the effect thereof."

And in *Newman v. Standard Acci. Ins. Co.* (1915) 192 Mo. App. 159, 177 S. W. 808, there was held to be no "loss of thumb and index finger of

either hand by severance at or above metacarpophalangeal joints," where the insured sustained an accident which necessitated the severance through the bone of the thumb and finger, two eighths and three eighths of an inch, respectively, below the articulations, so that two stubs of the thumb and finger bones were plainly visible in an X-ray picture of the hand. The court said: "The contract, in using the word 'joint,' fixed a place—a point of severance; it had no reference to the structures which must exist in order that a joint may be made. We do not mean to hold that, for the severance to be 'at the joint' within the meaning of the policy, it must follow and coincide with the line of articulation, but only that it must be such as destroys the joint as a joint; that is, as an anatomical mechanism. That is to say, the joint must be dismembered."

And under a policy providing that any member of a benefit association, who should suffer the amputation or severance of an entire hand at or above the wrist joint, should be considered totally and permanently disabled, but not otherwise, it has been held that no recovery could be had where a member received an injury which necessitated the amputation of his thumb, and crushed and injured the hand from above the wrist joint so that he was permanently unable to use it to perform any manual service whatever. *Brotherhood of R. Trainmen v. Walsh* (1913) 89 Ohio St. 15, 103 N. E. 759.

So, in *Chevaliers v. Shearer* (1905) 27 Ohio C. C. 509, under a provision of the constitution providing for indemnity if the insured should, "by accident, lose one hand by amputation at or above the wrist," it was held that no recovery could be had where the insured's arm had been permanently disabled, and the full use and service of it practically destroyed, but neither the arm nor hand had been amputated.

And in *Continental Casualty Co. v. Bows* (1916) 72 Fla. 17, 72 So. 278, where the policy provided for the payment of a certain sum "for loss of either hand by complete severance at

or above the wrist," it was held that a recovery under such provision was not justified by evidence that a hand was crushed, and all of it removed by amputation at the wrist, except the thumb, which was of little use, the court holding that there was not, under the facts, a "complete severance" within the meaning of the contract.

And in *Hardin v. Continental Casualty Co.* (1917) — Tex. Civ. App. —, 195 S. W. 654, where the policy provided for the payment of a certain sum in case of loss of a hand, and defined loss to be a complete severance at or above the wrist, it was held that the evidence did not show a loss of a hand within the meaning of the policy, the testimony showing an amputation and the loss of all the phalanges, except the proximal, one half of the first phalange of the thumb, the loss of all of the fifth metacarpal bones, except the proximal heads, and that there remained of the hand the proximal heads of the second, third, and fourth metacarpals, the proximal half of the first phalange of the thumb, all of the first metacarpal, and all of the rest of the bones of the hand.

And in *Eminent Household, C. W. v. Hancock* (1915) — Tex. Civ. App. —, 174 S. W. 657, where the insurer's constitution and by-laws were made a part of the contract, and provided that, if a member should sustain "the loss of one arm by severance at or above the wrist," a certain indemnity should be paid, it was held that recovery for the loss of an arm could be had only where there was a severance from the body, although the policy provided for recovery in the event of a loss of one arm; and it was held that no recovery could be had in case the insured's arm was totally paralyzed, but was not amputated or severed from the body.

And it has been held that the amputation of a person's foot, so as to leave all of the heel and substantially all of the hollow of the foot, and possibly a part of the ball of the foot, does not give any right to the full amount of insurance on the ground

that all the use of the foot is lost, under a by-law of a mutual benefit association providing for full payment in case of the "amputation of a limb (whole hand or foot)," as the word "whole" applies to the foot as well as to the hand, and the injury insured against is not the loss of the use of a hand or foot, but an amputation of the limb that should include a whole hand or foot. *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Co.* (1899) 122 Mich. 548, 48 L.R.A. 86, 80 Am. St. Rep. 598, 81 N. W. 326.

And under a policy providing for indemnity for total disability by "suffering, by means of a physical separation, the loss of four fingers of one hand at or above the third joint. . . . providing the above amputations occur," it has been held that there can be no recovery where an insured receives an injury resulting in the amputation of the second, third, and fourth fingers above the third joint, and injuring the bone in the palm of the hand connected with the first finger, and causing that finger to be deflected somewhat from its normal line, and a loss of about one half the power and efficiency of the finger, since such injury does not come within the language of the provision, as the insured's first finger and thumb remained attached to the hand. *Mady v. Switchmen's Union* (1911) 116 Minn. 147, 133 N. W. 472.

In *Sneck v. Travellers' Ins. Co.* (1894) 81 Hun, 331, 30 N. Y. Supp. 881, under a policy providing indemnity for injuries "if loss by severance of one entire hand" should result, where the plaintiff's hand was cut off three fourths of an inch back of the knuckle joint, and just back of the second bone of the thumb, it was held that, to bring the case within the provisions, the loss must be of the entire hand, the court remarking that this meant substantially the entire hand, in respect both to its structure and use, and stated that in that case there was, upon the undisputed evidence, not such a loss in either respect. But on a subsequent appeal of this case in (1895) 88 Hun, 94, 34 N. Y. Supp. 545, affirmed in (1898) 156 N. Y. 669, 50

N. E. 1122, after the plaintiff had testified substantially that he had no use of the injured member as a hand, and never had had since the accident, although he admitted that upon the former trial he had probably testified that he could use it to place under and against objects for the purpose of lifting and pushing, it was held that the term "entire hand" was to be taken in its general acceptation and ordinary meaning, the court saying that it would seem to be an extremely narrow and technical construction to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the provisions of the policy; and it was held erroneous for the court to hold as a matter of law that the insured had not suffered a loss by severance of an entire hand.

In the reported case (*JONES v. CONTINENTAL CASUALTY CO.* ante, 1329) it was held that an amputation of the foot immediately in front of the ankle joint and heel between the cuneiform and scaphoid, and through the cuboid bones, was within the protection of an accident policy insuring against severance of the foot at or above the ankle, the court holding that there had been a substantial severance of the foot at or above the ankle.

And in *Moore v. Aetna L. Ins. Co.* (1915) 75 Or. 47, L.R.A.1915D, 264, 146 Pac. 151, Ann. Cas. 1917B, 1005, a policy providing compensation for accidental loss of a hand by removal at or above the wrist was held to cover an accident requiring the removal of all the bones of the fingers at the wrist, leaving only flesh enough to protect the bones remaining, and the thumb in a stiffened and useless condition.

In *Beber v. Brotherhood of R. Trainmen* (1905) 75 Neb. 183, 121 Am. St. Rep. 782, 106 N. W. 168, it was held that the question whether there was a total loss of the insured's hand at or above the wrist joint was for the jury, it appearing that the policy sued on provided that any member suffering, "by means of physical separation,

. . . the loss of a hand at or above
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the wrist joint," should be considered totally and permanently disabled, and there being evidence that the insured, by reason of an accident, had lost three fingers, and suffered an injury to the remaining finger and thumb which materially interfered with their use, and that a part of the palm had also been cut away.

IV. Provisions against loss of arm.

It has been held that the amputation of an arm a little below the elbow is the "loss of an arm," within the meaning of a policy which does not mention whether the loss insured against is a loss by amputation below or above the elbow joint. *Garcelon v. Commercial Travelers' Eastern Acci. Asso.* (1904) 184 Mass. 8, 100 Am. St. Rep. 540, 67 N. E. 868.

V. Provisions as to breaking arm or leg.

In *Rogers v. Modern Brotherhood* (1908) 131 Mo. App. 353, 111 S. W. 518, it was held that the construction of a provision for an indemnity if the insured should "accidentally break his leg or arm" was for the court. It was further held in the *Rogers Case* that the definition of the word "leg," as used in the policy, should not be influenced by the meaning placed on it by specialists, since the word has a well-defined common meaning, and it was accordingly held that evidence to define the word should not be admitted, but that the court should ascertain its meaning from the language of the contract, and it was also held that the policy which provided for indemnity if the insured should "break his leg or arm" covered fractures of bones of the limbs, whether such bones were in the hands or feet, or were in the upper and central divisions of the limbs; and it was accordingly held that a fracture of the heel bone was covered by the policy.

And in *Southern Woodmen v. Morris* (1916) 14 Ala. App. 464, 70 So. 953, a benefit certificate providing for the payment of a certain sum "in the event of a broken arm or broken leg" was held to cover a fracture of an arm, the court stating that the contract did not undertake to define the term "broken

arm," or "broken leg," and that one definition of the word "broken" given by the Standard Dictionary was: "Separated forcibly into parts; fractured; shattered; ruptured; as broken reeds; a broken limb; broken skin; broken waves."

In *Peterson v. Modern Brotherhood* (1904) 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289, a Pott's fracture, consisting of the breaking of one bone of the lower leg between the knee and ankle joint, and a severance of the malleolus process of the other one so as to effect a complete solution of the continuity of both bones, was held not to be covered by a policy providing for indemnity in case of the breaking of the shafts of both bones between the knee and ankle joints, since the shaft of the bone was held to be distinct from the malleolus process, so that such a break did not come within the definition of the breaking of a leg contained in the policy.

VI. Provisions against loss of eyesight.

It has been held that the words "total and permanent loss of the sight of both eyes," when used in a policy insuring a person who has but one eye, which fact is known to the insurer, means the loss of eyesight, and that a recovery may be had where the insured loses the sight of his remaining eye. *Humphreys v. National Ben. Asso.* (1891) 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047.

So, under a policy defining permanent total disability to be "a complete and irrevocable loss of sight in both eyes," and permanent partial disability to be "a complete and irrevocable loss of sight in one eye," where the insured had only one eye at the time the policy was issued, which was known to the insurer's agent, and he afterwards lost the sight of the other eye, this was held to be "a complete and irrevocable loss of sight to both eyes." *Bawden v. London, E. & G. Assur. Co.* [1892] 2 Q. B. (Eng.) 534, 61 L. J. Q. B. N. S. 792, 57 J. P. 116.

And in *Maynard v. Locomotive Engineers' Mut. Life & Acci. Asso.* (1897) 16 Utah, 145, 67 Am. St. Rep. 602, 51 Pac. 259, under a by-law of a

mutual benefit association providing for a certain indemnity in case of injury causing a "total and permanent loss of eyesight," which was in force when a member of the association, who was a locomotive engineer, received an injury which immediately affected his eyesight, and about a year later resulted in the permanent loss of the sight of one eye, which disabled him from pursuing his usual occupation, it was held that a recovery might be had, since the by-law did not provide that the benefit should not be received unless the injuries were such as to cause the loss of the sight of both eyes, and since the object of the association was the mutual protection and relief of its members; and an amendment of the by-law, passed after the injury, but before the loss of sight of the eye became permanent, allowing recovery in case of "total and permanent loss of one or both eyes," was held to make the true meaning of the provisions more apparent.

But in *Phillippy v. Homesteaders* (1908) 140 Iowa, 562, 118 N. W. 880, it was held that the loss of one eye did not entitle the insured to any recovery under a policy providing for the payment of an indemnity for "the loss of the sight of both eyes," since the provision necessarily excluded, as a ground for benefit, the loss of one eye, and there was held to be no ambiguity in the above provision; and evidence that it was the intention and understanding of the insured that he was to have a right to recover in case of the loss of the sight of one eye was held inadmissible to change the terms of the contract.

In *Murray v. Aetna L. Ins. Co.* (1916) 243 Fed. 285, where the policy provided for the payment of an indemnity for "loss of entire sight of one eye, if irrevocably lost" as the result of an accident, it was held that a recovery could be had, if by an accident all the useful and practical sight of the eye was irrevocably lost, although the injured eye could distinguish light from darkness, or perceive objects temporarily for brief intervals. The court said: "The indemnity is virtually for the loss of the

benefit of sight or vision. The latter may be defined as the ability to perceive, distinguish, and recognize objects, and the former as satisfaction of will, need, or pleasure. If this ability is so far destroyed that what remains will not, to a practical and useful extent, confer any of this benefit, entire sight, within the construction of analogous terms in insurance law, is lost. So would it be in popular phrase or sense. The interpretation must be reasonable and relative, not literal. The ability to perceive light and objects, but no ability to distinguish and recognize objects, is not sight, but blindness. So would it be, though there were intermittent flashes of the latter ability. To no practical or useful extent would it serve the will, need, or pleasure."

And in *Tracey v. Standard Acci. Ins. Co.* (1920) 119 Me. 131, 9 A.L.R. 521, 109 Atl. 496, it was held that there was an "entire loss of sight" of an eye, where the insured could not distinguish colors, or one object from another in strong light, although he could distinguish between light and darkness.

And there was held to be a "loss of the entire sight of one eye" within the meaning of a policy, where the sight of one eye was lost to such an extent that it was useless, although there was a light penetration coming from the side which was useless, and there was no prospective cure. *Watkins v. United States Casualty Co.* (1919) 141 Tenn. 583, 214 S. W. 78.

And it has been held, under a provision for a specified indemnity if an accident should result in the loss "of the entire sight of one eye," that a recovery may be had where there is a practical loss of the entire sight of the eye, it being held not necessary that the whole sight should be destroyed in order to warrant a recovery.

International Travelers' Asso. v. Rogers (1914) — Tex. Civ. App. —, 163 S. W. 421.

In the *Rogers Case* (Tex.) *supra*, where there was testimony that, although the insured could see to some extent out of his injured eye, he could not use it for reading, or rely on it to get about with, the evidence was held sufficient to show a loss of the entire sight of the eye within the provision of the policy.

The evidence in the *Murray Case* (Fed.) *supra*, however, was held insufficient to warrant a finding that the plaintiff had lost the entire sight of his eye, there being evidence tending to show only that the sight of the eye had been impaired so that he was disabled to perform major operations, or to read continuously, and that, when the uninjured eye was closed, the injured one lost vision, and that natural co-ordination and accommodation were lacking, since the insurer did not undertake to pay upon the happening of these contingencies, but only when there was an entire loss of sight; that is, when all practical and useful sight, for any purpose of will, need, or pleasure, was lost.

In *Fallin v. Locomotive Engineers' Mut. Life & Acci. Ins. Co.* (1920) 24 Ga. App. 764, 102 S. E. 177, where an accident policy provided for the payment of the full benefit to any member "sustaining the total or permanent loss of sight in one or both eyes," but provided that the insurer would not recognize a claim for impaired eyesight, "but for total and permanent blindness only, in one or both eyes," it was held that a recovery for total blindness could not be had by an insured who had become color-blind in both eyes, as this did not come within the protection of the policy.

J. T. W.

ALLEN C. MCLEAN

v.

AMERICAN RAILWAY EXPRESS COMPANY, Appt.

Maine Supreme Judicial Court — October 22, 1920.

(119 Me. 322, 111 Atl. 383.)

Workmen's compensation — amputation of part of foot — how far loss of foot.

Amputation of so much of the foot as lies forward of the plane of the front surface of the shin bone does not effect the loss of the foot within the meaning of the Workmen's Compensation Act, where the injured person walks on what remains of the foot, with the aid of a specially constructed boot.

[See note on this question beginning on page 1350.]

APPEAL by defendant from a decree of the Supreme Judicial Court for Cumberland County, at Law, awarding compensation to claimant in a proceeding by him under the Workmen's Compensation Act to recover for injuries sustained to his foot while in defendant's employ. *Modified.*

The facts are stated in the opinion of the court.

Messrs. Verrill, Hale, Booth, & Ives, and Leon V. Walker, for appellant:

Claimant did not suffer the loss of a foot within the meaning of the Workmen's Compensation Act, so as to entitle him to compensation for one hundred and twenty-five weeks.

Tetro v. Superior Printing & Box Co. 185 App. Div. 73, 172 N. Y. Supp. 722; *Geiger v. Gotham Can Co.* 177 App. Div. 29, 163 N. Y. Supp. 678; *Thompson v. Sherwood Shoe Co.* 178 App. Div. 319, 164 N. Y. Supp. 869; *Ide v. Faul & Timmins*, 179 App. Div. 567, 166 N. Y. Supp. 858; *Mockler v. Hawkes*, 173 App. Div. 333, 158 N. Y. Supp. 759; *Grammici v. Zinn*, 219 N. Y. 322, 114 N. E. 897; *Adams v. Boorum & Pease Co.* 179 App. Div. 412, 166 N. Y. Supp. 97; *Barringer v. Clark*, 184 App. Div. 695, 172 N. Y. Supp. 398; *Carkey v. Island Paper Co.* 177 App. Div. 73, 163 N. Y. Supp. 710; *Packer v. Olds Motor Works*, 195 Mich. 497, 162 N. W. 80; *Adomites v. Royal Furniture Co.* 196 Mich. 498, 162 N. W. 965; *Carpenter v. Detroit Forging Co.* 191 Mich. 45, 157 N. W. 374; *Northwestern Fuel Co. v. Industrial Commission*, 161 Wis. 450, 152 N. W. 856, Ann. Cas. 1918A, 533.

Mr. Harry E. Nixon for appellee.

Cornish, Ch. J., delivered the opinion of the court:

On January 6, 1919, the claimant, an employee of the American Rail-

way Express Company, sustained an injury to his right foot, in consequence of which so much of the foot as lay forward of the plane of the front surface of the tibia, or shin bone, was amputated. The industrial accident commission decided that this constituted "the loss of a foot" under Rev. Stat. chap. 50, § 16, and accordingly awarded the plaintiff, in addition to his medical bills, \$132.50, the sum of \$8.88, being one half of his average weekly wages for a period of one hundred and twenty-five weeks, beginning January 20, 1919.

It is admitted that the injury arose out of and in the course of employment, and the only question to be decided by this court on appeal is whether the commission erred, as a matter of law, in so construing the statute as to hold that the claimant had sustained the loss of a foot under § 16. Nor is there any controversy as to the extent of the injury and amputation. Dr. Twitchell, who performed the operation, and the only surgical witness in the case, testified that the length of his foot was 9½ inches, that 6 inches were removed, and 3½ inches were left, including the calcaneum, or heel,

and the portion next the heel up to the line of severance; that it was necessary to take off the head of the astragalus, or ankle bone, where the shin bone articulates with it, because otherwise he could not get flap enough to cover it; that the ankle joint retains its motion, and that the heel support is the same as before the accident. In other words, the claimant has lost the toes and in-step, but not the heel, and walks upon what remains of the foot, with the aid of a specially constructed boot having a steel support running up the front of the tibia. It further appears that the claimant began work September 2, 1919, at a wage of \$20.75 per week, which is greater than he was receiving at the time of the accident, and has been at work continuously since that time.

In determining the question whether the claimant has lost his foot, it must be remembered that the accident occurred in January, 1919, before the amendment (Pub. Laws, 1919, chap. 238) took effect whereby this provision was added to § 16 of the original statute: "In all cases in this class where the usefulness of a member or any physical function thereof is permanently impaired, the compensation shall bear such relation to the amount stated in the above schedule as the incapacity shall bear to the injuries named in this schedule and the commission shall determine the extent of the incapacity." This addition provided for cases of loss or impairment of use of a member where the member itself was not lost. Previous to this amendment the words "loss of a member" were construed to mean loss by severance and not by incapacity. *Merchant's Case*, 118 Me. 96, 106 Atl. 117. In other words, a distinction was drawn between loss, and loss of use.

Applying this rule, which must apply to this case, and eliminating the question of use, the single problem remains whether the loss of two thirds of a foot, as in this case, is the loss of a foot; whether, in other words, the part is equal to the whole. Anatomically speaking, the

foot extends from the ankle joint to the end of the toes, and is divided into three parts—the tarsal bones or ankle, the metatarsal bones, or in-step, and the phalanges, or toes. In the case at bar the metatarsal bones and phalanges were severed, while the ankle bone and the heel were left practically unimpaired. If the loss contemplated by the statute is not of the entire foot, then what fractional part shall be fixed by the court as equal to the whole? Shall it be a loss of one third, or one half, or two thirds, or four fifths? Where shall the line be drawn? Such a construction would seem to be rather in the nature of judicial legislation than of judicial construction, and we think it more consonant with judicial interpretation to hold that, according to the common meaning of the language, the statutory words "the loss of a foot," mean the loss of an entire foot, and not a fractional part thereof.

Especially does this construction seem reasonable when we consider the fact that the legislature seems to have had in mind this very question in many instances, and, when it desired to make the loss of a part equivalent to the loss of the whole, it expressly provided for it. Thus, after specifying the compensation for the loss of a thumb and for the loss of each finger at a given rate, and the loss of the first phalange of the thumb or of any finger as one half of the amount for the whole, it added: "The loss of more than one phalange shall be considered as a loss of the entire thumb or finger." Again, after specifying the amount for the loss of a toe, and of the first phalange of any toe, the legislature expressly said: "The loss of more than one phalange shall be considered as the loss of the entire toe." In each of these instances it is indisputable that the words "thumb," "finger," and "toe," as used in the first clause, mean the entire thumb, finger, or toe, and that, when the intention was to make any part less than the whole equivalent to the whole, it was expressly so stated. If the claimant's contention is sound,

then these special provisions were entirely unnecessary, because without them the loss of a substantial portion of a member is equivalent to the loss of the entire member.

Still again, "for the loss of an arm, or any part at or above the wrist," and "the loss of a leg, or any part at or above the ankle," are provisions carrying out the legislative intention with precision. But in the clause of § 16 now under consideration, there is no such modifying provision. It does not say, "for the loss of a foot or the parts in front of the heel," or "the loss of the toes and instep shall be considered as the loss of the entire foot," but, simply and baldly, "for the loss of a foot," without any diminu-

Workmen's compensation—amputation of part of foot—how far loss of foot.

tion or qualification whatever. This must mean the entire foot, and nothing less.

Counsel for claimant calls our attention to a line of cases in other states, but upon examination these are found to have arisen under statutes giving compensation for loss of use, and therefore are not authorities in the case at bar.

Our conclusion, therefore, is that the decree should be modified, and the claimant should be awarded, in addition to his medical expenses, \$132.50, compensation for the loss of his toes at the rate of \$8.88 per week for a period of sixty-five weeks from January 20, 1919.

Appeal sustained.

Decree to be modified in accordance with the opinion.

ANNOTATION.

Workmen's compensation: what amounts to loss of member within the meaning of the acts.

- I. Introduction, 1350.
- II. Loss of foot, 1351.
- III. Loss of leg, 1352.
- IV. Loss of arm, 1352.
- V. Loss of thumb, 1353.
- VI. Loss of fingers, 1353.
- VII. Loss of phalanges, 1354.
- VIII. Loss of hand, 1358.
- IX. Loss of both hands, 1360.

I. Introduction.

This annotation does not cover the questions as to what injuries constitute a total disability or incapacity under the compensation acts; or what amounts to a "loss of the use" of members, except to the extent that that phrase is regarded as the equivalent of "loss" of member. The question of the amount of compensation recoverable is also beyond its scope.

As to what amounts to loss of eyesight within meaning of act. see anno-

In some jurisdictions, where the acts provide for compensation for "loss" of a member, the view has been taken that there is not a "loss" of a member unless there is an actual physical separation of the whole member. *Norwood v. Lake Bisteneau Oil Co.* (1919) 145 La. 823, 83 So. 25; *Merchant's Case* (1919) 118 Me. 96. 106 Atl. 117; *Clark v. Kennebec Journal Co.* (1921) — Me. —, 113 Atl. 51; *Carpenter v. Detroit Forging Co.* (1916) 191 Mich. 45, 157 N. W. 374; *Adomites v. Royal Furniture Co.* (1917) 196 Mich. 498, 162 N. W. 965; *Packer v. Olds Motor Works* (1917) 195 Mich. 497, 162 N. W. 80; *Wilcox v. Clarage Foundry & Mfg. Co.* (1917) 199 Mich. 79, 165 N. W. 925; *Northwestern Fuel Co. v. Industrial Commission* (1915) 161 Wis. 450, 152 N. W. 856. *Ann. Cas.* 1918A. 533.

understood than an actual severance. It is true that for the sufferer the loss of the use of a member may be equivalent to the loss of the member itself, so long as the disuse remains, but the two things are quite distinct, and if one has lost the use of a member it would be so described, and never as the loss of the member."

And, a fortiori, the same result has been reached where the provision of the act is for an actual severance. *Weber v. American Silk Spinning Co.* (1915) 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E, 153.

In *Ballou v. Industrial Commission* (1921) 296 Ill. 434, 129 N. E. 755, where the act made provision for compensation for loss of a hand, and also for the loss of the use of a hand, the court stated that the expressions "loss" and "loss of the use" should be given their ordinary meaning.

And in *Franko v. Schollhorn Co.* (1918) 93 Conn. 13, 104 Atl. 485, it was held that a provision for compensation in case of loss of a member means a deprivation of the member, and not an impairment of earning capacity.

Under the New York act it has been held that a member is not lost, providing it can fulfil in a degree, fair and worth considering, in any employment for which the claimant is physically and mentally fitted or adaptive, its normal and natural functions. *Grammici v. Zinn* (1916) 219 N. Y. 322, 114 N. E. 397; *Baron v. National Metal Spinning & Stamping Co.* (1918) 182 App. Div. 284, 169 N. Y. Supp. 337.

Although it is not intended here to indicate exhaustively the specific statutory provisions on the question under consideration, attention may be directed to the fact that by some acts it is provided that the "loss of the use" of specified members shall be equivalent to a "loss" of such members. These provisions were involved in the following cases, which are dealt with at length *infra*: *Deemer Steel Casting Co. v. Frank* (1919) 7 Boyce (Del.) 497, 108 Atl. 283; *Hull v. United States Fidelity & G. Co.* (1918) 102 Neb. 246, 166 N. W. 628; *Rockwell v. Lewis* (1915) 168 App. Div. 674, 154 N. Y.

Supp. 893, appeal dismissed in (1916) 218 N. Y. 692, 113 N. E. 1065; *Re Sugg* (1917) 180 App. Div. 133, 167 N. Y. Supp. 390; *Supple v. Erie R. Co.* (1917) 180 App. Div. 135, 167 N. Y. Supp. 391; *Modra v. Little* (1918) 223 N. Y. 452, 119 N. E. 853, Ann. Cas. 1918D, 177, 18 N. C. C. A. 789; *Phonville v. New York & C. S. S. Co.* (1919) 226 N. Y. 622, 123 N. E. 885; *Bristow Cotton Oil Co. v. State Industrial Commission* (1920) 77 Okla. 316, 188 Pac. 658; *Chovic v. Pittsburgh Crucible Steel Co.* (1919) 71 Pa. Super. Ct. 350.

It may likewise be of interest to state that some acts contain provisions that the loss of specified parts of a member shall be equivalent to a loss of the member. The following cases, involving such provisions, are considered *infra*: *Re Petrie* (1915) 215 N. Y. 335, 109 N. E. 549; *Feinman v. Albert Mfg. Co.* (1915) 170 App. Div. 147, 155 N. Y. Supp. 909; *Fortino v. Merchants' Despatch Transp. Co.* (1916) 171 App. Div. 956, 156 N. Y. Supp. 262; *Ide v. Faul & Timmins* (1917) 179 App. Div. 567, 166 N. Y. Supp. 858; *Baron v. National Metal Spinning & Stamping Co.* (N. Y.) *supra*; *Forbes v. Evening Mail* (1921) 194 App. Div. 563, 185 N. Y. Supp. 692; *Choctaw Portland Cement Co. v. Lamb* (1920) 79 Okla. 109, 189 Pac. 750; *Pater v. Superior Steel Co.* (1919) 263 Pa. 244, 106 Atl. 202, 18 N. C. C. A. 447.

II. Loss of foot.

It will be observed that in the reported case (*McLEAN v. AMERICAN R. EXP. Co.* ante, 1348) the loss of a foot was held not sustained within the meaning of the Compensation Act, where there was an amputation of so much of the foot as lay forward of the plane of the front surface of the shin bone, and, with the aid of a specially constructed boot and what remained of the foot, the employee was able to walk, the court holding that the words "the loss of a foot" meant the loss of the entire foot, and not a fractional part thereof.

And in *State ex rel. Globe Indemnity Co. v. District Ct.* (1917) 136 Minn. 147, 161 N. W. 391, there was held not

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only entitled the claimant to compensation for the loss of a hand, but, where the injury caused the loss of the use of the entire arm, it was equivalent to the loss of the arm; and it was held that a finding was proper that the amputation of the claimant's arm between the wrist and elbow was equivalent to a loss of the arm, he having lost the use of his arm.

And in *Stocin v. C. R. Wilson Body Co.* (1919) 205 Mich. 1, 171 N. W. 352, a finding that there was a "loss of an arm" was held justified, and an award therefor sustained, where the evidence showed that the claimant's arm had been crushed at the junction of the upper and middle third, necessitating the amputation of the forearm near the elbow, and that an atrophy of the muscles of the upper arm, and a loss of a great part of the functions, resulted.

In *Northwestern Fuel Co. v. Industrial Commission* (1915) 161 Wis. 450, 152 N. W. 856, Ann. Cas. 1918A, 533, it was held that a schedule of compensation for specific injuries, including "the loss of an arm at the elbow," had reference solely to the physical loss of the member, and that it did not include a case of an impairment of the use of the arm, where there was no physical severance.

V. Loss of thumb.

In *Packer v. Olds Motor Works* (1917) 195 Mich. 497, 162 N. W. 80, where claimant's thumb was injured, necessitating the amputation of about one half of the distal phalange, but there remained a stump of the nail on the upper side of the thumb and a good cushion on the underside, it was held that there was not a "loss of a thumb," or "the first phalange of the thumb," within the provision of the act for compensation for specific injuries, the court stating that the statute nowhere provided for compensation for the loss of a part of a phalange.

And, relying on *Packer v. Olds Motor Works* (Mich.) *supra*, it was held in *Adomites v. Royal Furniture Co.* (1917) 196 Mich. 498, 162 N. W. 965, that compensation should not be

awarded for the loss of a thumb under the provision for fixed compensation for the loss of certain members, where a thumb was injured and the flesh and all joints of the thumb remained with life and feeling, and there was no actual removal of the thumb as a whole, or of any phalange, although control and use of it were lost by reason of the stiffened, or ankylosed, joints.

And the amputation of the index finger between the second and third joints, and the severance of a small piece of bone, and pieces of tendons, and flesh of the thumb, do not amount to the "loss by severance at or above the second joint, of two or more fingers, including thumb." *Weber v. American Silk Spinning Co.* (1915) 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E, 153.

See also cases under VII. *infra*.

VI. Loss of fingers.

In *Merchant's Case* (1919) 118 Me. 96, 106 Atl. 117, where the Compensation Act provided for specified awards "for the loss of the third finger," and "for the loss of the fourth finger," it was held that "loss" meant loss in the ordinary acceptation of the term,—that is, the physical loss of a member,—the court pointing out, by reference to other sections of the act, that there was an intention to distinguish between loss, and loss of use; and it was held that there was not a loss of the fingers, it appearing that the claimant's injury consisted in a laceration of the back of the left hand, which affected the extensor muscles controlling the third and fourth fingers, the third finger being drawn toward the palm of the hand at an angle of about 45 degrees, and the fourth finger at an angle of about 90 degrees, the two fingers being practically useless.

And in *Norwood v. Lake Bisteneau Oil Co.* (1919) 145 La. 823, 83 So. 25, it was held that, to come within a section of the Compensation Act providing for certain compensation for the loss of a finger, thumb, hand, etc., the member must have been severed or amputated, and that no award under that section was justified, where the

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somewhat contradictory, and rather unsatisfactory in that they state in one place that the amputation of the phalange occurred near the first joint, and in another place that about one third of the bone of the distal phalange was cut off, we think that, construed together and in the light of the evidence, they may be regarded as stating that substantially all of the phalange was cut off, and on that theory the award may be sustained. The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support, as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees. Under such circumstances we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish. Applying these rules to what happens to be in this case an accident of minor importance, we think we should hold that the provisions of the statute providing compensation for the loss of a certain portion of the finger become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost, and that we should not interpret such provisions too narrowly, for the purpose of defeating a recovery."

In *Feinman v. Albert Mfg. Co.* (1915) 170 App. Div. 147, 155 N. Y. Supp. 909, where there was an amputation of the third finger at the first phalange, and cellulitis of the joints followed so that the finger became practically useless, it was held that

there was a loss of the entire finger, it appearing that the statute provided that a loss of more than one phalange should be equivalent to the loss of the entire finger; and it was accordingly held that the claimant could not maintain that there had not been a loss of the finger and that she was entitled to an award under a section providing for compensation for "other causes," it appearing that the result of this contention, if acquiesced in, would be that where a person had lost the entire use of a finger, only a portion of which had been amputated, he might be entitled to a larger compensation than one who had suffered the absolute amputation of an entire finger. And to the same effect are *Possner v. Smith Metal Bed Co.* (1915) — App. Div. —, 155 N. Y. Supp. 912, and *O'Neil v. West Side Storage Warehouse Co.* (1915) — App. Div. —, 155 N. Y. Supp. 912.

And in *Fortino v. Merchants' Despatch Transp. Co.* (1916) 171 App. Div. 956, 156 N. Y. Supp. 262, it was held that an award as for the total loss of a finger should be made where an amputation, made necessary by the injury, resulted in the taking of a portion of the second phalange of the finger.

In *Tetro v. Superior Printing & Box Co.* (1918) 185 App. Div. 73, 172 N. Y. Supp. 722, an award was held erroneous "for the equivalent of one half of the index finger of the right hand," where the claimant lost between a quarter and a half of the distal phalange of the index finger, including a portion of the bone. The court said: "It is a 'loss of the first phalange,' not of a part thereof, which is made equivalent to the loss of one half of the finger. Workmen's Compensation Law (Consol. Laws, chap. 67), § 15, subd. 3. It is not necessary that every particle of the first phalange be lost. Yet it is necessary to show that 'substantially all of the portion of the finger so designated has been lost.' Re *Petrie* (1915) 215 N. Y. 335, 109 N. E. 549. A loss of one quarter of the first phalange is not the loss of the entire phalange. *Thompson v. Sherwood Shoe Co.* (1917) 178 App. Div. 319, 164

N. Y. Supp. 869. The loss under consideration here was but little more than that considered in the Thompson Case. It certainly did not approximate a loss of substantially all of the first phalange, which was made the criterion by the Petrie Case. The award was, therefore, erroneous."

And the loss of the tip of a finger, so minute that only by careful examination of the X-ray photograph can any injury at all be discovered, does not amount to the loss of the first phalange of the finger, and therefore the equivalent of the loss of one half of the finger. *Mockler v. Hawkes* (1916) 173 App. Div. 333, 158 N. Y. Supp. 759.

And in *Geiger v. Gotham Can Co.* (1917) 177 App. Div. 29, 163 N. Y. Supp. 678, it was held that a loss of one eighth of an inch of the bone of the first phalange of a finger did not constitute a loss of the phalange, and justify an award under the Compensation Act for a loss of one half the finger.

And in *Thompson v. Sherwood Shoe Co.* (N. Y.) supra, it was held that an award for the loss of one half the finger was erroneous where the claimant suffered the loss of approximately one fourth of an inch of the tip of one of his forefingers, the entire bulbous terminal of the tip of the finger not being taken off. The court said: "The state industrial commission, holding that the injury constituted the loss of the first phalange of the finger, made an award of twenty-three weeks' compensation, which was the full statutory award for the loss of one half the finger. The employer and insurance carrier have appealed, claiming that the loss of so small a portion of the finger did not constitute the loss of substantially all the phalange, and hence that the award was not warranted. In this we think the appellants are correct. In the case of *Geiger v. Gotham Can Co.* (N. Y.) supra, we held, discussing authorities bearing upon the question, that the amputation of one eighth of the tip of a finger did not entitle the claimant to be awarded compensation for the loss of the entire first phalange. We do not think the loss of an

additional one eighth of an inch of the tip of a finger, with the result shown in the case at bar, in any way alters the legal principle, and hence that the award should be set aside and the claim remitted to the commission for further consideration."

And in *Ide v. Faul & Timmins* (1917) 179 App. Div. 567, 166 N. Y. Supp. 858, where there was an amputation of one quarter of an inch of the distal phalange of the index finger, and one eighth of an inch of the distal phalange of the second finger, it was held that there was not a loss of a substantial portion of the phalanges, and that an award was improper under the provision that the loss of the first phalange should be equal to the loss of half of a finger. The court here distinguished the *Petrie Case*, supra, on the ground that there substantially all of the phalange was cut off, while in the case at bar this was not the fact.

And in *Forbes v. Evening Mail* (1921) 194 App. Div. 563, 185 N. Y. Supp. 592, there was held not to be a loss of the first phalange, where less than one fourth of the injured phalanges was amputated. The court said: "In our case the loss is stated in the employer's first report of injury to be a loss of 'pulp of middle and ring fingers.' It is stated in the employee's claim for compensation to be 'bone exposed on middle and ring fingers of right hand.' It is stated in the attending physician's report to be 'amputation of pulp of right middle and ring fingers, with part of distal phalange in each finger chipped off.' The finger loss is not otherwise stated in the testimony, and is not further proven, except by the X-ray photographs which appear in the record. A comparison of the finger phalanges which are sound, with those which have been chipped, as shown by these pictures, indicates that less than one fourth of each of the injured phalanges has been amputated. It is evidence that 'substantially all' of a phalange cannot be removed, and 'substantially all' of the same phalange be left after the removal. Necessarily, therefore, under the

Petrie Case, the major portion or more than half of a phalange must be removed before the same is 'substantially lost,' and a loss of the first phalange,' within the meaning of the statute, is made out. Assuming, as nice wording would compel us to assume, that a phalange is a finger bone, no such loss has been proven in this case."

And in *Edward E. McMorran & Co. v. Industrial Commission* (1919) 290 Ill. 569, 125 N. E. 284, 19 N. C. C. A. 904, it was held that there was not a loss of the first phalange, where about one sixteenth of an inch of the phalange bone was missing, but the injury did not interfere with the use of the distal joint, which still remained serviceable.

And in *Baron v. National Metal Spinning & Stamping Co.* (1918) 182 App. Div. 284, 169 N. Y. Supp. 337, where the first or distal phalange of a thumb was amputated, and there was an injury to the second or proximal phalange, resulting in the removal of a very small piece of bone, it was held that an award should not be made as for the loss of an entire thumb, under a provision of the act that the loss of the first phalange of the thumb or finger should be considered equal to the loss of one half of such thumb or finger, and that "the loss of more than one phalange shall be considered as the loss of the entire thumb or finger." The court said: "Whether the award should have been for the loss of the entire thumb, or for the loss of only one half the thumb, depends very much upon the construction which should be given the last sentence above quoted. If the sentence means that the loss, however slight, of more than one phalange of a thumb or finger, shall entitle a claimant to an award of compensation for the loss of the entire thumb or finger, then the taking off of the most minute sliver of the second phalange, without regard to whether it in fact disabled the second phalange, would entitle the claimant to an award for the loss of an entire finger. However, if the sentence should be construed as requiring the loss of more phalanges

than one in order to constitute the loss of an entire finger, then the loss of a portion of the second phalange must be so substantial as to entitle the claimant to an award, if it were the only phalange injured. Apparently it was not the intention of the legislature that a different rule should be applied to an injury to the proximal phalange of a thumb or finger, from that applicable to the distal phalange, and that an injury, which should be treated as inconsequential when occurring to one phalange should be treated as creating disability and compensative when occurring to another. The statute makes no such distinction. It treats both alike. In either case the disability to the phalange, to be compensative, must be, as was said in the frequently quoted portion of the opinion in *Grammici v. Zinn* (1916) 219 N. Y. 322, 114 N. E. 397: 'That a hand, or the use of it, was not lost, provided it could fulfil, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions.' In *Re Petrie* (1915) 215 N. Y. 335, 109 N. E. 549, it was held that the provisions of the statute for compensation for the loss of a certain part of a finger become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost. It is apparent from an inspection of the X-ray picture that the slight chipping off of the second phalange has not lessened the use of the phalange. The commission has made no finding that the injury has so done, or that the loss suffered by the claimant is of a substantial portion of the phalange."

And in *Maxwell's Case* (1921) 119 Me. 504, 111 Atl. 849, it was held that there was not a loss, even substantially, of all of the phalange, where the employee was able to bend the injured finger at the distal joint, and had practically one third of the bone of the phalange left, and some part, at least, of the nail.

In *H. K. Toy & Novelty Co. v. Richards* (1917) 68 Ind. App. 653, 117 N.

E. 260, the loss was held within subdivision (a) of the act providing for compensation "for the loss by separation of not more than one phalange of a thumb, or not more than two phalanges of a finger," where an employee lost one eighth of an inch of the first phalange of a finger. The court said: "Appellant contends that subdivision (a) of said section is only applicable when substantially two phalanges of a finger are lost by separation, and that, inasmuch as only a small portion of the first phalange of appellee's finger was thus lost, the provision for compensation for fifteen weeks does not apply. We cannot concur in this contention. The language of the act forbids it. It should be noted that the subdivision in question does not read 'not less than two phalanges,' or 'substantially two phalanges,' but reads 'not more than two phalanges.' A fair and reasonable construction of the language used makes it apparent that the loss by separation of the whole of the distal and middle phalanges of a finger, or any material fraction thereof, entitles an employee to compensation for fifteen weeks. While the loss by separation of only one eighth of an inch in length of the distal phalange of a finger may appear to be a small fraction thereof, it should be remembered that the loss by separation of any portion in length of such phalange necessarily removes the muscular cushion on the end thereof, and thereby seriously interferes with the use of such finger. This fact may have had its influence with the legislature in wording the clause under consideration in such manner as to give fifteen weeks' compensation 'for the loss by separation of not more than . . . two phalanges of a finger.'"

See also subds. V. and VI. *supra*.

VIII. Loss of hand.

In *Grammici v. Zinn* (1916) 219 N. Y. 322, 114 N. E. 397, there was held not a loss of a hand where the claimant lost the first, second, and third fingers, and the first phalange of the fourth finger, and it was stated that the fact that the injuries barred the

claimant from the particular occupation or vocation he was engaged in did not, in or of itself, tend to prove that the hand was lost. The court said: "In the case at bar, the hand, or the use of it, was not lost, provided it could fulfil, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions. In case the hand was destroyed by amputation, directly or indirectly caused by the injuries, to such an extent that it could not thus fulfil its natural functions, it was, within the purview of the law, lost. *Sneck v. Travelers' Ins. Co.* (1895) 88 Hun, 94, 34 N. Y. Supp. 545, affirmed on opinion below in (1898) 156 N. Y. 669, 50 N. E. 1122. While the loss of a hand necessarily involves the loss of the use of it, the loss of the use of a hand does not involve the actual loss of the hand as a physical member—a distinction the law recognizes and observes. The question here was whether the first or second rate of compensation should be awarded. The uncontradicted evidence established that the hand was not lost, and that the first rate should be awarded."

And in *Adams v. Boorum & P. Co.* (1917) 179 App. Div. 412, 166 N. Y. Supp. 97, it was held that there could not be an award granting compensation for the loss of a hand, where it appeared that the claimant lost three fingers on a hand, and the index finger remaining was permanently ankylosed, that the thumb was in a normal condition, and the palm was not seriously affected, and the claimant had some use of the hand.

And in *Deemer Steel Casting Co. v. Frank* (1919) 7 Boyce (Del.) 497, 108 Atl. 283, where an employee was injured, and his index, middle, and ring fingers were amputated back of the metacarpal bones, and the first joint of the thumb was also amputated, but there was testimony that the hand would be 25 per cent efficient, it was held that an award should not be made under a clause providing compensation for all permanent injuries of certain classes, among which was "the

loss of a hand," and providing that permanent loss of the use of a hand should be considered as equivalent to the loss of the hand.

In *Rockwell v. Lewis* (1915) 168 App. Div. 674, 154 N. Y. Supp. 893, appeal dismissed in 218 N. Y. 692, 113 N. E. 1065, where the act provided that the permanent loss of the use of a hand should be considered as the equivalent of the loss of such hand, it was held that there was a loss of the hand, where there had been a complete loss of the index, second, and third fingers, and the fourth finger was stiff and practically useless. The court said: "Such a hand as that is obviously permanently useless,—as much so, practically, as though it were amputated at the wrist,—and no good reason suggests itself why the compensation provided for a hand permanently useless should not be paid, rather than the rate established where one of the particular fingers is lost, and where the use of the hand may not be seriously impaired for doing many kinds of labor. We do not recognize the theory that the question of the use of the hand is to be determined by the particular work in which the claimant has been engaged; the act has not attempted to insure the workman in his particular avocation for life. It simply undertakes to compensate for the injury sustained, and the question presented to the commission is not whether the hand is permanently useless for a particular work, but whether it is useless for any kind of work to which the claimant may be adapted. We have no doubt, however, that, where the loss or injury to fingers and thumb results in the permanent loss of the use of the hand in the practical everyday work of the individual, the commission is authorized to recognize this fact and to treat the hand as lost in fixing the compensation. That is the natural and logical meaning of the language, which seeks to do approximate justice to the individual, and it should not be construed to work an injustice in a case such as is here presented."

And in *Dutcher v. American Exp. Co.* (1918) 183 App. Div. 162, 170 N. Y.

Supp. 442, it was held that there was an equivalent of the loss of the right hand, where the claimant sustained injuries which necessitated the amputation of all four fingers of the hand, up to and including the greater portion of their proximal phalanges, leaving a stump with no ends of the fingers or separations between the ends protruding, but with no involvement of the metacarpal bones, it also appearing that there were a laceration and fracture of the terminal phalange of his right thumb, resulting in some thickening, due to the growth of callos, and in the muscles and tendons becoming somewhat shortened and smaller, impairing the full use of the thumb, and resulting in inability to bring the thumb into conjunction with the palm of the hand, although he could hold a pencil for a short time between the thumb and palm, and write a little, and could also use the hand to some extent in his employment.

And in *Cobb v. Library Bureau* (1916) 176 App. Div. 91, 162 N. Y. Supp. 291, appeal dismissed in (1917) 221 N. Y. 574, 116 N. E. 1041, it was held that a finding by the commission that the employee had lost the use of his hand should be affirmed, where he had lost all the fingers, including the palm of the hand, and all the evidence before the commission, consisting of reports made by the employer, the employee, and the attending physician, was to the effect that he had probably lost the use of his hand.

And in *Bristow Cotton Oil Co. v. State Industrial Commission* (1920) 77 Okla. 316, 188 Pac. 658, where the Compensation Act provided that the permanent loss of the use of a hand shall be considered as the equivalent of the loss of such hand, it appearing that four fingers and a portion of the palm were amputated, leaving about an inch of the palm and the thumb, which were of little use, it was held that there was a loss of the use of, and therefore a loss of, the hand.

And in *Chovic v. Pittsburgh Crucible Steel Co.* (1919) 71 Pa. Super. Ct. 350, where the act provided that permanent loss of the use of a hand

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Appeal — error in evidence — affirmation.

2. Error in the admission or rejection of evidence will not be sufficient ground for reversal, when it appears upon the whole case, including the admissions of the defendant, that the verdict would not have been changed, and ought to be affirmed.

[See 2 R. C. L. 255; 2 R. C. L. Supp. 478.]

Criminal law — right to special verdict.

3. Section 5, chap. 131, of the Code (§ 4909), authorizing the circuit court to submit interrogatories to the jury upon the trial of any issue, for the purpose of having it render separate verdicts upon any one or more of the issues, does not apply to jury trials in criminal cases.

[See 27 R. C. L. 866.]

ERROR to the Criminal Court for Harrison County to review a judgment convicting defendant of assault with intent to kill. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Law & McCue for plaintiff in error.

Messrs. E. T. England, Attorney General, R. A. Blessing, Assistant Attorney General, and Steptoe & Johnson, for the State:

If an officer, without lawful authority or just cause, arrests a person, there is an illegal assault which such person has a right at once to resist and prevent.

Whart. Homicide, § 408, p. 631; Stockton v. State, 25 Tex. 772; Miers v. State, 34 Tex. Crim. Rep. 161, 53 Am. St. Rep. 705, 29 S. W. 1074; Miller v. State, 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836, 21 S. W. 925; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Coleman v. State, 121 Ga. 594, 49 S. E. 716.

Where one is about to be unlawfully deprived of his liberty, he may resist the aggressions of the offender, whether of a private citizen or a public officer.

State v. Gum, 68 W. Va. 105, 33 L.R.A.(N.S.) 150, 69 S. E. 463; Whart. Homicide, p. 737; Conraddy v. People, 5 Park. Crim. Rep. 234.

Lively, J., delivered the opinion of the court:

This writ of error brings up for review the judgment of the criminal court of Harrison county, rendered on the 18th of November, 1920, which sentenced J. E. Boggs to confinement in the penitentiary for two years on a verdict finding him guilty of an unlawful assault with intent to maim, disfigure, disable, and kill Clyde Coffindaffer.

A justice of the peace had issued a warrant for the apprehension of Joe Costa for a violation of the prohibition law, and had appointed

John Siers as a special constable to make the arrest. Siers had obtained information that Costa was expected to arrive at Clarksburg in the nighttime, in an automobile, with a load of spirituous liquors, and that he would come from Shinnston by Maulsby bridge across the West Fork river. He had received information that Costa was a "bad" man, and would likely resist arrest, and that there would be danger in making the arrest. He secured the assistance of Boggs, the defendant, and George Darnell, both of whom were members of the department of public safety and stationed at that time in the vicinity of Clarksburg, where there was an industrial disturbance, informing them of the character of the person to be arrested and the possible danger attending the arrest. This special constable and these two members of the department of public safety went in an automobile to the Maulsby bridge, arriving there about 9 o'clock on the evening of October 5, 1920, and stationed themselves at the end of the bridge nearest to Clarksburg for the purpose of apprehending Costa if he should pass that way. The bridge was a covered bridge, and about 20 feet wide, and the record does not disclose its length. They had detained, temporarily, several persons until about the hour of 10:30 P. M., when an automobile coming from the direction of Shinnston entered the bridge. In this automobile were Dr. Clyde Coffindaffer, F. Byrl Wyer

and wife, and John Ashcraft, who was driving the car. Clyde Coffindaffer was a physician, well known in that community, practising his profession at Clarksburg, and was then taking Mrs. Wyer, who was suffering from peritonitis, to a hospital at Clarksburg. She was sitting on the rear seat, with her husband on her left side. The doctor was sitting in the right front seat by the side of Ashcraft, and had his back toward the right door of the car, and was assisting in steadying Mrs. Wyer with his left hand. This car was a four-seated Chandler chummy roadster, and was somewhat similar to the car which Costa was supposed to be using. It appears that Siers, the special constable, was standing on the left-hand side of the bridge, a short distance inside thereof, and to the left of this car as it approached. He had an electric flashlight in one hand, which he waved at the approaching car, and two of the witnesses in the car stated that he had a pistol in the other hand. Siers denied that he had a pistol. Boggs was on the right-hand side of the car as it approached, and inside of the covered bridge a short distance, and just in front of another car which was standing there, which had been detained, and which belonged to a Mr. Raikes. Darnell was also standing on the same side of the bridge, and a short distance from the other end of the last-named car. As the doctor's car approached these men it slowed down, but as Siers and Boggs approached it, seemingly in a threatening manner, and without giving information of their design, the chauffeur quickly "put on more gas," and the speed of the car was quickly accelerated. Shooting then began, and there is considerable conflict as to whether the first shot was fired from the left-hand side of the car or from the other side. Siers states that Boggs was on the same side of the bridge with himself. Boggs stated that he was on the opposite side, and all of the other witnesses place

him on the opposite side, from Siers. All of the occupants of the car state that the first shot penetrated the rear left-hand tire of the car, releasing the air therefrom, and almost immediately after the first shot the man standing on the opposite side of the car, and 4 or 5 feet from the car, presented his pistol at Dr. Coffindaffer, and shot him in the back, the doctor exclaiming, "Oh, I am shot!" The car was in rapid motion, and after it left the bridge some more shots were fired. The wounded man was immediately taken to the hospital at Clarksburg, where he received medical attention. The testimony of Boggs does not coincide with that of the occupants of the car respecting the actual shooting. He corroborates the state's evidence as to the place he was standing, but testified that after he approached the car when it slowed down, and after it had started to go faster, he commanded them to halt, and that the car had passed him and had almost reached Darnell, who was standing several feet from him, when Darnell also called on the car to halt, and he. Boggs, then began shooting, not at the occupants of the car, but at the tires, and for the sole purpose of stopping the car. He did not know that anyone was shot that night, and had no idea that anyone had been wounded until the next morning, when he heard from Siers, or saw it in the newspapers, that Dr. Coffindaffer had been severely wounded. He stated both before and on the trial that all of the shots which were fired that night were fired by him with a 45 Colt's Army revolver. Immediately upon learning that Dr. Coffindaffer had been wounded, he came to Clarksburg, admitted the shooting to the sheriff and others, and went to the doctor's sick room, where he admitted the shooting, but stated that he had no intention whatever of hurting anyone, and that his shots were in good faith at the tires of the automobile, and for the purpose of stopping it in order to make the arrest of Costa.

Boggs, Siers, and Darnell were indicted for malicious wounding, and Boggs elected to be tried separately. On the evidence, a summary only of which is above given, the jury found the defendant not guilty of malicious wounding, but of unlawful wounding with the intent to maim, disfigure, etc. Five instructions were offered by the state, all of which were objected to by the defense, but all were given except instruction No. 3. Instruction No. 1 was to the effect that an officer had no right to kill, or attempt to kill, in endeavoring to make an arrest for a misdemeanor, and unless the jury believed from the evidence that these officers were attempting to arrest Coffindaffer for the committing of the felony, or in the act of committing a felony, that the defendant was not authorized to shoot with intent to kill for the purpose of arresting Coffindaffer. This instruction simply lays down the law of arrest, and it is to the effect that defendant was not justified in shooting Coffindaffer with intent to maim, etc., unless the jury believe that Coffindaffer was doing an act which would justify such shooting. We can see no good objection to this instruction. It is apparent that defendant and the other officers were attempting to make the arrest of Joe Costa, the person for whom they had the warrant, and, when the car began to go faster at the command to halt, they erroneously concluded that Dr. Coffindaffer was the person for whom they had the warrant, or that he was in that car; and the instruction simply propounded the law applicable to that situation, to the effect that an officer is not justified in shooting with intent to kill the person for whom he has a warrant, unless that person has committed, or is in the act of committing, a felony; and in no case is an officer justified in shooting with like intent in making an arrest for a misdemeanor. The instruction is further objected to because there was no evidence of any attempt to kill anyone on that occasion; that the shoot-

ing was accidental. But the evidence of all the witnesses who were in the car was positive that the pistol which did the wounding was fired at Dr. Coffindaffer's back, when only a few feet from him. The question whether it was accidental or intentional is one for the jury. A man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act. If the jury believed beyond a reasonable doubt that the shot was fired with the intent to kill or wound the doctor, then there was no justification, unless they further believed that the doctor was committing, or attempting to commit, a felony. These officers were evidently attempting to make an arrest, or, at least, to stop the occupants of the car for the purpose of ascertaining if Costa was therein in order to make the arrest. Neither purpose alone would justify the shooting of the occupants, unless with the qualification set out in the instruction. It is argued that the doctor should have stopped and permitted these men to make an examination of the car and search for Costa. But even if this be true, and he did not stop or permit search, that alone would not justify the defendant in shooting him, or in such reckless shooting as would be likely to kill or wound any of the occupants of the car.

Arrest—shoot-
ing innocent
person—
liability.

Objection is made to instruction No. 2, which was given for the state, because it is more or less abstract in laying down the law of arrest, in that an officer acts at his own peril in making such arrests; that it is unlawful in making the arrest of a person without at the time having a warrant for him, unless he is at the time committing a felony, or in the act of committing a felony, or has committed some offense less than a felony in the presence or view of such officer. While this instruction is somewhat abstract, we cannot see that it might have or did mislead the jury. Reed v. Com. 98 Va. 817, 36 S. E. 399.

given for the state, while objected to at the trial, are not insisted upon as error here. We can see no error in them. They correctly state the law on reasonable doubt as to the guilt of the prisoner.

Five instructions were asked for by the defendant, and all given except No. 3, which was refused, and error is assigned for that reason. This instruction was to the effect that the defendant, then assisting officers who had a warrant for Costa and awaiting him on the bridge, had the lawful right to temporarily detain Dr. Coffindaffer long enough to ascertain if he was Costa or some other person, and to use such reasonable force as was necessary to cause the doctor to pause for that purpose, if he refused such request.

The evidence did not disclose that Dr. Coffindaffer or any other person in the car knew that these men had a warrant for Costa or for any other person. He knew Siers, but it must be remembered that Siers was a special constable for this arrest only. Their mission was not known to him, nor did he know that they were officers; and the command of "Halt!" was not very communicative of their authority or design. Besides, if they had any right to detain him temporarily, the force used was not reasonable. We cannot accede to the proposition that an officer with a misdemeanor warrant may station himself on the highway and command innocent persons to halt, and if they, not

much greater reason where an innocent traveler on the highway is not even sought to be arrested, but to be detained for examination. This instruction would tend to lead the jury to understand that the law would justify the defendant in using force necessary to cause Dr. Coffindaffer to pause for the purpose of being investigated. The force used was the firing of the shots, one of which almost caused death. Even this force was not sufficient to cause him to pause; on the contrary, it caused him to flee for his life. The instruction would, if given, have tended to justify the offense charged. Under this evidence the instruction was misleading and properly refused. It is argued that if an officer can break a door to enter a dwelling house in order to search for a criminal supposed to have taken refuge therein, then like force can be used to stop and enter an automobile and make search. But before an officer can break the doors and enter a dwelling house to make an arrest, he must first make due demand as an officer armed with authority, and a refusal would not justify the taking of life. The controlling feature on this question in this case is not what might have been done, but what was actually done.

Shooting with firearms by officers in pursuit of fugitives charged with minor crimes, as a ruse to prevent further flight, is illegal as a reckless use of firearms, and was disapproved in State use of *Johnson v. Cunning-*

would attempt to run over the officers with his automobile; and also that Costa was expected to come through the bridge that night; and that he (Siers) had informed the defendant of what had been told him in that regard by Lohm; also, that the court refused to allow the warrant to be put in evidence, which witness had as a special officer for Costa, for violation of the prohibition law. The record discloses that practically all of this evidence went to the jury in another form.

The defendant testified that he was requested by Siers to help him make an arrest of a man who was coming in with liquor.

He [Siers] said he [Costa] was a bad man, and he did not feel like going after him alone; he wanted some assistance, and I felt it was my duty to do so, and I did.

Question: Was that man Joe Costa?

Answer: Joe Costa.

Question: At the time you went down to the bridge, did you know, or had you learned, that this fellow, Joe Costa, was a bad man, and would likely resist arrest?

Answer: I did.

Siers also testified that he had a warrant for Joe Costa at the time he went to the bridge, and requested the defendant and Mr. Darnell to accompany him to assist in making the arrest, and that they were all at the bridge for that purpose. The information which Siers had received from Lohm went to the jury, and the prisoner received the benefit of it. The fact that Siers had a warrant for Costa went to the jury, and it is not perceived how the warrant itself, if introduced to the jury, would have strengthened that fact. Moreover, it is apparent that the jury gave the defendant the benefit of this evidence. It did not find him guilty of malicious shooting. The object of that evidence was to repel the presumption of malice in the use of the deadly weapon, and the reason why the defendant was at the bridge. Malice was successfully

eliminated. The verdict was for unlawful wounding. The error, if any, in refusing to allow Siers to give this evidence (which in fact went to the jury in another form), was harmless, in view of the verdict. State v. Miller, 85 W. Va. 326, 102 S. E. 303. Had Costa been in Dr. Coffindaffer's place, the jury would have been justified in finding a verdict for unlawful wounding. There is conflict in the evidence as to the actual shooting. All of the occupants of the car, four in number, testify that the shot which wounded the doctor was fired by a man standing immediately to the right of the car, and within 4 or 5 feet of the doctor, and that he pointed his pistol directly at, and in line with, the doctor's shoulder. The doctor felt the burn on his neck. The ball entered the posterior part of his right shoulder, close to the upper portion of the shoulder blade, or scapula, and came out just beneath the collar bone, which it broke, and lodged in his clothing. There was evidence that a pistol ball had penetrated the rear tire on the left side of the car, entering from the left side of the tire near the rim, and, glancing upward, came out of the opposite side of the tire, making a ragged hole. All of the occupants of the car testified that the first shot came from the left side, the side where Siers stood, and they heard the air go out of the tire, and immediately afterwards the shot which wounded the doctor was fired from the right by a man standing very close to the car, and in front of the other car standing on that side of the bridge. This was about the position which the defendant testified he occupied at the time of the shooting. The defendant very frankly and promptly stated that he had done all the shooting that was done there that night, and the other defendants make the same statement. As heretofore stated, the main conflict in the evidence concerning the immediate shooting arises between the statement of the witnesses that the

Appeal—error
in evidence—
affirmance.

shot was fired directly into the back of the doctor from a man on the right, and the statement of Boggs that the shots were not fired until after the car had passed him. The physical fact that the doctor was shot in the right shoulder, and the range of the bullet directly through his body, corroborates the testimony of the state's witnesses. These questions of fact were passed upon by the jury, and adversely to the defendant. It was within the province of the jury, under this testimony to say that the defendant either did the act maliciously or unlawfully. The jury was instructed by defendant's instruction No. 1 on the question of malice. That instruction reads as follows: "The court instructs the jury that the defense of accidental injury to Dr. Coffindaffer goes to the very gist of the charge, and denies all criminal intent, and throws the burden of proving the intent as charged in the indictment, beyond a reasonable doubt, upon the state. Therefore, although you may believe that the defendant Boggs did shoot and wound Dr. Coffindaffer, yet, unless you believe beyond all reasonable doubt that such shooting was done with intent to maim, disfigure, disable, and kill him, you must find the defendant not guilty of the malicious and unlawful shooting." This instruction put before the jury the full theory of the defense, and it may be that the result was the best for the defendant that he could expect under the circumstances. At least, the jury so disposed of the case, and it is not within the province of this court to gainsay it.

Exception was made to the ruling of the court in refusing to permit Dr. Coffindaffer to state, on cross-examination, a conversation between himself and two men who passed him on Gipsy hill, a place about a mile from the bridge and between Shinnston and the bridge. The doctor had stated, on cross-examination, that he had passed two men at that point, who asked him if he had any whisky, and, if so,

"you had better not go ahead." To which he replied, "We haven't got any whisky; we have got a very sick woman;" and I said,—I don't know whether I said, 'We are in a hurry,' or not,—and they began to say something more, and I thought the fellows were drinking, and we just drove on." The defense then asked, "Now, doctor, I want you to state what these parties said to you when they came to you, or when they drove *apast* you, on the road before you reached the bridge." This question was objected to, and the court sustained the objection because the witness had practically answered the question, and because the court said it was not pertinent to the issue. There was another ground upon which this question was not proper. This was a cross-examination of the doctor, and he had not testified to this matter on direct examination. As to this conversation between these witnesses, the defense was making the doctor their own witness. He could have been recalled for that purpose when the defense put in its evidence. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

Interrogatories were prepared by the defense and submitted to the jury, touching the questions of malice and the intention of the defendant in firing the shots, and were carried by the jury to their room, and afterwards, and before they returned their verdict, on motion of the state, these interrogatories were withdrawn from the jury over the objection and exception of the defense, and this action of the court is insisted upon here as error. The statute allowing interrogatories is found in chap. 120 of the Acts of 1882, and is § 5 of chap. 131 of the Code (§ 4909), which chapter relates to trials in civil cases. There is no reference to propounding such interrogatories in chapter 159 of the Code (§§ 5577-5601), which relates to the trial of criminal cases. The statute is as follows: "A circuit court may in any case before it, other than a chancery case, have an

issue tried, or an inquiry of damages made by a jury, and determine all questions concerning the legality of evidence and other matters of law which may arise. Upon the trial of any issue or issues by a jury, whether under this section or not, the court may on motion of any party, direct the jury, in addition to rendering a general verdict, to render separate verdicts upon any one or more of the issues, or to find in writing upon particular questions of fact to be stated in writing. The action of the court upon such motion shall be subject to review as in other cases. Where any such separate verdict or special findings shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." It is at once apparent from the context that

**Criminal law—
right to special
verdict.**

these interrogatories were intended to be used only in the trial of civil cases. On this question Judge Cooley says: "How far the jury are to judge of the law as well as of the facts is a question a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict; they have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt." Cooley, Const. Lim. 7th ed. p. 461.

"Statutes permitting findings to be required in response to interrogatories are held not to apply to criminal cases, for the reason that to so apply them would be to impair the right of trial by jury secured by the Constitution. It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would

violate its design and destroy its spirit.

"But though the jury cannot be compelled to answer specially, it is undoubtedly at liberty to include special findings in its verdict." Clementson, Special Verdicts, p. 49.

See also *People v. Roat*, 117 Mich. 578, 76 N. W. 91; *People v. Marion*, 29 Mich. 31; *Maiden v. Com.* 82 Ky. 133; *Smith v. State*, 59 Ohio St. 350, 52 N. E. 826; *State v. Fooks*, 65 Iowa, 196, 452, 21 N. W. 773.

This law has been on our statute books for thirty-eight years, and it has never been considered as applying to criminal cases by either the bench or the bar. This fact could be considered in the interpretation of the application of this statute, if it were necessary. "A construction of a statute that has been acted upon by the bench and bar for nearly half a century should not be disturbed. The common consent and opinion of the legal profession on a question of the construction and practical operation of a statute were held to be of persuasive force." 2 Lewis's Sutherland, Stat. Constr. 2d ed. p. 887.

As above intimated, we are of the opinion that special interrogatories cannot be propounded to the jury in criminal cases, and we see no error in the action of the trial court in withdrawing these interrogatories from the jury. In the first place, they should not have been submitted to the jury.

This is a most unfortunate case, both for the defendant and for Dr. Coffindaffer. The defendant is only twenty-six years of age, and for nearly two years he was with the American Expeditionary Forces in Europe, and his services were acknowledged by decorations for gallantry on the battlefield. Possibly his military training impelled him to act overhastily when the occupants of the car refused to heed the command of "Halt!" Possibly the influence of Army life, and the incidents of the battlefield, made it more difficult for him to heed the civil requirements in making arrests.

this court, perceiving no error in his trial, can give him no relief. .

Petition for rehearing denied May 10, 1921.

ANNOTATION.

Criminal law: criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify.

The reported case (*STATE v. BOGGS*, ante, 1360) is the only one disclosed by an extended search wherein the criminal responsibility of peace officers for shooting to prevent the escape of one whom they wish to investigate or identify, in the belief or upon the suspicion that he is the particular misdemeanor whom they are seeking to arrest, and for whom they have a warrant, has been passed upon; but the decision therein to the effect that an officer with a misdemeanor warrant, who stations himself on a highway and commands innocent persons to halt, and, upon their refusal to do so because of lack of knowledge of his character, intent, or design, shoots so recklessly that fatalities or serious injuries occur, is criminally responsible, even though the officer believed that the supposed misdemeanor was attempting to escape, is in accord with the general rule governing the rights of peace officers in making arrests, which is that they must, at least, act in good faith and be free from negligence.

A somewhat similar situation was involved in the case of *Wiley v. State* (1918) 19 Ariz. 346, L.R.A.1918D, 373, 170 Pac. 869, which held that a peace officer, going by automobile at night to a point where he had been notified a felony had been committed, for the purpose of making an investigation, and having no warrant for arrest, was guilty of second-degree murder, where, upon overtaking an automobile upon the road and failing to bring it to halt by a command which he should have known was not heard, he killed an innocent occupant by firing a bullet into the car for the purpose of enforcing his command. This was upon the theory that the officer had no reason-

able and probable cause to suspect the commission of a felony by the occupants of the other car which he had overtaken on the road, although he and his companions testified that they had believed that the other car was coming toward them, and upon their approach had suddenly turned back.

And in *Castle v. Lewis* (1918) 166 C. C. A. 279, 254 Fed. 917, a habeas corpus proceeding to secure the release of Federal officers who had killed a person, in attempting to arrest him for suspected unlawful transportation of intoxicating liquors, by firing at a fleeing automobile in which the deceased was riding, it was held that even conceding that the officers honestly believed that the person killed was, at the time of the shooting, actually engaged in unlawfully transporting intoxicating liquors, they could not act arbitrarily, but must use only such force as an ordinarily prudent and intelligent person would have deemed necessary under the circumstances. In reaching this conclusion the court said: "Was there any error of law, or mistake of fact, in that the judge failed to find under the evidence that the petitioners were acting within the scope of their authority in shooting into Mays's car and taking the chance of killing some of its occupants? Conceding, for the purpose of considering this issue only, that the petitioners were authorized to arrest the occupants of Mays's car without a warrant, for the felony of introducing liquor into Osage county, that authority included the lawful power to use such force as they then had reasonable cause to believe, and in the exercise of their sound discretion they did honestly believe, was necessary to make the arrest; but it included the

right to use, no more, and the use of any greater force was beyond the scope of their authority, unauthorized, and without justification. Here, too, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. 5 C. J. 424, § 59; 1 Bishop, New Crim. Proc. § 159. The officers testified that, as Mays's car approached them, they raised their hands and called "Halt!" The living occupants of Mays's car testified that they saw no motion and heard no call to stop. The officers and occupants of Mays's car testified that the former fired the first shot into the side of Mays's car as it passed them; the living occupants of the car testified that, as they passed, all they heard was a command to kill them all as the shooting commenced. The officers testified no such command was given, but the witnesses agree that the shooting continued for some time after the car passed, and that from eight to twenty shots were fired. Several of these shots struck the automobile; some passed through the back of it above the seat; some passed over it, and struck in the road ahead of it, as it was going up a hill. The officers testified that they fired into the machinery below the body of the car, and at the tires, for the purpose of stopping the car, and that they did not intend to injure the occupants. The officers knew Mays, Mosier, and Tinker; they recognized them, or some of them as Mays's car approached, and recognized that the car was Mays's; they knew that the lived in Pawhuska, toward which city they were going, and that they had lived there for many years. Mays was a married man, and had two children there. The occupants of Mays's car had no weapons, and had not resisted arrest; they testified they did not know that the officers wanted them to stop, or wanted to arrest them, until after the shooting. They were not fugitives from justice; they were not violent men; they were not itinerants or strangers. So it is that the evidence as to the sayings and doings of the parties when Mays's car

passed the officers presents a substantial conflict as to what was said and done by the officers that invokes the consideration of a jury, and the facts that all the occupants of the car, except Roberts, were known by the officers to be settled residents and citizens of Pawhuska, and that they were going towards their homes there, whence the officers themselves came, render it difficult to conclude that a person of ordinary prudence and intelligence, knowing the facts and circumstances which these officers knew, could have had cause to believe, if he were in their situation, or could have honestly believed, that he could not have accomplished the arrest of the occupants of Mays's car in Pawhuska, which was only 5 miles away, or that it was necessary in the exercise of sound discretion, in order to make their arrest, to fire into the automobile and take the dangerous chances of injuring or killing some of its occupants. The judge below was unable to reach that conclusion, and no error or mistake in his findings here is discovered." And see *People v. McCarthy* (1888) 47 Hun (N. Y.) 491, affirmed in (1888) 110 N. Y. 309, 18 N. E. 128, wherein it was held that an officer who, upon seeing an unknown person, who was in fact guilty of no offense, running along a public street in the nighttime, and upon his failure to stop upon command, fired and killed him, could not justify the shooting by showing that burglaries had recently been committed in the neighborhood, and that he was searching for the offenders.

And, of course, there is considerable authority to the general effect that a peace officer cannot shoot to stop a person upon a suspicion that he has committed a felony, so that when such an officer does so shoot, and no felony has in fact been committed, the officer is both civilly and criminally liable; in other words, that the common-law rule allowing an officer to kill a felon in order to arrest him cannot be extended to cases of suspected felonies. That an officer acts at his peril in such a case, see *Petrie v. Cartwright* (1902) 114 Ky. 103, 59 L.R.A. 720, 102 Am.

St. Rep. 274, 70 S. W. 297, 13 Am. Crim. Rep. 72. And see *Castle v. Lewis* (Fed.) supra, wherein it is stated that the general rule is that, while an officer may arrest without a warrant under certain circumstances, he may not so arrest arbitrarily, or on

a mere belief or suspicion that the party he arrests is guilty of a felony. Naturally, if he cannot arrest at all, he cannot use force. See also 5 C. J. title "Arrest," § 46. And see *Kopplekom v. Huffman* (1881) 12 Neb. 95, 10 N. W. 577. G. J. C.

CARL WILHELM OLSEN, Respt.,
v.

DANISH BROTHERHOOD IN AMERICA et al., Appts.

Minnesota Supreme Court—July 22, 1921.

(— Minn. —, 184 N. W. 178.)

Courts — affairs of foreign corporations — interference.

1. Courts refuse to entertain actions which interfere with or attempt to regulate the management of the internal affairs of a foreign corporation. Hence the complaint herein, which shows that the action is brought by plaintiff in his own behalf and in behalf of the other members of the defendant corporation, a fraternal beneficiary association incorporated under the laws of Nebraska, to enjoin said defendant and its officers from enforcing changes made in the assessment rates and benefits of the association, was demurrable.

[See note on this question beginning on page 1383.]

Corporation — foreign — internal management.

2. Changing rates of assessments

and benefits in a fraternal beneficiary association pertains to the management of its internal affairs.

[See 12 R. C. L. 32.]

Headnotes by HOLT, J.

APPEAL by defendants from an order of the District Court for St. Louis County (Dancer, J.) overruling a demurrer to the amended complaint in an action brought to enjoin them from enforcing changes made in the assessment rates and benefits of the defendant association. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Warren E. Greene and Mason M. Forbes for appellants.

Mr. James A. Wharton, for respondent:

The changes made affect rights of a contractual nature, which could not be legally affected without the consent of the plaintiff.

Bornstein v. District Grand Lodge, I. O. B. B. 2 Cal. App. 624, 84 Pac. 271; *Sexton v. National L. Ins. Co.* 40 Colo. 60, 12 L.R.A.(N.S.) 504, 90 Pac. 58; *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; *Hart v. Life & Annuity Asso.* 86 Kan. 318, 120 Pac. 363, Ann. Cas. 1913C, 672; *Covenant Mut. Life Asso. v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Wright v. Knights of Maccabees*, 196 N. Y.

391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078; *Ayers v. Grand Lodge*, A. O. U. W. 188 N. Y. 280, 80 N. E. 1020; *Langan v. Supreme Council*, A. L. H. 174 N. Y. 266, 66 N. E. 932; *Green v. Supreme Council*, R. A. 206 N. Y. 591, 100 N. E. 411; *Pearson v. Knight Templars & M. Indemnity Co.* 114 Mo. App. 283, 89 S. W. 588; *Morton v. Supreme Council*, R. L. 100 Mo. App. 76, 73 S. W. 259; *Rockwell v. Knights Templars & M. Mut. Aid Asso.* 134 App. Div. 736, 119 N. Y. Supp. 515; *Smythe v. Supreme Lodge*, K. P. 198 Fed. 967; *Weber v. Supreme Tent*, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; *Campbell v. American Ben. Club*

Fraternity, 100 Mo. App. 249, 73 S. W. 342.

Amendments to by-laws will be held to have a prospective operation only, unless a contrary intention clearly appears. -

Voigt v. Kersten, 164 Ill. 314, 45 N. E. 543.

A fraternal society cannot, by amending its by-laws, cut down the amount of its benefit certificate.

Newhall v. Supreme Council, A. L. H. 181 Mass. 117, 63 N. E. 1; Wright v. Knights of Maccabees, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078; Ayers v. Grand Lodge, A. O. U. W. 188 N. Y. 280, 80 N. E. 1020; Evans v. Southern Tier Masonic Relief Asso. 182 N. Y. 453, 75 N. E. 317; Bornstein v. District Grand Lodge, I. O. B. B. supra.

Amendments such as proposed in the case at bar were either held beyond the powers of the association, or unreasonable, or inoperative, so far as existing contracts were concerned, because they attempted to change vested rights.

Ruder v. National Council, K. L. S. 124 Minn. 431, 145 N. W. 118; Tebo v. Supreme Council, R. A. 89 Minn. 3, 93 N. W. 513; Thibert v. Supreme Lodge, K. H. 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220; Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Sisson v. Supreme Court of Honor, 104 Mo. App. 54, 78 S. W. 297; Edwards v. American Patriots, 162 Mo. App. 231, 144 S. W. 1117; Young v. Railway Mail Asso. 126 Mo. App. 325, 103 S. W. 557; Umbarger v. Supreme Council, R. L. — Mo. App. —, 118 S. W. 1199; Hines v. Modern Woodmen, 41 Okla. 135, L.R.A. 1915A, 264, 137 Pac. 675; Palmer v. Protected Home Circle, 252 Pa. 201, 97 Atl. 188; Ericson v. Supreme Ruling, F. M. C. 105 Tex. 170, 146 S. W. 160; Supreme Lodge, K. P. v. Mims, — Tex. Civ. App. —, 167 S. W. 835; Eaton v. International Travelers' Asso. — Tex. Civ. App. —, 136 S. W. 817; Jaeger v. Grand Lodge, O. H. S. 149 Wis. 354, 39 L.R.A.(N.S.) 494, 135 N. W. 869; Stirn v. Supreme Lodge, B. S. B. S. 150 Wis. 13, 136 N. W. 164.

Holt, J., delivered the opinion of the court:

Appeal from an order overruling a demurrer to an amended com-

plaint, the questions involved being certified as doubtful.

It will not be necessary to set out the lengthy pleading, in view of the ground upon which we dispose of the appeal. The substance of the allegations, only, need be mentioned, and are these: That the defendant corporation is a fraternal beneficiary association, organized and existing under the laws of Nebraska, the other defendants being the officers of a subordinate lodge of the association at Duluth; that plaintiff is a member in good standing, and holds a membership benefit certificate issued by the association; that the association has been authorized to do business in this state; that at a convention of the association it undertook to change its by-laws, radically altering the membership assessments and the benefits; and that these changes were not made in accordance with the constitution or by-laws of the association, and were not made so as to comply with a certain Nebraska statute pleaded. Plaintiff alleges that he brings the action "in his own behalf and in behalf of other members of said order;" that defendants are about to promulgate and enforce said changes and amendment, and thereby irrevocably destroy the vested rights and equities of plaintiff and other members of said order; "that said amendment and change in their contract of insurance will impose increased rates, liens, charges, and in some cases loss of death benefit; will impair the value of certificates and deplete the present surplus funds; will create lapses with extended insurance privilege never intended in original certificate; and that said act is wrongful, unauthorized, illegal, and unreasonable, and constitutes a breach of contract with plaintiff and other members, and each of them," in nine specified respects pertaining to each member of the order. The prayer is that the said amendment and changes in the rates and plan of assessments be declared null and void, and that said defendants and each of them and their successors

and agents be forever restrained "from carrying them into effect."

The demurrer was on two grounds: (1) That the court has no jurisdiction of the subject of the action, in that it appears that the acts complained of affect plaintiff solely as a member of the defendant corporation, and that the action relates altogether to the management of the internal affairs of a Nebraska corporation; and (2) the facts stated do not constitute a cause of action.

It is to be noted that the action is not confined to plaintiff's own contract and its preservation. It is brought in behalf of other members of the corporation, also, and to prohibit defendants from enforcing the adopted changes of rates and benefits. Such action in behalf of others is authorized under the proviso to § 7674, Gen. Stat. 1913. But it is quite apparent that fixing rates and benefits of a corporation of this kind pertains to the management of its internal affairs. Benefits promised must come from rates paid or assessments levied against the members. The very existence of the corporation depends upon a proper adjustment of rates and benefits. How this is to be done is peculiarly a problem of internal management, to be solved by the governing body of the corporation, or by delegates of its members in convention assembled. The necessary changes to maintain a proper ratio between receipts and disbursements must be worked out within the organization, under the supervision of its officers, and in the manner prescribed by its laws and the laws of the state of its domicil. It is apparent that, if an action of the nature here pleaded may be maintained in every state where the corporation has members, uniformity of either assessments or benefits could not be hoped for. The courts of one state might hold changes made by the corporation valid, while courts of other states declare them void. No association of the sort here involved, having members in different states, could

well survive a condition where the courts of a state other than its domicil step in and determine for the future what the assessments and benefits of its members in such state shall be. The disaster likely to result to foreign fraternal beneficiary associations, if actions of the instant type lie, may well cause courts to pause before assuming jurisdiction. Especially so, in view of the decision in *Supreme Council, R. A. v. Green*, 237 U. S. 531, 35 Sup. Ct. Rep. 724, 59 L. ed. 1089, L.R.A.1916A, 771, where it was held that an adjudication as to rates and benefits by the courts of the domicil of the corporation binds its members, wherever residing. Some courts also give as a reason for declining to assume jurisdiction over affairs relating to the internal management of a foreign corporation, that neither its officers, or governing body, nor its records, are within the reach of the decrees, orders, or processes of any courts except the courts of its domicil.

This court has repeatedly recognized the rule that equity will not take jurisdiction of actions wherein it is sought to interfere with the internal management of a foreign corporation's business. *Guilford v. Western U. Teleg. Co.* 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324; *Selover v. Isle Harbor Land Co.* 91 Minn. 451, 98 N. W. 344; *State ex rel. Lake Shore Teleph. & Teleg. Co. v. De Groat*, 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417; *Gere v. Dorr*, 114 Minn. 240, 130 N. W. 1022; *Van Dyke v. Railway Mail Asso.* 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455; *Tasler v. Peerless Tire Co.* 144 Minn. 150, 174 N. W. 731.

Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932, is greatly relied on by respondent. It was there held, three justice dissenting, that an action for damages does not lie against a foreign fraternal benefit association for unlawfully increasing assessments, but

Courts—affairs of foreign corporations—interference.

the remedy is in equity to compel the association to live up to its contract with its member. However, it was not intimated that an action in behalf of other members would lie. Our attention has not been called to any other case of a similar ruling, and we have found none outside the state of New York. It is directly opposed to the decision in *Ebert v. Mutual Reserve Fund Life Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, where this equitable remedy was unsuccessfully urged upon the court. The experience of the New York courts seems to cast doubt on the practical workings of the rule there adopted; for, after *Green v. Supreme Council*, R. A. 206 N. Y. 591, 100 N. E. 411, was, in 237 U. S. 531, 59 L. ed. 1089, L.R.A.1916A, 771, 35 Sup. Ct. Rep. 724, reversed by the Supreme Court of the United States (wherein the appellate court of New York had applied the rule of the *Langan Case*, notwithstanding that the courts of the domicile of the corporation had held the change in the assessments valid), the case of *Evans v. Supreme Council*, R. A. 223 N. Y. 497, 1 A.L.R. 163, 120 N. E. 93, was determined. There the plaintiff, Evans, relying on the *Green* decision in 206 N. Y. 591, 100 N. E. 411, tendered the assessments according to the rate before the change, and, when the amount was refused, brought the action to enjoin the society from suspending him. He obtained a temporary injunction

upon the giving of a bond to pay whatever rate the court would finally adjudge to be the lawful rate. The appellate court, under the decision of the Federal court in the *Green Case*, felt itself compelled to hold the change in the rate binding as determined by the courts of the domicile of the defendant, and that, therefore, Evans, because of the nonpayment of the assessments as changed, was deprived of membership, notwithstanding the courts of New York had attempted to maintain his status by means of the injunction.

In our opinion the amended complaint shows on its face that the action is one in which a court of this state is asked to interfere with the internal management of a foreign corporation. Jurisdiction should not be assumed for that purpose, and the demurrer should be sustained.

Corporation—
foreign—internal
management.

The order is reversed.

NOTE.

The jurisdiction of an action or proceeding involving the internal affairs of a corporation is the subject of the annotation following *BOYETTE v. PRESTON MOTORS CORP.* post, 1383. As to the various specific subjects in regard to which this jurisdiction is exercised or invoked, see the various subdivisions of III. b, of that annotation.

RE FRYEBURG WATER COMPANY.

New Hampshire Supreme Court—January 7, 1919.

(— N. H. —, 106 Atl. 225.)

Courts — visitatorial power over foreign corporation.

1. Courts of one state have no visitatorial power over corporations of another state, and no jurisdiction to determine questions relating to their internal affairs.

[See note on this question beginning on page 1383.]

Conflict of laws — issuance of stock by corporation.

2. The issuance of stock by a corporation is regulated and controlled

by the laws of the state of its incorporation, and exclusively subject to those laws.

Statutes — construction — issuance of corporate stock.

3. A statute conferring upon the public service commission power to control the issuance of stock by corporations doing business in the state will not be construed to apply to foreign corporations.

Corporations — power of legislature to determine stock issue.

4. The legislature of the state where

a foreign corporation is engaged in business has no power to increase or diminish the amount of stock fixed by its charter.

— power of public service commission to consent to increase of stock.

5. The public service commission of a state in which a foreign corporation is doing business has no power to consent to the increase by it of its capital stock.

TRANSFER by the Public Service Commission, for determination by the Supreme Court, of questions arising in a proceeding by petitioner for the approval of the Commission of stock dividends. *Case discharged.*

The case was transferred by the Commission upon the following facts:

The Fryeburg Water Company is a public utility incorporated under the laws of Maine, and furnishes water to the public in both Maine and New Hampshire. It has accumulated from its earnings a surplus of \$8,000, which it has used in improving its plant in both states. Under the laws of Maine, it has been authorized to issue a stock dividend of \$8,000 to take up the surplus so invested. This proceeding is a petition to the public service commission for its approval of so much of the stock dividend as is represented by investment in the company's plant property in this state. This commission submits the following questions for determination: (1) Whether its approval is necessary to validate the stock dividend referred to; and (2) whether, if such approval is necessary, it has authority to approve a stock dividend.

There was no appearance of counsel in the case.

Walker, J., delivered the opinion of the court:

The first question presented by the case is whether the public service commission of this state has the power or jurisdiction to approve the proposed issue of additional stock by the Fryeburg Water Company, a corporation organized under the laws of the state of Maine. It is a well-recognized principle of law, that the courts of one state have no visitatorial power over cor-

porations of another state, and no jurisdiction to determine questions relating to their internal affairs. *Courts—visitatorial power over foreign corporation.* Clark, Corp. 635.

Whether the object of a proceeding is intrinsically to regulate the internal affairs of a foreign corporation, or whether it is merely to enforce a contractual obligation or to prevent a fraud (*Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L.R.A. (N.S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971), is not always easy to determine; and the result is that there is some apparent conflict in the authorities (see *Kansas & E. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817; *Guilford v. Western U. Teleg. Co.* 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324; *Harding v. American Glucose Co.* 182 Ill. 551, 633, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577.)

Little doubt, however, can be entertained that the issuing of stock is a corporate act which is regulated and controlled by the laws of the incorporating state, and which, relating to the internal conduct and management of the corporation, is exclusively subject to the local laws. *Conflict of laws—issuance of stock by corporation.*

"From the nature of corporate stock, which is created by and under the authority of a state, the right or duty to issue it, like the

other attributes of the corporation, is governed by the local law of the state from which it derives its existence, and not by that of any other state." *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 40, 46 Am. Rep. 439, supra; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039.

Although the language of the statute (Laws 1915, chap. 115), conferring power upon the public service commission to control the issuing of stock by a corporation doing business in this state, is sufficiently broad to include within its provisions foreign corporations, it is not to be presumed that the legis-

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lature intended to give the commission power to regulate the internal affairs of such corporations. The fact that a foreign corporation is engaged in business in this state, and owns property located here, brings it within the jurisdiction of our courts in suits against it upon its contracts, or for fraud practised by it in the conduct of its business, but does not, also, subject it to legislation purporting to regulate the exercise of the inherent corporate powers conferred upon it by the legislative power of the incorporating state. *North State Copper & Gold Min. Co. v. Field*, supra; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378. If the amount of its capital stock is limited by the act of incorporation, the legislature of another state, where it happens to be

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engaged in business, has no power to increase or diminish the amount of stock thus fixed and established. One of the apparent rea-

sons for this proposition is "the impropriety and futility of interfering in the internal affairs of the corporation." *Beale, Foreign Corp.* § 307. The petitioner's request for the approval by the commission of an increase of its capital stock, which has been authorized by the laws of Maine, is misconceived, and is an application for the exercise of power by the commission which it does not possess. The effect of its approval of a domestic corporation's increase of stock is to render the stock legal; while its disapproval has the opposite effect. Laws 1915, chap. 115. But no one would claim that its disapproval in this case would render the stock authorized under the laws of Maine illegal or void.

—power of pub-
lic service
commission to
consent to in-
crease of stock.

In view of the foregoing discussion, the second question submitted by the Commission, whether it has power to approve a stock dividend (see Pub. Stat. chap. 273, § 11) which appears to represent actual value, becomes immaterial in this case, and, therefore, is not considered.

Case discharged.

All concur.

NOTE.

Jurisdiction of an action or proceeding involving the internal affairs of foreign corporations is treated in the annotation following *BOYETTE v. PRESTON MOTORS CORP.* post, 1383. Specifically, as to jurisdiction to compel the issuance of corporate stock, see subd. III. b, 4, of that annotation.

Corporation — visitatorial powers over foreign corporation.

1. Courts of one state have no jurisdiction to exercise visitatorial powers or supervisory powers over the management of the internal affairs of a corporation organized under the laws of another state where it is domiciled.

[See note on this question beginning on page 1383.]

— place of residence.

2. A corporation must dwell at the place of its creation, although it may do business wherever its charter permits if the right is not denied by local laws.

[See 7 R. C. L. 139.]

— power to compel issuance of stock.

3. A corporation cannot be compelled to issue stock if it is not provided for by the law of its incorporation and available to be issued.

Courts — power to determine merger of foreign corporations.

4. The courts of one state cannot determine whether or not there has been a merger of two corporations of another state, since to do so would require the exercise of visitatorial powers.

— power to determine rules governing foreign corporations.

5. The courts of one state cannot

determine what principles and what circumstances, under the laws of another state, regulate the creation and merger of corporations created by such state, and regulate the relation of stockholders in such corporation to each other and to the corporation.

Conflict of laws — rights of holder of stock in foreign corporation.

6. One becoming a stockholder in a foreign corporation contracts with reference to the laws of the state of its origin, and not to those of his residence.

Courts — jurisdiction to compel issuance of stock by foreign corporation.

7. The holder of stock in a foreign corporation cannot resort to the courts of the state of his residence to compel issuance to him of stock of another corporation of the same state into which the corporation in which he held stock was merged.

APPEAL by complainant from a decree of the Circuit Court for Jefferson County (Locke, J.) dismissing a bill filed to compel the issuance of stock to complainant in the defendant corporation, or to pay an amount equal to the par value of stock held by him in another company. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Thomas J. Judge, for appellant:

The relief sought does not involve the exercise of visitatorial powers over the internal affairs of a foreign corporation.

Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 3 L.R.A.(N.S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; Guilford v. Western U. Teleg. Co. 59 Minn. 332, 50 Am. St. Rep. 497, 61 N. W. 324.

Courts of this state will assume jurisdiction in cases involving the internal affairs of a foreign corporation,

where complete relief can be granted and the decree enforced in this state.

5 Thomp. Corp. 2d ed. §§ 6743, 6744, p. 1542; State ex rel. Watkins v. North American Land & Timber Co. 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172; Babcock v. Farwell, 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74; Edwards v. Schillinger, 245 Ill. 231, 33 L.R.A.(N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048; Miller v. Quincy, 179 N. Y. 294, 72 N. E. 116; Richardson v. Clinton Wall Trunk Mfg. Co. 181 Mass. 580, 64 N. E. 400;

Guilford v. Western U. Tele. Co. 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324; Westminster Nat. Bank v. New England Electrical Works, *supra*; Holbrook v. Ford, 158 Ill. 633, 27 L.R.A. 324, 46 Am. St. Rep. 917, 39 N. E. 1091; Travis v. Knox Terpezzone Co. 215 N. Y. 259, L.R.A. 1916A, 542, 109 N. E. 250, Ann. Cas. 1917A, 387; 19 Cyc. pp. 1345, 1346.

Messrs. Roscoe Chamberle and Weatherly, Birch, Chapman, & Hickman, for appellee:

The courts of a state have no jurisdiction to interfere by injunction, mandamus, or otherwise, in the management of the internal affairs of a foreign corporation, even at the suit of a resident stockholder, and even though the corporation may maintain an office and place of business in the state, and may have expressly or impliedly agreed to submit to the jurisdiction of the court in suits against it.

Importing & Exporting Co. v. Locke, 50 Ala. 332; North State Copper & Gold Min. Co. v. Fields, 64 Md. 151, 20 Atl. 1039; Hogue v. American Steel Foundries, 247 Pa. 12, 92 Atl. 1073; Madden v. Penn Electric Light Co. 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; Kinney v. Mexican Plantation Co. 233 Pa. 232, 82 Atl. 93; Taylor v. Mutual Reserve Fund Life Asso. 97 Va. 60, 45 L.R.A. 621, 33 S. E. 385; Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L.R.A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306; Wason v. Buzzell, 181 Mass. 338, 63 N. E. 909; Kimball v. St. Louis & S. F. R. Co. 157 Mass. 7, 34 Am. St. Rep. 250, 31 N. E. 697; Babcock v. Farwell, 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74; Van Dyke v. Railway Mail Asso. 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455; State ex rel. Hartford L. Ins. Co. v. Shain, 245 Mo. 78, 149 S. W. 479; Jackson v. Hooper, 76 N. J. Eq. 592, 27 L.R.A. (N.S.) 658, 75 Atl. 568; Gregory v. New York, L. E. & W. R. Co. 40 N. J. Eq. 38; Howard v. Mutual Reserve Fund Life Asso. 125 N. C. 49, 45 L.R.A. 853, 34 S. E. 199; Moore v. Silver Valley Min. Co. 104 N. C. 534, 10 S. E. 679; Re Culver, 145 Iowa, 1, 25 L.R.A. (N.S.) 384, 123 N. W. 743; Pacific Coast Coal Co. v. Esary, 85 Wash. 448, 148 Pac. 579; Edwards v. Schillinger, 245 Ill. 231, 33 L.R.A. (N.S.) 895, 137 Am. St. Rep. 308, 91 18 A.L.R.—87.

N. E. 1048; Dickey v. Southwestern Surety Ins. Co. 119 Ark. 12, 173 S. W. 398, Ann. Cas. 1917B, 634; State ex rel. Minnesota Mut. L. Ins. Co. v. Denton, 229 Mo. 187, 138 Am. St. Rep. 417, 129 S. W. 709.

The courts of any one state other than the one by which the corporation was created have no jurisdiction "to exercise authority over the organization, the corporate functions, the by-laws, or the relations between the stockholders and its members; nor to determine the rights and obligations of the corporation, or its members, arising under the law of its creation and depending upon such local law."

Smith v. Mutual L. Ins. Co. 14 Allen, 336.

Whether or not there exists a reorganization, consolidation, or merger of one or more corporations, incorporated under the laws of a particular state, depends upon express statutory authority of that state.

5 Thomp. Corp. 2d ed. §§ 5986, 6035.

The domicile of the corporation is the state where organized, and this domicile cannot be changed.

Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 33 Sup. Ct. Rep. 363.

A corporation must dwell in the place of its creation and cannot migrate to another sovereignty, though it may do business in all places where its charter allows, and the local laws do not forbid.

Bank of Augusta v. Earle, 13 Pet. 588, 10 L. ed. 307; Baltimore & O. R. Co. v. Koontz, 104 U. S. 12, 26 L. ed. 645; Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 226, 26 L. ed. 339; Sullivan v. Sullivan Timber Co. 103 Ala. 371, 25 L.R.A. 543, 15 So. 941; New York L. Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899.

Thomas, J., delivered the opinion of the court:

The bill, by a shareholder of the Preston Motor Car Company, was against the Preston Motors Corporation, and certain individuals averred to be the officers, and several of the directors of defendant corporation, to compel the issuance of stock to complainant in the latter corporation to the amount indicated, or an amount equal to the par value of stock held by plaintiff in the first-named company.

It is averred that the Preston "Motor Car Company" was organized (does not state where incorporated) for the purpose of manufacturing and selling automobiles; that plans and specifications of cars called "Preston" and "Preston Four" were obtained by "much work, labor, and expense" incurred by said corporation, and that the designs, names of the cars, and the good will of the company, and prestige acquired as the result of advertisement of said Preston cars, were the "only unencumbered assets of any practical value which were owned by the Motor Car Company." The respective corporations will be hereafter referred to as the Motor Car Company and the Motors Corporation.

Following the averment that the Motor Car Company was organized for the purpose we have indicated, that its only unencumbered assets of practical value were such designs, averred to be of great value, it is averred that prior to the organization of the Motors Corporation, organized under the laws of the state of Delaware, the officers and directors of the Motor Car Company "informed the stockholders" and "led them to believe" that stock would be issued to them in the Motors Corporation; that the assets of the Motor Car Company "were fraudulently transferred" to the Motors Corporation "without any consideration," and that the Motor Car Company has ceased to carry out the objects and purposes of its incorporation; that the personnel of the organization which established the Motor Car Company and abandoned the same, at the time of the filing of the bill, devoted time, attention, and energies to the promotion of the Motors Corporation, and has "fraudulently transferred" to the latter corporation the above-named assets, together with the good will, plans, tradename and whatever prestige the Motor Car Company had acquired, together with access to its books and business affairs, in violation of the

rights of the stockholders of the Motor Car Company, which "illegal acts are tantamount, in effect, to a merger" of the two corporations. It is further averred that after the organization of the Motors Corporation its directors adopted a resolution to the effect that its capital stock should be issued to the stockholders of the Motor Car Company in exact proportion to the amount of the capital stock held by such stockholders in the former corporation; that pursuant to this resolution stock had been issued in the Motors Corporation to a number of stockholders of the Motor Car Company, upon surrender of their stock in said company, and, in lieu thereof, acceptance of stock in the Motors Corporation.

The bill contains the averment that the officers of the Motors Corporation are residents of Alabama; that said corporation owns no property in the state of Delaware; that its plant, and practically all its assets, are in Alabama; that meetings of the board of directors are held in Alabama; that its stock books, minute books, and records are kept in this state, where stock is signed and issued by its officers.

The outstanding features of the foregoing bill may be thus summarized: (a) That the individual officers and directors of the old corporation, who are named in the bill, used the good will and the name of the cars of the old corporation for the benefit of the new corporation, paying nothing therefor; (b) that these individuals promised the stockholders of the old corporation that they would issue stock in the new corporation for the stock in the old corporation of equal par value, share for share; (c) that it is not averred that this promise was based upon any consideration; (d) that the capitalization or relative value of stock in said corporations is not averred; nor (e) is it averred how much of the stock of the Motors Corporation is owned or held by subscribers or purchasers for value, who had no knowledge or notice of

the interest (under the facts declared in the bill) of the Motor Car Company therein, or that there was available \$18,000 of unissued stock of the Motors Corporation.

The relief sought is against the Motors Corporation (a Delaware corporation), that it be ordered to issue to the complainant an amount of stock of like number and value as that held by him in the Motor Car Company; failing in this, that the officers and directors of the Motor Car Company be required to pay complainant an amount equal to the par value of the stock held by him in said Motor Car Company, and that "a decree be made and entered for this amount against said parties."

Assuming, without deciding, that the bill is not multifarious, for the purpose of the plea to the jurisdiction, the relief sought will be treated as against the Motors Corporation, and that it, through its officers, be required to issue stock in specific performance of the alleged undertaking (without having averred that such unissued stock was available); or, in lieu thereof, that its directors and officers pay the money value of complainant's stock in the Motor Car Company out of the funds of the Motors Corporation.

If such bill contains equity, it must rest upon the alleged merger of the old with or in the new corporation, or some privity between the new corporation and the stockholders of the old corporation, including complainant. No such privity is disclosed. Do the facts and conclusion contained in the bill show a merger of the two corporations?

The two amended pleas to the jurisdiction of the court (to the bill as amended) aver that the cause of action or controversy involves "the question of an alleged merger of the two corporations," and that the Alabama courts are without jurisdiction, and that no further cognizance of the cause be taken, and that it be dismissed with its reasonable costs sustained. Exceptions were

filed to the pleas (separately), which were overruled. Plaintiff declined to plead further, the court dismissed the bill, and for such action of the court error is assigned.

The question presented is whether "visitatorial power of an Alabama court over the respondent, a Delaware corporation," may be judicially exercised in awarding the relief prayed. The pleas are essentially alike, except that plea 1 is to the jurisdiction of the court over the subject-matter of the cause set forth in the bill, because the Motors Corporation, named as a respondent, is a foreign corporation, and pleads compliance with the Delaware laws, and that "the cause of action or controversy evidenced in and by the bill of complaint is one involving the alleged rights of stockholders, as such, of one of said corporations against another of said corporations, and involves questions relating to the internal management of the affairs of one or both of said foreign corporations and the exercise by this court of visitatorial powers over said Preston Motors Corporation, and involves particularly the question of the alleged right of complainant, as a stockholder of Preston Motor Car Company, to be admitted as a member or stockholder of Preston Motors Corporation, and to have its stock issued to him, or to be compensated for some alleged damage or injury to him, as a stockholder of said Preston Motor Car Company, against the officers and directors thereof, constituting matters over which the government, or the court, of the state of Delaware, has sole and exclusive jurisdiction."

Plea 2 is to the jurisdiction of the court "over the subject-matter of the cause or causes set forth, or attempted to be set forth, in said bill of complaint in the first aspect," so far as said bill is applicable to and seeks relief against the Motors Corporation, because said corporation is a foreign corporation.

The last plea presents the simple question of jurisdiction of the Ala-

bama court to entertain the cause of action as to the Motors Corporation; and this aspect of the case will be now considered. Though the bill avers that the Motors Corporation was organized under the laws of Delaware, it is not averred that it maintains a principal office and place of business in Wilmington, Delaware; and though it does aver that the Motor Car Company was organized for the purpose indicated, it does not aver that it was incorporated under the laws of the state of Delaware. Hence, the sufficiency of the bill was not questioned by demurrer, such matter being set up by the special pleas to the sufficiency of which exception was taken.

It is established that a corporation must dwell at the place of its creation (Bank of Augusta v. Earle, 13 Pet. 588, 10 L. ed. 307; La Fayette Ins. Co. v. French, 18 How. 404, 408, 15 L. ed. 451, 453; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57), though it may do business wherever its charter permits, provided that right is not denied by local law (Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 12, 26 L. ed. 643, 645; Western U. Tele. Co. v. Kansas, 216 U. S. 1, 33, 54 L. ed. 355, 369, 30 Sup. Ct. Rep. 190; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Interstate Amusement Co. v. Albert, 239 U. S. 560, 60 L. ed. 439, 36 Sup. Ct. Rep. 168). However, the corporation carries its charter—as the law of its existence—wherever it may and does go for business. Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 226, 26 L. ed. 337, 339; Shaw v. Quincy Min. Co. 145 U. S. 444, 450, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; Nashua Sav. Bank v. Anglo-American, etc., Co. 189 U. S. 221, 47 L. ed. 782, 23 Sup. Ct. Rep. 517; Converse v. Hamilton,

224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. That is to say, the powers and limitations of its charter are the same abroad as at home. Beard v. Union & American Pub. Co. 71 Ala. 60, 62; Christian v. American Freehold Land Mortg. Co. 89 Ala. 198, 7 So. 427; Sullivan v. Sullivan Timber Co. 103 Ala. 371, 379, 25 L.R.A. 543, 15 So. 941; State v. Anniston Rolling Mills, 125 Ala. 121, 27 So. 921; Holman v. Durham Buggy Co. 200 Ala. 556, 76 So. 914; Ashurst v. Arnold-Henegar-Doyle Co. 201 Ala. 480, 78 So. 386; Louisville & N. R. Co. v. Dawson, 14 Ala. App. 272, 68 So. 674; 2 Beach, Priv. Corp. §§ 416, 890; Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; Shaw v. Quincy Min. Co. 145 U. S. 444, 450, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935; Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 189 U. S. 221, 47 L. ed. 782, 23 Sup. Ct. Rep. 517.

Mr. Thompson (Corp. 2d ed. §§ 5986, 6035, et seq.) collects authorities to the effect that reorganization, consolidation, and merger of corporations have no other source of authority than by statute; and whether or not there was reorganization, consolidation, or merger of one or more corporations incorporated under the laws of a particular state, depends upon authority of law of that state (Meyer v. Johnston, 64 Ala. 603, 656, 657, 662; State v. Atlantic Coast Line R. Co. 202 Ala. 558, 81 So. 60; Alabama, T. & N. R. Co. v. Tolman, 200 Ala. 449, 76 So. 381; Southern Steel Co. v. Hopkins, 157 Ala. 175, 20 L.R.A. (N.S.) 848, 131 Am. St. Rep. 20, 47 So. 274, 16 Ann. Cas. 690).

In Smith v. Mutual L. Ins. Co. 14 Allen, 336, 341, the rule is stated that state courts, other than in the state in which a corporation is created, have no jurisdiction to exercise authority over the organization, the corporate functions, the by-laws, the relations between the corporation and its members, or to determine the rights and obliga-

tions of the corporation or its members arising under the law of its creation, such questions or matters depending on local law. 7 R. C. L. p. 1065, § 103; id. p. 415, § 403.

The many authorities bearing upon the question are to the effect that courts of one state have no jurisdiction to exercise visitatorial or supervisory powers over the management of the internal affairs of a corporation organized and domiciled under the laws of another state, such powers belonging to the

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corporation.

state in which
the corporation was
created, and by
which it is contin-

ued in life. As a corollary of such rule, state courts have no jurisdiction to interfere by injunction, mandamus, or otherwise, in the management of the internal affairs of a foreign corporation at the suit of a resident stockholder, even though the corporation may maintain an office and place of business in the state, and may, expressly or impliedly, agree to submit to the jurisdiction of the court in suits against it. *New York L. Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899; *Importing & Exporting Co. v. Locke*, 50 Ala. 332, 335.

The provisions of § 3054 of the Code of 1907, as construed in *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; *Rucker v. Morgan*, 122 Ala. 308, 318, 25 So. 242; *Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858; *Montgomery Enterprises v. Empire Theater Co.* 204 Ala. 566, — A.L.R. —, 86 So. 880, and *Alcazar Amusement Co. v. Mudd & Colley Amusement Co.* 204 Ala. 509, 86 So. 209, are not to a contrary effect. The statute merely provides jurisdiction in courts of chancery when the defendants reside in this state, and against nonresidents in the classes of cases indicated, to wit: "When the object of the suit concerns an estate of, lien, or charge upon, lands [in this state], or the disposition thereof, or any interest in, title to, or encumbrance on personal prop-

erty within this state, or where the cause of action arose, or the act on which the suit is founded was to have been performed, in this state."

See *Montgomery Enterprises v. Empire Theater Co.* 204 Ala. 566, — A.L.R. —, 86 So. 880.

The relief sought is for the issue of \$18,000 of stock of the Motors Corporation at its home office in Delaware, which cannot be done if such stock was not

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pel issuance of
stock.

authorized by the law of its incorporation and available for such issue—this latter possibility involving the question of whether or not the whole amount of the capital stock of the corporation had been issued and sold to other parties. The alternative relief prayed for is—failing in the issue of said stock—that a money judgment be rendered against that corporation, which latter liability would be dependent upon whether or not there was a legal merger of the two Delaware corporations. Preliminary to the inquiry of such liability is that whether the Motor Car Company had been merged with the Motors Corporation—a question which the Alabama courts may not decide without exercising visitatorial powers; and this the courts have uniformly declined to do. Any other rule would produce inextricable confusion and breach of comity that should exist between states.

Courts—power to
determine
merger of
foreign cor-
porations.

The bill of complaint shows clearly that the only injury, if any, the complainant Boyette may have sustained by reason of the alleged wrong of the officers and directors of the Motor Car Company, was a common injury, which he and all the other stockholders of the old company sustained; and his claim is differentiated in no respect from the rights of the other stockholders, except as to the number of shares owned by each stockholder. Therefore, it necessarily follows that a decision in this case as to the lia-

bility vel non of the Motors Corporation, or its officers, or the other respondents, will establish a precedent for the other claims, and, hence, the court must say what principle and what circumstances, under the laws of Delaware, regulate the creation, merger, etc., of corporations in such state, and regulate the relation of stockholders

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porations.

in such corporations to each other and to the corporations. This claim cannot be established and finally adjudicated by the Alabama courts, and have due regard to the sovereignty of the state of Delaware over all corporations created by it.

The question is stated in *Guilford v. Western U. Teleg. Co.* 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324: "The doctrine is well settled that courts will not exercise visitatorial powers over foreign corporations, or interfere with the management of their internal affairs. Such matters must be settled by the courts of the state creating the corporation. This rule rests upon a broader and deeper foundation than the mere want of jurisdiction in the ordinary sense of that word. It involves the extent of the authority of the state (from which its courts derive all their powers) over foreign corporations. The only difficulty is in drawing the line of demarcation between matters which do, and those which do not, pertain to the management of the internal affairs of a corporation. To entertain an action to dissolve a corporation; to determine the validity of its organization; to determine which of two rival organizations is the legal one, or who of rival claimants are its legal officers; to restrain it from declaring a dividend, or to compel it to make one; to restrain it from issuing its bonds, or for making an additional issue of stock—would clearly all be the exercise of visitatorial powers over the corporation, or an interference with the management of its internal

affairs. . . . But in the present case there is no question as to the issue, validity, or forfeiture of the stock. There is not even any controversy as to the right of the plaintiff to a certificate as evidence of his title. The only dispute is over the terms or conditions upon which that certificate shall be issued. We do not see how the granting of such relief is, in any proper sense, the exercise of visitatorial powers or an interference with the management of the internal affairs of the defendant."

See also *Taylor v. Mutual Reserve Fund Life Asso.* 97 Va. 60, 45 L.R.A. 621, 33 S. E. 385.

In this jurisdiction, in *Importing & Exporting Company of Georgia v. Locke*, supra, it was sought to have an Alabama court declare the charter of a Georgia corporation forfeited; and, on authority of *Society for Propagation of Gospel v. New Haven*, 8 Wheat. 464, 5 L. ed. 662, it was said: "The courts of Alabama have not jurisdiction to adjudge a forfeiture of a Georgia corporation."

See 8 Am. St. Rep. 199, note; *Edwards v. Schillinger*, 245 Ill. 231, 33 L.R.A. (N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048; *Hogue v. American Steel Foundries*, 247 Pa. 12, 92 Atl. 1073; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Dickey v. Southwestern Surety Ins. Co.* 119 Ark. 12, 173 S. W. 398, Ann. Cas. 1917B, 634; *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 307, note, 19 Ann. Cas. 74; *Madden v. Penn. Electric Light Co.* 181 Pa. 617, 621, 622, 38 L.R.A. 638, 37 Atl. 817; *Wilkins v. Thorne*, 60 Md. 253; *Stafford v. American Mills Co.* 13 R. I. 310.

After all that may be said of comity between states by public policy, it is sufficient that when complainant became a stockholder in the Motor Car Company, a corporation organized and operating under the laws of Delaware, he subjected himself—in assuming the relation of stockholder—to the general corporate

(— Ala. —, 89 So. 746.)

laws of that state as affecting that corporation's powers, obligations, and merger or consolidation with other corporations organized under the laws of that state; and he is presumed, or is held, to have contracted with reference to the laws of Delaware, and not of Alabama. *Canada Southern R. R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363, and other like cases we have cited above. See also *Wright v. Hix*, 203 Ala. 425, 83 So. 341.

The instant bill does not present a case of well-recognized exception to the general rule. 5 *Thomp. Corp.* 2d. ed. §§ 6743, 6744; *Travis v. Knox Terpezone Co.* 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 250, Ann. Cas. 1917A, 387; 19 Cyc. 1345, 1348; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L.R.A. (N.S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971, 137 Am. St. Rep. 307,

note; *Lockwood v. United States Steel Co.* 209 N. Y. 375, L.R.A. 1915C, 471, 103 N. E. 697; *Guilford v. Western U. Teleg. Co.* supra. The legal obligation of a corporation to keep its records or registry of stock transfers, etc., according to the laws of the state of its creation (which laws are pleaded), imposes the obligation to keep the books at the place its charter designates. Under the averments of the plea, the principal situs of the stock, for the purpose of its transfer upon the books, is in the state in which the incorporation, merger, or consolidation took place or was effected. 10 Cyc. 593.

Courts—jurisdiction to compel issuance of stock by foreign corporation.

The judgment of the circuit court in equity is affirmed.

Anderson, Ch. J., and McClellan and Somerville, JJ., concur.

Petition for rehearing denied, June 23, 1921.

ANNOTATION.

Jurisdiction of action or proceeding involving internal affairs of foreign corporation.

- I. General rule, 1383.
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I. General rule.

It is well established that, as a general rule, courts will not take jurisdiction of the internal affairs of a foreign corporation, or, in the exercise of visitatorial powers, interfere with, supervise, administer, or direct the management of such a corporation.

United States.—Republican Moun-

tain *Silver Mines v. Brown* (1893) 24 L.R.A. 776, 7 C. C. A. 412, 19 U. S. App. 203, 58 Fed. 648, reviewing (1893) 55 Fed. 9; *Leary v. Columbia River & P. S. Nav. Co.* (1897) 82 Fed. 777; *London, P. & A. Bank v. Aronstein* (1902) 54 C. C. A. 663, 117 Fed. 609, certiorari denied in (1902) 187 U. S. 641, 47 L. ed. 345, 23 Sup. Ct. Rep. 841;

Parks v. United States Bankers' Corp. (1905) 140 Fed. 160; *Chicago Title & T. Co. v. Newman* (1911) 109 C. C. A. 263, 187 Fed. 573. *Hanssen v. Pusey & J. Co.* (1921) 276 Fed. 296. See also *Sidway v. Missouri Land & Live-Stock Co.* (1900) 101 Fed. 486.

Alabama. — *BOYETTE v. PRESTON MOTORS CORP.* (reported herewith) ante, 1376. See also *Importing & Exporting Co. v. Locke* (1874) 50 Ala. 335.

Arkansas. — See *Dickey v. Southwestern Surety Ins. Co.* (1915) 119 Ark. 12, 172 S. W. 398, Ann. Cas. 1917B, 634.

California. — *Miles v. Woodward* (1896) 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360.

Delaware. — *Swift v. State* (1886) 7 *Houst.* 351, 40 *Am. St. Rep.* 127, 6 *Atl.* 856, 32 *Atl.* 143.

District of Columbia. — *Clark v. Mutual Reserve Fund Life Asso.* (1899) 14 *App. D. C.* 154, 43 *L.R.A.*

Ins. Co. (1867) 14 *Allen*, 336; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* (1883) 135 *Mass.* 34, 46 *Am. Rep.* 439; *New Haven Horse Nail Co. v. Linden Spring Co.* (1886) 142 *Mass.* 349, 7 *N. E.* 773; *Kimball v. St. Louis & S. F. R. Co.* (1892) 157 *Mass.* 7, 34 *Am. St. Rep.* 250, 31 *N. E.* 697; *Andrews v. Mines Corp.* (1910) 205 *Mass.* 121, 137 *Am. St. Rep.* 428, 91 *N. E.* 122.

Minnesota. — *Guilford v. Western U. Teleg. Co.* (1894) 59 *Minn.* 332, 50 *Am. St. Rep.* 407, 61 *N. W.* 324; *State ex rel. Lake Shore Teleph. & Teleg. Co. v. DeGroat* (1909) 109 *Minn.* 168, 134 *Am. St. Rep.* 764, 123 *N. W.* 417; *Van Dyke v. Railway Mail Asso.* (1912) 118 *Minn.* 390, 137 *N. W.* 15, Ann. Cas. 1913E, 455; *Tasler v. Peerless Tire Co.* (1919) 144 *Minn.* 150, 174 *N. W.* 731; *OLSEN v. DANISH BROTHERHOOD* (reported herewith) ante, 1370. See also *Selover v. Isle Harbor Land Co.* (1904) 91 *Minn.* 451, 78 *N. W.* 344.

Missouri. — *State ex rel. Minnesota*

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615, 55 N. E. 1100; *Howe v. New York, N. H. & H. R. Co.* (1911) 142 App. Div. 451, 126 N. Y. Supp. 1090; *Butler v. Standard Milk Flour Co.* (1911) 146 App. Div. 735, 131 N. Y. Supp. 451; *De Raismes v. United States Lithograph Co.* (1914) 161 App. Div. 781, 146 N. Y. Supp. 813; *Travis v. Knox Terpezone Co.* (1915) 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 250, Ann. Cas. 1917A, 387; *People ex rel. Solomon v. Brotherhood of Painters, Decorators & Paperhangers* (1916) 218 N. Y. 115, 112 N. E. 752; *Sauerbrunn v. Hartford L. Ins. Co.* (1917) 220 N. Y. 363, 115 N. E. 1001.

North Carolina. — *Moore v. Silver Valley Min. Co.* (1889) 104 N. C. 534, 10 S. E. 679; *Howard v. Mutual Reserve Fund Life Asso.* (1899) 125 N. C. 54, 45 L.R.A. 853, 34 S. E. 199; *Brenizer v. Supreme Council, R. A.* (1906) 141 N. C. 409, 6 L.R.A.(N.S.) 235, 53 S. E. 835; *Reid v. Norfolk S. R. Co.* (1913) 162 N. C. 355, 78 S. E. 306.

Ohio.—*State ex rel. Ferencz v. Unida Gold Min. Co.* (1910) 32 Ohio C. C. 60.

Oregon.—*Beard v. Beard* (1913) 66 Or. 512, 133 Pac. 797, 134 Pac. 1196.

Pennsylvania. — *Madden v. Penn Electric Light Co.* (1897) 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817; *Madden v. Penn Electric Light Co.* (1901) 199 Pa. 454, 49 Atl. 296, affirming (1898) 7 Pa. Dist. R. 304; *McCloskey v. Snowden* (1905) 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; *Hartley v. Welsh* (1899) 8 Pa. Dist. R. 546, 16 Montg. Co. L. Rep. 13; *Morris v. Stevens* (1867) 6 Phila. 488; *Bank of Virginia v. Adams* (1850) 1 Pars. Sel. Eq. Cas. 534; *American Grease Co. v. Vogellus* (1900) 23 Pa. Co. Ct. 664; *Cheyney v. Equitable Life Assur. Soc.* (1907) 16 Pa. Dist. R. 765; *Flory Mfg. Co. v. Bangor Slate Co.* (1908) 18 Pa. Dist. R. 564; *Happersett v. Eaton* (1909) 19 Pa. Dist. R. 640, 38 Pa. Co. Ct. 2; *Com. ex rel. Kinney v. Mexican Plantation Co.* (1909) 19 Pa. Dist. R. 861; *Kinney v. Mexican Plantation Co.* (1911) 233 Pa. 232, 82 Atl. 93; *Hogue v. American Steel Foundries* (1913) 42 Pa. Co. Ct. 215, affirmed in (1915) 247 Pa. 12, 92 Atl. 1073; *Kelly v. Thomas* (1912) 234 Pa. 419, 51 L.R.A.(N.S.) 122, 83 Atl. 307;

Loan Soc. of Phila. v. Eavenson (1913) 241 Pa. 65, 88 Atl. 295.

Texas.—*Royal Fraternal Union v. Lunday* (1908) 51 Tex. Civ. App. 637, 113 S. W. 185. See also *American Tribune New Colony Co. v. Schuler* (1904) 34 Tex. Civ. App. 560, 79 S. W. 370.

Vermont.—*Corry v. Barre Granite & Quarry Co.* (1917) 91 Vt. 413, 101 Atl. 38.

Virginia.—*Taylor v. Mutual Reserve Fund Life Asso.* (1899) 97 Va. 60, 45 L.R.A. 621, 33 S. E. 385.

Washington.—*Tolbert v. Modern Woodmen* (1915) 83 Wash. 287, 145 Pac. 183.

Wisconsin. — *Ganzer v. Rosenfeld* (1913) 153 Wis. 442, 141 N. W. 121; *State ex rel. Wisconsin Dry Milk Co. v. Circuit Ct.* (1922) — Wis. —, 186 Nev. 732.

Canada.—*Merritt v. Copper Crown Co.* (1902) 36 N. S. 383.

"The general rule has been declared by the decisions of many courts, and has been stated by text-writers, to be that the courts of one state will not exercise the power of deciding controversies relating merely to the internal management of the affairs of a corporation organized under the laws of another state, or of determining rights dependent upon such management." *Babcock v. Farwell* (1910) 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74.

"It is a well-recognized principle of law that the courts of one state have no visitatorial power over corporations of another state, and no jurisdiction to determine questions relating to their internal affairs." *RE FRYEBURG WATER CO.* (reported herewith) ante, 1373.

Actions involving the internal affairs or management of a foreign corporation, wherein it is sought to regulate or control the same, should be maintained in the courts of the domicil. *Leary v. Columbia River & P. S. Nav. Co.* (1897) 82 Fed. 777; *Wilkins v. Thorne* (1883) 60 Md. 253; *Loan Soc. of Phila. v. Eavenson* (1913) 241 Pa. 65, 88 Atl. 295; *Lehr v. Murphy* (1908) 136 Wis. 92, 116 N. W. 893. And see cases cited supra.

In *Wilkins v. Thorne* (1883) 60 Md. 258, the court said: "This is clearly a controversy relating to the internal management of the corporation, and the validity of the acts of those who claim to be, and indeed are admitted to be, de facto, its president, directors, and stockholders. Now if this were a Maryland corporation, there could be no question as to the jurisdiction of a Maryland court over the subject. But such is not the case. This corporation was created under the laws of another state, and it seems to us that all such controversies must be determined by the courts of the state by which the corporation was created. Our researches have enabled us to find no case in which the courts of another state have ever assumed jurisdiction over a controversy like this, and we think none can be found."

See also *North State Copper & G. Min. Co. v. Field* (1885) 64 Md. 151, 20 Atl. 1039.

So, in *Andrews v. Mines Corp.* (1910) 205 Mass. 121, 137 Am. St. Rep. 428, 91 N. E. 122, the court said: "It has often been decided that this court will not take jurisdiction, in ordinary cases, to regulate the internal affairs of a foreign corporation, which ought to be managed under the laws and by the direction of the courts of the state or country where it is organized."

In an earlier case in the same jurisdiction this view was lucidly expressed as follows: "The rule is well established in this commonwealth that ordinarily our courts will decline jurisdiction in matters which pertain to the interior life and conduct of a corporation as a creature of a foreign state, and which particularly involve a knowledge and application of the statutes of that state, and which often require for their proper adjustment full jurisdiction of the corporation and of its members for different purposes." *Richardson v. Clinton Wall Trunk Mfg. Co.* (1902) 181 Mass. 580, 64 N. E. 400.

II. Reasons of rule.

a. *Impropriety of exercising jurisdiction.*

The rule rests, according to some decisions on considerations of policy and propriety, rather than of power.

Though the court has acquired jurisdiction of the necessary parties, and of the subject-matter, the exercise of that power rests in its discretion, and in the exercise of that discretion courts have refused to render a decree affecting the internal affairs or management of a foreign corporation, deeming it expedient that the matter should be committed to the courts of the domicile. *Edwards v. Schillinger* (1910) 245 Ill. 231, 33 L.R.A.(N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048; *Smith v. Mutual L. Ins. Co.* (1867) 14 Allen (Mass.) 336; *New Haven Horse Nail Co. v. Linden Spring Co.* (1886) 142 Mass. 349, 7 N. E. 773; *Guilford v. Western U. Teleg. Co.* (1894) 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324; *Lewisohn Bros. v. Anaconda Copper Min. Co.* (1899) 26 Misc. 622, 56 N. Y. Supp. 807; *Moore v. Silver Valley Min. Co.* (1889) 104 N. C. 534, 10 S. E. 679. And see *Babcock v. Farwell* (1910) 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74. Compare *Chicago Title & T. Co. v. Newman* (1911) 109 C. C. A. 263, 187 Fed. 573.

In an early case, *Smith v. Mutual L. Ins. Co.* (1867) 14 Allen (Mass.) 336, the court, in assigning this reason for the rule, said: "Aside from the question of power depending on the right of jurisdiction, we regard it as within the province of this court sitting as a court of equity, in its discretion, to decline to exercise jurisdiction in such cases; referring parties to the tribunals of the state upon whose laws their relations and rights peculiarly depend, and where alone they can be effectually and properly administered. This course is especially appropriate in the case of a foreign corporation, when the proceeding is such as not merely to affect its external relations, but also to involve its organic laws, which are necessarily local, and require local administration."

And in a later case the same court, in further explanation of the rule, said: "Where the rights sought to be passed upon and determined are those which arise from the relation between a corporation and its members, they depend upon the local law which exists at the place of its creation, and true policy

would seem to require us to leave them to be there determined. The liability which the stockholders are alleged to be under to the corporation and its creditors has little analogy to a debt due according to the generally recognized principles of law. It is of a peculiar character, involving the organic law by which the corporation is created, and requiring local administration." *New Haven Horse Nail Co. v. Linden Springs Co.* (1886) 142 Mass. 353, 7 N. E. 773.

So, in *Edwards v. Schillinger* (1910) 245 Ill. 231, 33 L.R.A.(N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, it was said: "If a court . . . has jurisdiction of the necessary parties and of the subject-matter, and has power to grant an effective remedy, there has never been any question about the existence of the jurisdiction, but the question has been as to the propriety of assuming jurisdiction in the exercise of a sound judicial discretion."

But it would seem that, in the case of corporations which are nonresident only in that they were created in another state,—the officers, agents, stockholders, business, and property, all being within the jurisdiction of the court,—the court will not deny relief, in a proper case, on the ground that the "internal affairs" of the corporation will be affected. *Babcock v. Farwell* (1910) 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74; *State ex rel. Watkins v. North American Land & Timber Co.* (1901) 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172; *Beard v. Beard* (1913) 66 Or. 512, 133 Pac. 797, 134 Pac. 1196; *Corry v. Barre Granite & Quarry Co.* (1917) 91 Vt. 413, 101 Atl. 38.

A comprehensive statement of this rule and its application was made in a recent case, *Corry v. Barre Granite & Quarry Co.* (Vt.) *supra*, wherein it was said: "It may safely be said that when a corporation is nonresident only in that it is the creation of another state,—its officers, agents, stockholders, business, and property, all being within the jurisdiction of the court,—policy and expediency do not require the court to deny relief, in a proper case, on the ground that the in-

ternal affairs of the corporation will be affected. Where the relief sought is within the general jurisdiction of a court of chancery, and all the parties necessary to the full and proper adjustment of the rights involved are before the court, and where the relief sought does not require an exercise of the visitatorial power of the government, the court should determine the controversy, instead of remitting suitors to a foreign jurisdiction."

Likewise, in *State ex rel. Watkins v. North American Land & Timber Co.* (1901) 106 La. 634, 87 Am. St. Rep. 309, 31 So. 172, the court said: "Whether a court should exercise jurisdiction in a particular case against a foreign corporation is, in our opinion, a question to be determined with reference rather to its power to enforce any decree that it may find it necessary to render, in order to do complete justice, than with reference to the possible effect of the suit upon the internal management of the corporation." And in the same case the court expressed the opinion that "if a corporation succeeds in migrating into another state than that of its creation, and in carrying there its officers and property, and holds its corporate meetings and transacts its corporate business within the jurisdiction of the courts of such other state, so that any judgment rendered by such courts concerning such business can be completely enforced, we know of no reason why controversies as to the regulation of that business, whether arising among the members of the corporation, or between them and third persons, should not be determined by these courts."

But in a few cases the fact that, because the defendant is a foreign corporation, and its officers and books and assets are in another state, it may be impossible to grant full relief, was held not to affect the jurisdiction of the court. *Guilford v. Western U. Teleg. Co.* (1894) 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324, followed in *Lively v. Husebye* (1910) 60 Wash. 47, 110 Pac. 675; *Clark v. Equitable Life Assur. Soc.* (1898) 76 Miss. 22, 23 So. 453.

In *Guilford v. Western U. Teleg. Co.* (Minn.) supra, which was a suit to compel the corporation to issue a certificate of stock, it was contended by counsel for the defendant that the court ought not to entertain the action, because it had no means of enforcing its decree by compelling the issue of a certificate. The court said: "It is undoubtedly true that courts will not entertain an action, where it is apparent that if a judgment was rendered they would be wholly unable to enforce it. But the mere fact that they may be unable to compel specific performance in a particular way is no reason why the suit should not be entertained. If the defendant should refuse to issue certificates in accordance with the judgment, it would be entirely competent for the court, in accordance with the prayer of the complaint, to render judgment for the value of the stock. Our conclusion is that the action can be maintained."

Similarly, in *Clark v. Equitable Life Assur. Soc. (Miss.)* supra, it was said: "As we understand counsel, the proposition is that by reason of the facts adverted to a moment ago by us, viz., that the appellee is a foreign corporation, domiciled in New York, and that its offices and books of account, and its assets, are all beyond the boundaries of our own state, our courts will, in the exercise of judicial discretion, decline to entertain jurisdiction when it thus is made to appear that the court may, in the progress of the cause, find itself unable to grant administrative relief, if the appellee shall decline to make discovery, or otherwise refuse obedience to the orders or decrees of the court. It is suggested that it does not comport with judicial dignity to assume jurisdiction of a case where it is apparent that the court may be balked in its efforts to administer the law by a recalcitrant litigant. It would seem better to comport with judicial dignity for the court to proceed upon the supposition that obedience will be promptly yielded to its orders and decrees by every litigant before it, and to endeavor to find some legal method of enforcing obedience to its commands,

if they shall be sought to be defied or evaded. It will be time enough for the court to abdicate its powers when it finds itself powerless to enforce its authority."

It follows that where, in some form, a satisfactory remedy may justly be given, a court will assume jurisdiction. *Raynes v. Sharp* (1921) 238 Mass. 20, 130 N. E. 199.

b. Ineffectiveness of remedy.

Many cases declare the reason of the rule against assuming jurisdiction of an action involving the internal affairs of a foreign corporation, to be the impossibility of enforcing the decree or order.

United States.—See *Leary v. Columbia River & P. S. Nav. Co.* (1897) 82 Fed. 777.

District of Columbia. — *Clark v. Mutual Reserve Fund Life Asso.* (1899) 14 App. D. C. 154, 43 L.R.A. 390.

Illinois.—*Patterson v. Lynde* (1884) 112 Ill. 206. See also *Babcock v. Farwell* (1910) 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74.

Louisiana.—*State ex rel. Watkins v. North American Land & Timber Co.* (1901) 106 La. 632, 87 Am. St. Rep. 309, 31 So. 172.

Minnesota.—See *OLSEN v. DANISH BROTHERHOOD* (reported herewith) ante, 1370.

New Jersey.—*Gregory v. New York, L. E. & W. R. Co.* (1885) 40 N. J. Eq. 44; *Jackson v. Hooper*, 76 N. J. Eq. 592, 27 L.R.A.(N.S.) 658, 75 Atl. 568.

New York.—*Howell v. Chicago & N. W. R. Co.* (1868) 51 Barb. 383; *Hallenborg v. Greene* (1901) 66 App. Div. 590, 73 N. Y. Supp. 403; *Fisher v. Charter Oak L. Ins. Co.* (1885) 20 Jones & S. 179. See also *Redmond v. Enfield Mfg. Co.* (1872) 13 Abb. Pr. N. S. 332.

North Carolina.—*Howard v. Mutual Reserve Fund L. Asso.* (1899) 125 N. C. 54, 45 L.R.A. 853, 34 S. E. 199.

Texas.—*Royal Fraternal Union v. Lunday* (1908) 51 Tex. Civ. App. 637, 113 S. W. 185.

Virginia. — *Taylor v. Mutual Reserve Fund Life Asso.* (1899) 97 Va. 60, 45 L.R.A. 621, 33 S. E. 385.

Washington. — *Lively v. Husebye* (1910) 60 Wash. 47, 110 Pac. 673.

"The reasons for such a rule are apparent. Only the courts of the state in which the corporation has its residence can enforce their judgment and orders against them; only those courts have power to remove the officers of such corporation for dereliction of duty, or to declare a forfeiture of their charters." *Howard v. Mutual Reserve Fund Life Asso. (N. C.) supra*. See also *Taylor v. Mutual Reserve Fund Life Asso. (Va.) supra*.

"The orders and decrees of a court have no extraterritorial effect or force. They can only be enforced directly against property within the state, or in personam against individuals or officers of corporations found within the jurisdiction of the court, and thereby affect property without the state. When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country, or of a sister state, and it may contravene the public policy of the foreign jurisdiction, or rest upon the construction of a foreign statute the interpretation of which is not free from doubt,—as where the subject-matter of the litigation and the judgment would relate strictly to the internal affairs and management of the foreign corporation,—the court should decline jurisdiction, because such questions are of local administration, and should be relegated to the courts of the state or country under the laws of which the corporation was organized." *Hallenborg v. Greene* (1901) 66 App. Div. 590, 73 N. Y. Supp. 403.

Likewise, it has been said: "It is the duty of the state to provide for the collection of debts from foreign corporations, due to its citizens, and this has been done; and it is the duty of the state to protect its citizens from fraud, by all the means in its power, whether against domestic or foreign wrongdoers. This, however, does not authorize the courts to regulate the internal affairs of foreign corporations. The courts possess no visitatorial power over them. We can enforce no forfeiture of charter for vio-

lation of law, nor can we remove directors for misconduct. These powers all properly belong to the courts of the state from which they derive their existence." *Howell v. Chicago & N. W. R. Co. (1868) 51 Barb. (N. Y.) 379*.

So, where neither the officers nor the property of the corporation are within the state, the court can render no effective decree, and if it were to undertake to act in such cases, has no power, and therefore cannot bring the officers, or the corporate books, or the assets of the corporation within its jurisdiction, to be subject to its process. Its decrees could be enforced only by proceedings for contempt, and yet there would be no person subject to that process, to be coerced to act for the corporation. *Clark v. Mutual Reserve Fund Life Asso. (1899) 14 App. D. C. 151, 43 L.R.A. 390*.

See also *Fisher v. Charter Oak L. Ins. Co. (1885) 20 Jones & S. (N. Y.) 188*; *Taylor v. Mutual Reserve Fund Life Asso. (1899) 97 Va. 60, 45 L.R.A. 621, 33 S. E. 385*.

"Whilst a court may have jurisdiction to hear and determine a cause against a corporation, and to render judgment commanding it to perform a particular act, and may also have such power for the enforcement of its judgment as its grantor can confer, nevertheless, if the corporation has its domicile in a foreign state or country, and the particular officers to whom alone the necessary compulsion can be applied are beyond the reach of its process, the jurisdiction, as a whole, falls short; and, as the court will be powerless to enforce obedience, the judgment will not be rendered." *State ex rel. Watkins v. North American Land & Timber Co. (1901) 106 La. 632, 87 Am. St. Rep. 309, 31 So. 172*.

Where the only person who might be proceeded against for contempt, in the event that a decree was rendered and disobeyed, is a mere local agent of the corporation, the assumption of jurisdiction would be futile. *Clark v. Mutual Reserve Fund Life Asso. (1899) 14 App. D. C. 154, 43 L.R.A. 390*.

a. What constitute "internal affairs."

It has been observed that the term "internal affairs," within the meaning of the rule that a court will not entertain an action involving the internal affairs of a foreign corporation, has no very definite or fixed meaning. *Edwards v. Schillinger* (1910) 245 Ill. 231, 33 L.R.A.(N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048.

"To trace . . . the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed, and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience, or of efficiency, or of justice, point to the courts of the domicile of the corporation as the appropriate tribunals." *Travis v. Knox Terpezone Co.* (1915) 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 260, Ann. Cas. 1917A, 337.

Courts will not exercise visitatorial powers over foreign corporations, or interfere with the management of their strictly internal affairs. The difficulty is in drawing the line of demarcation between matters which do, and matters which do not, pertain to the management of the internal affairs of the corporation. The purpose of the rule which restricts interference by a court in the internal affairs of a foreign corporation is the protection of the corporation. The defense, therefore, is available only to the corporation; it cannot be maintained as against the corporation, in a proceeding brought on its behalf and at its instance. *Beard v. Beard* (1913) 66 Or. 512, 133 Pac. 799, 134 Pac. 1196.

After commenting on the difficulty of drawing any clear line of distinction between the acts of a corporation relating to its internal management, and those acts which do not, the distinction was explained in the leading case of *North State Copper & G. Min. Co. v. Field* (1885) 64 Md. 151, 20 Atl.

member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here."

In several cases the distinction drawn in the case last cited has been accepted and approved. *Bradbury v. Waukegan & W. Min. & Smelting Co.* (1904) 113 Ill. App. 608; *Jackson v. Hooper* (1910) 76 N. J. Eq. 592, 27 L.R.A.(N.S.) 658, 75 Atl. 573; *Howard v. Mutual Reserve Fund Life Asso.* (1899) 125 N. C. 49, 45 L.R.A. 853, 34 S. E. 199; *State ex rel. Ferencz v. Unida Gold Min. Co.* (1910) 32 Ohio C. C. 60; *Madden v. Penn Electric Light Co.* (1897) 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817; *McCloskey v. Snowden* (1905) 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796. Compare *State ex rel. Watkins v. North American Land & Timber Co.* (1901) 106 La. 634, 37 Am. St. Rep. 309, 31 So. 172.

In *Madden v. Penn Electric Light Co.* (1897) 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817, the court added that it was immaterial that the visible, tangible property of the foreign corporation was situated within the state. See to the same effect, *Sprague v. Universal Voting Mach. Co.* (1907) 134 Ill. App. 379.

But in a later Pennsylvania case, *Kelly v. Thomas* (1912) 234 Pa. 419, 51 L.R.A.(N.S.) 122, 83 Atl. 307, the court said: "In view of the circumstances of the present case we do not feel that a departure from our own rule would be justifiable; but in a case free from the peculiarities of this one, where the foreign corporation was

exercise of visitatorial powers is not requisite to the relief, the rule as to noninterference should be restricted, and not carried further than is absolutely required by universal fixed rules of law; for, where possible, we should prevent its use as a cloak to cover apparent fraudulent conduct on the part of officers of foreign corporations to the prejudice of Pennsylvania stockholders."

So, it has been said: "Statements are sometimes found to the effect that where the act of the corporation complained of affects a person solely in his capacity as a member of the corporation, or where the rights of a person grow solely out of his membership in the corporation, and not out of some external transaction, the subject relates to the management of the internal affairs of the corporation, over which the courts of another state should not assume jurisdiction. Such general statements must always be construed in connection with the particular facts of the cases in which they are used. Moreover, such statements are not strictly correct as abstract propositions in the broad and unqualified sense in which they are sometimes understood. We think there are cases, and that this is one of them, where, although the rights of a party grow out of his membership in the corporation, yet, as the matter affects only his individual rights under the contract by which the stock was issued, therefore an enforcement of those rights will not be an interference with the internal management of the corporate affairs within the meaning of the rule." *Guilford v. Western U. Teleg. Co.* (1894) 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

In a number of other cases the courts have defined what affairs of a foreign corporation will not be interfered with.

Examples of such cases are suits to dissolve a corporation; to appoint a receiver; to determine the validity of its organization, or which of two rival organizations is legal; to restrain it from declaring a dividend or compel it to make one; to restrain an issue of stock or of bonds; to compel a division

of its assets; to restore a stockholder to his right to vote at stockholders' meetings from which he has been excluded; or to compel the recognition of one claiming to have been elected a director." *Babcock v. Farwell* (1910) 245 Ill. 14, 137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74.

"To entertain an action to dissolve a corporation; to determine the validity of its organization; to determine which of two rival organizations is the legal one, or who of rival claimants are its legal officers; to restrain it from declaring a dividend, or to compel it to make one; to restrain it from issuing its bonds, or from making an additional issue of stock—would clearly all be the exercise of visitatorial powers over the corporation, or an interference with the management of its internal affairs." *Guilford v. Western U. Teleg. Co.* (Minn.) *supra*.

So, it has been said: "Where the acts complained of affect the plaintiff in his rights as corporator, or stockholder, or as a member of a mutual benefit or insurance company or other corporation, and the acts are those of the corporation, done and performed in the course of the administration of the corporate affairs, and especially when claimed to have been done and performed, or authorized to be done, by virtue of authority derived from its charter or by-laws, the courts of another state or jurisdiction will not interfere, or attempt to exercise jurisdiction to direct, control, or revise corporate action." *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 154, 43 L.R.A. 390.

In *Tasler v. Peerless Tire Co.* (1919) 144 Minn. 150, 174 N. W. 731, the court said: "The courts of this state have no 'visitatorial powers' over foreign corporations. They have no jurisdiction to interfere with their 'internal management'; that is, they could not enforce forfeiture of charter, or removal of officers, nor could they exercise authority over corporate functions, or direct the manner of the transaction of the corporate business."

Similarly, it has been held that "courts of one state cannot exercise visitatorial powers over corporations

of other states, such as requiring them to pay such dividends as, on an accounting of the affairs of the corporation, may appear to be proper, nor to determine whether a stockholder has been wrongfully excluded from his privileges, and matters of that kind." *Edwards v. Schillinger* (1910) 245 Ill. 231, 33 L.R.A.(N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048.

In *Ives v. Smith* (1888) 19 N. Y. S. R. 556, 3 N. Y. Supp. 651, the court said: "The rule deducible from the cases is that the courts of this state will entertain actions against foreign corporations, in favor of resident plaintiffs, not only to recover at law, but also in equity, including suits in favor of resident shareholders, who have clear rights to be protected; and they will compel the enforcement, by officers and directors of foreign corporations, if properly brought into court, of the contract obligations of the corporation, if the neglect or violation of such contract obligations amounts to a breach of trust or duty which will be productive of injury to such resident shareholders, in matters removed from the ordinary powers or discretion of such directors, and no adequate remedy at law is available."

Courts have power to govern and control the acts of foreign corporations which constitute doing business within the state, and, by assuming jurisdiction respecting business transactions, the court does not regulate the internal affairs of the corporation. *London P. & A. Bank v. Aronstein* (1902) 54 C. C. A. 663, 117 Fed. 601, certiorari denied in (1902) 187 U. S. 641, 47 L. ed. 345, 23 Sup. Ct. Rep. 841.

b. Scope of jurisdiction.

1. In general.

Jurisdiction will be assumed, in a proper case, to grant mandamus compelling a resident officer of a foreign corporation to discharge certain duties. *State ex rel. Richardson v. Swift* (1885) 7 Houst. (Del.) 137, 30 Atl. 781.

It has been held that a suit may be maintained to compel the former directors of a foreign corporation, resident in the state, to account for losses sustained by the corporation by reason of

their negligent and fraudulent acts while officers of the corporation. *Loan Soc. of Phila. v. Eavenson* (1913) 241 Pa. 65, 88 Atl. 295, wherein it was said: "The defendants against whom the corporation is proceeding are residents of the state, are within the jurisdiction of the court, and have been duly served. Any decree that may be entered against them can be enforced by the court. The suit is a proceeding to compel the defendants to account for losses sustained by the corporation, by reason of their negligent and fraudulent acts while officers of the corporation. To enforce this relief the bill prays for an accounting and discovery. This, of course, involves an investigation of the management of the affairs of the corporation by the defendants, while they are acting in their official capacity as directors. This investigation is necessary in order to establish the tortious acts of the defendants complained of in the bill, and for which the corporation itself now seeks reparation. This is not, however, an interference with the internal management of the corporation, within contemplation of the rule which denies jurisdiction to our courts. It does not seek to control or regulate the affairs of the corporation. It does not attempt to control the acts of any of the officials of the corporation. It does not seek to determine the rights of the stockholders among themselves, or between them and the corporation. There is no attempt to test the right of any officer or director to his office, or to control his action in the performance of any official duty. The proceeding was instituted against the defendants after they had severed their connection with the corporation, to compel them to account to the corporation for losses sustained while acting in their official capacity as directors. This, as already observed, involves an investigation of the official conduct of the defendants as directors of the corporation, but it does not regulate or interfere with the management of the corporation. It seeks redress for the mismanagement and misfeasance of the defendants as directors, but it does not ask the court to

control or regulate the management of the corporation."

A like result was reached in *Ganzer v. Rosenfeld* (1913) 153 Wis. 442, 141 N. W. 121, the court saying: "The only serious question involved is whether stockholders and creditors of a foreign corporation, which has its business office in this state, may maintain an action in equity in the courts of this state against resident officers of the corporation, to recover, on behalf of the corporation, corporate moneys converted by such officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct. This question must be answered in the affirmative. It is doubtless true that the courts of a state will not assume to dissolve or regulate the internal affairs of a foreign corporation; in other words, they will not exercise visitatorial powers over such a corporation; but they may, and will in a proper case, require an accounting and restoration of property and money misappropriated or wasted by unfaithful officers who are within their jurisdiction." And this case was followed in *State ex rel. Wisconsin Dry Milk Co. v. Circuit Ct.* (1922) — Wis. —, 186 N. W. 732.

But while the court may require an agent of the corporation who is resident in the state to render an account of his transactions as agent, yet a prayer of a bill that a foreign corporation be required to exact of a local agent due and proper accounts of his transactions as agent will not be granted, although the corporation has its place of business and principal office within the state, on the ground that to do so "would be beyond the jurisdiction of the court, and within the rule relating to the internal management of a foreign corporation." *Sloan v. Clarkson* (1907) 105 Md. 179, 66 Atl. 18.

So, in *Wason v. Buzzell* (1902) 181 Mass. 338, 63 N. E. 909, the petitioners alleged that they were two of five directors of a corporation organized under the laws of the state of Maine, having an office in that state, authorized to do business in Massachusetts, and having its usual place of business

in the latter state. The petition was filed against the corporation, the three remaining directors, and two other persons, for a writ of mandamus commanding the three directors to recognize and act with the petitioners as directors, and commanding the other respondents to refrain from attempting to act as directors. All of the individual petitioners and respondents were residents of Massachusetts. The court said: "It is plain that the demurrer [to the petition] must be sustained. The only thing in controversy is whether the petitioners have been elected directors in accordance with the law of the home of the corporation—a question relating simply to the official relations existing between them and the corporation. This is a question relating solely to the management of the internal affairs of the corporation."

The courts of one state cannot, by injunction, afford equitable relief, even to one of its residents who is a member of a foreign corporation, by an order commanding and requiring such corporation to do, or not to do, certain specified acts connected with the internal management of its corporate affairs. *Howard v. Mutual Reserve Life Asso.* (1899) 125 N. C. 49, 45 L.R.A. 853, 34 S. E. 199.

Where a foreign corporation is chartered expressly for the purpose of doing business in another state, and the majority of its directors, its business, and its property are located therein, the courts of such latter state will entertain jurisdiction of an action against it, and will decree equitable relief, although it involves an interference with the internal affairs of the corporation. *Corry v. Barre Granite & Quarry Co.* (1917) 91 Vt. 413, 101 Atl. 38.

"When a foreign corporation accepts a license to do business in this state, or does some act which subjects itself to the jurisdiction of this state, it may be treated as a domestic corporation to the extent of rendering it subject to the writ of mandamus. . . . Where, however, it has not been authorized to do business in this state, and has done no act to subject it to the jurisdiction

of this state, its action in reference to its internal affairs may not be controlled by the writ of mandamus." *People ex rel. Solomon v. Brotherhood of Painters* (1916) 218 N. Y. 115, 112 N. E. 752.

The rule under consideration does not militate against the power of the court, by virtue of its equity jurisdiction, to take charge of a foreign corporation within the jurisdiction of the court, and to enforce the rights of creditors and stockholders in respect to the same. *Culver Lumber & Mfg. Co. v. Culver* (1906) 81 Ark. 102, 118 Am. St. Rep. 17, 99 S. W. 391.

In *Lehr v. Murphy* (1908) 136 Wis. 92, 116 N. W. 898, which was a creditor's action, it was contended that the court was without jurisdiction, because it sought to regulate the internal affairs of the corporation. The court disposed of this contention as follows: "It is sufficient to say, as to such contentions, that the primary purpose, at least, of this action, is merely to conserve corporate assets within the jurisdiction of the court, for the benefit of creditors in, or that may come into, such jurisdiction. It is neither a winding-up action nor an action to regulate the internal affairs of the corporation."

"The question of membership in a foreign corporation relates to the internal affairs of the corporation, and is subject to regulation only by the courts of the state or country to which the corporation owes its existence." *People ex rel. Solomon v. Brotherhood of Painters* (N. Y.) *supra*.

The courts will not assume jurisdiction to set aside the election of officers of a foreign corporation, nor will they restrain the action of such officers, when elected. *Butler v. Standard Milk Flour Co.* (1911) 146 App. Div. 735, 131 N. Y. Supp. 451. See also *Travis v. Knox Terpezone Co.* (1915) 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 260, Ann. Cas. 1917A, 387.

It has been held that the question whether a contract entered into by a foreign corporation is disadvantageous, as alleged in a stockholder's bill in equity, is one relating to the internal management of the corporation.

Madden v. Penn Electric Light Co. (1896) 7 Pa. Dist. R. 304.

In *Clifford v. Hedrick* (1910) 159 Ill. App. 63, the court refused to issue an injunction restraining the defendants, who constituted the executive board of a trade-union incorporated under the laws of Indiana, from revoking, or attempting to revoke, the charter of a local union, it not appearing that any question of property rights was involved.

In *OLSEN v. DANISH BROTHERHOOD* (reported herewith) ante, 1370, it was held that an action to enjoin a change of rates in the matter of assessments and benefits, in a fraternal benefit association incorporated in another state, involved an interference with the internal affairs of such corporation, and jurisdiction of the action could not be entertained.

2. *Ultra vires act.*

If the officers of the corporation are within the state, and all of its property is situated therein, the court may enjoin the officers from carrying on in the state a business not authorized by the company's charter. *Richardson v. Clinton Wall Trunk Mfg. Co.* (1902) 181 Mass. 580, 64 N. E. 400.

3. *Funds and property of corporation.*

Where it appears that there is danger of the destruction or misappropriation of funds or property within the jurisdiction, and belonging to a foreign corporation, the local courts will assume jurisdiction to prevent the same. *Fisk v. Chicago, R. I. & P. R. Co.* (1868) 53 Barb. (N. Y.) 513, 3 Abb. Pr. N. S. 453; *Whitman v. Holmes Pub. Co.* (1900) 33 Misc. 47, 68 N. Y. Supp. 167; *Moneuse v. Riley* (1903) 40 Misc. 110, 81 N. Y. Supp. 325.

Consequently, if the officers and property are within the jurisdiction of the court, an accounting of funds diverted and misappropriated will be decreed. *Babcock v. Farwell* (1910) 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74; *Wineburgh v. United States Steam & Street R. Advertising Co.* (1899) 173 Mass. 60, 73 Am. St. Rep. 261, 53 N. E. 145; *Richardson v. Clinton Wall Trunk Mfg. Co.* (1902) 181 Mass. 580, 64 N. E.

400; *Miller v. Quincy* (1904) 179 N. Y. 294, 72 N. E. 116, reviewing (1903) 88 App. Div. 529, 85 N. Y. Supp. 310.

As was said in *Babcock v. Farwell* (III.) supra: "In many cases, under various circumstances, the courts have entertained jurisdiction of a suit brought against a foreign corporation and its directors or agents, to compel the restoration of property misappropriated by such officers. . . . Accordingly, actions by minority stockholders in foreign corporations, to redress grievances in corporate management have been sustained, where the court has obtained jurisdiction of the persons of the necessary parties, and the relief sought could be accomplished by acting directly on the persons of the defendants. . . . Where minority stockholders seek to have restored to the corporation property fraudulently appropriated to their own use by directors, who, together with the corporation itself, are personally subject to the jurisdiction of the court, we think it is the better doctrine that the court should exercise its jurisdiction for the determination of the controversy."

Likewise, in *Acken v. Coughlin* (1905) 103 App. Div. 1, 34 N. Y. Civ. Proc. Rep. 200, 92 N. Y. Supp. 700, the court said: "The courts of this state, at the suit of an officer, director, stockholder, or creditor of a foreign corporation, have jurisdiction to compel the officers or directors of the corporation, over whom jurisdiction has been acquired by the service of process, to account to the corporation for property of the corporation in their hands, or which they have misapplied."

In *Richardson v. Clinton Wall Trunk Mfg. Co.* (1902) 181 Mass. 580, 64 N. E. 400, it appeared that the defendant corporation was established under the laws of Maine, but that all of its officers, except its clerk, were residents of Massachusetts, and all its property was in Massachusetts. The prayer of the bill was for an injunction against the defendant officers, to prevent them from using the name or property of the company for carrying on business contrary to its charter, for an account of the company's property

taken and misappropriated by them, and for general relief. It was stated in the bill that the defendant directors had fraudulently used the property and franchise of the corporation for their own private gains, and had misappropriated the property in different ways, in respect to the prayer that the defendant directors should be ordered to account for the company's property taken and misappropriated by them, it was contended that this called for an interference by the court with the management of the internal affairs of the corporation, which should be left to the courts of the state in which the company was incorporated. The court said that "this part of the present plaintiff's case is rather in the nature of a suit by the corporation against wrongdoers whose persons and property are in this commonwealth."

If some of the officers of the corporation have been served with process, and the corporation has appeared generally, and the subject-matter of the suit is a fund which is within the jurisdiction, the court will enjoin the use of such fund in violation of the contracts of the corporation. *Ives v. Smith* (1888) 19 N. Y. S. R. 556, 3 N. Y. Supp. 651.

If the court has jurisdiction of the parties, it may determine, without infringing on the rule forbidding interference with the internal affairs of a foreign corporation, an issue as to a conspiracy and fraudulent agreement, under which it is proposed to divest the company of its property without consideration; and, if the facts shown and circumstances then existing seem to warrant that course, the court may perpetually enjoin the consummation of such a fraudulent contract and the transfer of the property of the company, and require an accounting, and compel the restoration of any of its property appropriated by the defendants, even though such decree will operate on property beyond the jurisdiction of the court. *Hallenborg v. Greene* (1901) 66 App. Div. 590, 73 N. Y. Supp. 403.

A fraudulent transfer of personalty situated within the state will be set aside. *Kidd v. New Hampshire Trac-*

tion Co. (1903) 72 N. H. 273, 66 L.R.A. 574, 56 Atl. 465. See also *Wilson v. American Palace Car Co.* (1903) 64 N. J. Eq. 534, 54 Atl. 415.

Likewise, in a proper case, the court will decree a rescission of a contract for the sale of lands of the corporation which lie within the state. *Watkins v. North American Land & Timber Co.* (1902) 107 La. 107, 31 So. 683.

In *Beard v. Beard* (1913) 66 Or. 512, 133 Pac. 797, 134 Pac. 1191, it appeared that mandamus proceedings were begun to compel the defendant to deliver to the plaintiff, as secretary of a certain corporation, certain books, papers, and promissory notes. The writ set forth the organization of the corporation under the laws of Washington, and that the plaintiff was the duly qualified and acting secretary of the corporation, entitled to the books and choses in action of the company, some of which were without the state of Oregon where the action was commenced. It recited that the defendant resided in Oregon, and could not be personally served in Washington, and that the defendant had been secretary of the corporation before the alleged election of the plaintiff, and had refused to turn over the books and papers to the plaintiff. The defendant in his defense claimed to be secretary, and denied the legality of the plaintiff's election. The court, deciding that it had jurisdiction, said: "This is not an action where it is claimed that an officer of a corporation has offended solely against the majesty of the state of Washington. It appears from the pleadings and all the evidence that the action is brought to protect the rights of stockholders and citizens of this state to the property in the corporation. No good reason appears why they are not entitled to receive full relief in our courts, in so far as such relief can be accomplished by acting directly on the person of the defendant. Should there be a question as to the enforcement of the judgment, we should be inclined to apply the suggestion made in the case of *Kalyton v. Kalyton* (1904) 45 Or. 116, 74 Pac. 491, 78 Pac. 332, and declare

the law, irrespective of consequences that may result therefrom."

4. Issuance of stock.

There is a conflict of authority as to whether a foreign corporation may be compelled to issue shares of its stock. According to some courts, this may be done.

Thus, in *Guilford v. Western U. Tele. Co.* (1894) 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324, which was an action brought to have the plaintiff adjudged the owner of certain shares of the stock of the defendant company, and to compel the company to issue to him new certificates therefor in place of the originals, which were alleged to have been lost, it appeared that the defendant was a corporation organized under the laws of another state, that its principal place of business was located, that all its general officers resided, and that all its stock and other books were kept, in such other state. The only business transacted by the defendant in the forum was the maintenance of telegraph lines and the transmission of telegrams, for which purpose, exclusively, it had local agents. The court said: "In the present case there is no question as to the issue, validity, or forfeiture of the stock. There is not even any controversy as to the right of the plaintiff to a certificate as evidence of his title. The only dispute is over the terms or conditions upon which that certificate shall be issued. We do not see how the granting of such relief is, in any proper sense, the exercise of visitatorial powers, or an interference with the management of the internal affairs of the defendant."

And in *Babcock v. Schuylkill & L. Valley R. Co.* (1890) 56 Hun, 649, 31 N. Y. S. R. 643, 9 N. Y. Supp. 845, it was held that a court may decree specific performance of an agreement by a foreign corporation to issue certain of its capital stock to another company. See also *Pitts v. Pittsburgh Metals, Min. & Milling Co.* (1908) 17 Pa. Dist. R. 821.

However, a contrary view was expressed in *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* (1883) 135

Mass. 34, 46 Am. Rep. 439, the court saying: "The determination of the question, Who shall be entitled to receive from the corporation certificates of its stock, so that they shall thereby become members of it? is one which does not alone affect the external relations of the corporation, but involves its organic laws, which are necessarily local and require local administration."

The latter view has been approved in **RE FRYEBURG WATER CO.** (reported herewith) ante, 1373, wherein the court said: "Little doubt . . . can be entertained that the issuing of stock is a corporate act, which is regulated and controlled by the laws of the incorporating state, and which, relating to the internal conduct and management of the corporation, is exclusively subject to the local laws. 'From the nature of corporate stock, which is created by and under the authority of the state, the right or duty to issue it, like the other attributes of the corporation, is governed by the local law of the state from which it derives its existence, and not by that of any other state.'"

In **BOYETTE v. PRESTON MOTORS CORP.** (reported herewith) ante, 1376, it is held that the court will not compel a foreign corporation to issue stock in another corporation, on the ground that a merger has occurred, entitling the original shareholders to new certificates of stock.

In one jurisdiction the view has been taken that an illegal issue of stock may be enjoined, without infringing on the rule that courts should decline jurisdiction to decide questions relating strictly to the internal affairs and management of foreign corporations, which are of local administration in the state of their incorporation. **Ernst v. Rutherford & B. S. Gas Co.** (1899) 38 App. Div. 388, 56 N. Y. Supp. 403; **Kraft v. Griffon Co.** (1903) 82 App. Div. 29, 81 N. Y. Supp. 438.

But in **Kimball v. St. Louis & S. F. R. Co.** (1892) 157 Mass. 7, 34 Am. St. Rep. 250, 81 N. E. 697, which was a suit in equity brought by certain holders of preferred stock to enjoin a corporation organized under the

laws of Missouri, but having a place of business in Massachusetts, and having five directors residing therein, from issuing bonds, except under certain conditions, the court said: "The plaintiffs necessarily will be referred to the courts of Missouri to compel the defendant to respect their rights, in case compulsion is necessary. The most that we can do, if they have the right they claim, is to reduce it to *res judicata*. Whether they have that right is a question of Missouri law touching the internal affairs of a Missouri corporation. The objection to our proceeding with the case was taken at the outset, and we are of opinion that it must prevail. We assume, for the purposes of decision, that we have jurisdiction in such a sense that, if we proceeded to a decree upon the merits, it would be binding in Missouri. But it seems to us clear that, as among the states of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law."

Also, it has been held that a court will not determine whether stock of a foreign corporation was properly issued, but that the court of the corporation's domicil is the proper forum to determine that question. **Gregory v. New York, L. E. & W. R. Co.** (1885) 40 N. J. Eq. 44.

5. *Transfer of stock.*

In the matter of compelling a foreign corporation to transfer stock on the books, the courts are agreed. It is uniformly held that such a course is open to an aggrieved stockholder. **London P. & A. Bank v. Aronstein** (1902) 54 C. C. A. 663, 117 Fed. 601, certiorari denied in (1902) 187 U. S. 641, 47 L. ed. 345, 23 Sup. Ct. Rep. 841; **Westminster Nat. Bank v. New England Electrical Works** (1906) 73 N. H. 479, 8 L.R.A.(N.S.) 551, 111 Am.

St. Rep. 637, 62 Atl. 971; Travis v. Knox Terpezone Co. (1915) 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 250, Ann. Cas. 1917A, 387; Lively v. Husebye (1910) 60 Wash. 47, 110 Pac. 673; Citizens Nat. Bank v. Consolidated Glass Co. (1918) 83 W. Va. 1, 97 S. E. 689. See *BOYETTE v. PRESTON MOTOR CORP.* (reported herewith) ante, 1376.

Thus, in *Citizens Nat. Bank v. Consolidated Glass Co.* (1918) 83 W. Va. 1, 97 S. E. 689, the rule was stated as follows: "It is well settled that the right of a vendee of stock to a transfer thereof on the books of the corporation involves only his individual contractual rights, and is not a matter relating to the essential internal management of the company, cognizable only in the courts of the state in which the charter was granted, and that this right is enforceable wherever the corporation is properly made a party defendant."

Likewise, in *Westminster Nat. Bank v. New England Electrical Works* (1906) 73 N. H. 479, 3 L.R.A.(N.S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971, the court said: "The plaintiff's right to a transfer, therefore, depends on the contract of the corporation. The bank is merely seeking the enforcement of a contracted obligation. It is not attempting in this proceeding to interfere with the essentially internal affairs of the corporation. It asks merely that the corporation—a party to the suit—shall recognize it as a stockholder, by virtue of its representation to the bank at the time of the sale that it would do so. The court is not asked to determine what the rights of a stockholder may be in this foreign corporation, or to exercise a discretion in behalf of the plaintiff in regard to the corporate management of the defendant. The relief sought is merely the enforcement of a contractual right which accrued to the plaintiff when it bought the stock of Bibber. It then impliedly promised that it would permit the transfer."

As to the remedies available to one complaining against a foreign corporation for a refusal to transfer stock, it has been said: "The law gave him a choice of remedies, equitable

and legal. He might treat the refusal to transfer the shares as a conversion, and sue the corporation for their value, either in trover or in assumpsit. . . . He might assert his ownership of the shares, irrespective of the registry, and sue for dividends declared upon them. . . . He might, finally, maintain an action to compel the specific performance of the contract expressed in the certificate, and thereby place himself in possession of the evidence of title. None of these forms of action involves in any prohibited sense a regulation of the internal management of a foreign corporation. That is just as true of the action which calls for equitable remedies as it is of the actions where the remedy is at law. In each there must be an inquiry into the ownership of the shares, and a determination of the relation between the claimant and his corporation, before the court can proceed to judgment. In each that inquiry is merely preliminary or incidental to the inquiry whether a contract has been broken, a tort committed, a right of ownership infringed. From liability for such wrongs, a foreign corporation is not emancipated because it is foreign. The defendants are subject to our process; they have appropriated shares of stock which belong to a resident of our state; and he is entitled to the aid of our courts to protect his ownership and perfect his muniments of title." *Travis v. Knox Terpezone Co.* (1915) 215 N. Y. 259, L.R.A.1916A, 542, 109 N. E. 250, Ann. Cas. 1917A, 387.

6. *Rights of stockholders.*

Where an agreement was made by the plaintiff and another, owners of a majority of the stock of a foreign corporation, that it should be deposited with the defendant, another stockholder, and held by him with all the powers incident to stock ownership, one of such majority owners to have the privilege to purchase the stock at any time within a year on certain conditions, and it appeared that the defendant fraudulently inserted a clause in the deposit agreement to the effect that if the option was not exercised

within the year the deposit was to remain with the defendant two years longer, it was held that it was not an interference with the internal management of the corporation for the court to restrain the defendant from exercising any of the privileges of a stockholder, by virtue of the plaintiff's stock held by him, during the pendency of an action to restrain other defendants from selling or otherwise disposing of or issuing treasury stock, and from acting as directors and officers of the corporation. *Butler v. Standard Milk Flour Co.* (1911) 146 App. Div. 735, 181 N. Y. Supp. 451.

It has been held not to be an interference with the internal affairs of a foreign corporation for a court to entertain jurisdiction of an action against promoters and officials of a foreign corporation to have an issue of stock to such defendants declared fraudulent, and to restrain the defendants from voting the stock, or otherwise disposing of it. *Gere v. Dorr* (1911) 114 Minn. 240, 180 N. W. 1022, wherein the court said: "It is charged that appellant, a resident of this state, for the purpose of obtaining money from the plaintiffs, entered into a conspiracy with other persons to organize the corporation for the fraudulent purpose of securing 50,000 shares of the stock without consideration; that it never was the intention to purchase lands and cultivate them in good faith for the benefit of the plaintiffs, although that was represented by him to be the purpose, when they subscribed for stock. If the plaintiffs parted with their money on account of such representations, and if by such means appellant secured control of the corporation to the detriment of the plaintiffs, they and the other stockholders are entitled to some relief. The purpose of this action, in part, is to prevent appellant from parting with the stock. The courts of this state have jurisdiction as against him for that purpose, even if no jurisdiction exists as to the corporation or the nonresident defendants. It is a personal matter between the appellant and the plaintiffs, and this proceeding is not an interference with the man-

agement of the internal affairs of the corporation."

But it has been held that a court will not exercise jurisdiction to compel a foreign corporation to call a meeting of its stockholders. *State ex rel. Lake Shore Teleph. & Teleg. Co. v. De Groat* (1909) 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417; *State ex rel. Ferencz v. Unida Gold Min. Co.* (1910) 32 Ohio C. C. 60.

And in like manner it has been held that the court will not grant mandamus against the secretary of a foreign holding corporation, on the application of another holding corporation, to require the secretary to call a meeting of the corporation for the consideration of particular questions. *State ex rel. Lake Shore Teleph. & Teleg. Co. v. De Groat* (Minn.) *supra*.

Likewise, a court cannot compel a foreign corporation to supply a stockholder with a list of stockholders for the organization of a club to care for their joint interests. *Com. ex rel. Kinney v. Mexican Plantation Co.* (1910) 19 Pa. Dist. R. 861.

Where the right of the registered holder of stock to vote the shares is doubtful, under the law of the corporation's domicile, the court will not enjoin such stockholder from voting at a stockholders' meeting. *Lewisohn Bros. v. Anaconda Copper Min. Co.* (1899) 26 Misc. 622, 56 N. Y. Supp. 807.

7. *Inspection, etc., of books.*

It has been held in numerous cases that a court will entertain jurisdiction of an action to compel an inspection of the corporate books of a foreign corporation, and will require an officer having custody thereof to permit a proper person to examine and copy the same, where such books are within the jurisdiction.

Alabama. — *Nettles v. McConnell* (1907) 151 Ala. 538, 43 So. 838.

Connecticut. — *Cummings ex rel. Elliott v. Lake Torpedo Boat Co.* (1916) 90 Conn. 638, L.R.A.1916F, 1033, 98 Atl. 580.

Delaware. — *State ex rel. Richardson v. Swift* (1885) 7 Houst. 137, 30 Atl.

781; *Swift v. State* (1886) 7 *Houst.* 338, 40 *Am. St. Rep.* 127, 6 *Atl.* 856, 32 *Atl.* 143.

District of Columbia. — Compare *Clark v. Mutual Reserve Fund Life Asso.* 14 *App. D. C.* 154, 43 *L.R.A.* 390 (books apparently outside jurisdiction).

Louisiana.—*State ex rel. Watkins v. North American Land & Timber Co.* (1901) 106 *La.* 634, 87 *Am. St. Rep.* 309, 31 *So.* 172.

Massachusetts.—*Andrews v. Mines Corp.* (1910) 205 *Mass.* 121, 137 *Am. St. Rep.* 428, 91 *N. E.* 122; *Klotz v. Pan-American Match Co.* (1915) 221 *Mass.* 38, 108 *N. E.* 764, *Ann. Cas.* 1917D, 895.

Missouri.—*State ex rel. English v. Lazarus* (1907) 127 *Mo. App.* 401, 105 *S. W.* 780.

Ohio. — *State ex rel. Templin v. Farmer* (1892) 7 *Ohio C. C.* 429, 4 *Ohio C. D.* 664.

Pennsylvania.—*McGrew v. Pitts-*

corporation to do business in this commonwealth, and subject it to the jurisdiction of our courts, any proper jurisdiction may be exercised which concerns its dealings with third parties here, whereby their rights are affected. Rights of third parties, whether they happen to be stockholders or not, if the rights are such as are recognized by our laws, may be enforced by our courts, unless they relate to such internal affairs of the corporation as ought to be regulated only by the courts of the state or country to which it owes its existence. Where all that is desired is an examination of books, and the corporation has a usual place of business in this commonwealth, and the books and their custodian are here, there is every reason of policy and convenience why our courts should enforce a stockholder's right to examine them."

And in *State ex rel. English v. Lazarus* (Mo.) *supra*, a like view was

whether the courts of this state have jurisdiction to enforce here the law of the state of Maine which gives to stockholders the right to inspect the stock books and records of the respondent corporation. It is claimed by the respondent that to do so would be to interfere with the internal affairs of the corporation, and should not be done. But this is not so. The order applied for would in no way interfere with the management of the corporation's business affairs by its directors, to whom are intrusted the powers of contracting for the corporation, investing its funds, and other internal affairs. It would not change the relations of the stockholder to the corporation or his fellow stockholders. The purpose of the proceeding is to compel an officer of the corporation having its books and papers in this state, where the corporation has its office and chief place of business, to do what the laws of the state under which it exists require to be done. The courts of this state have jurisdiction of the parties. The books sought to be inspected are within their jurisdiction, so that the order asked for can be enforced by them. Had the purpose of the application been to enforce the common-law right of inspection, it is not claimed that the order asked for would be denied. Such orders have frequently been made in other jurisdictions."

The reason for thus allowing an inspection of corporate books was stated in *Machen v. Machen & M. Electrical Mfg. Co.* (1912) 237 Pa. 212, 42 L.R.A. (N.S.) 1079, 85 Atl. 100, Ann. Cas. 1914B, 420, as follows: "We are at a loss to see how the granting of the relief sought in this proceeding will regulate, or interfere in any way with, the internal affairs of the corporation. It is simply a demand on the part of the plaintiff that he be permitted to see the books, records, and documents of the corporation, that he may perform the duties of director, which the stockholders and others interested in the corporation have the right to demand of him. To deny him this right is, in effect, to exclude him from the directorate of the corporation, as

well as to announce the principle that a majority of the directors may, at their pleasure, exclude the minority from all participation in the management of the corporation. Unless the court assumes jurisdiction and grants the relief prayed for, the plaintiff is without any adequate remedy to enforce a manifest right. The books desired, and the officers and directors having the custody of them, are within the jurisdiction of the court, and a foreign court could not grant the relief which the plaintiff seeks, and to which he is entitled. It would be worse than idle to compel the plaintiff, a citizen of this state, to go to the domiciliary jurisdiction to seek the relief he asks here."

In New York the rule has been laid down that a proceeding by mandamus, which has no other purpose than an inspection of the books of a foreign corporation, is unauthorized. *Re Rappleye* (1899) 43 App. Div. 84, 59 N. Y. Supp. 338, appeal dismissed in (1899) 161 N. Y. 615, 55 N. E. 1100; *Re Crosby* (1899) 43 App. Div. 618, 59 N. Y. Supp. 340, reversing (1899) 28 Misc. 300, 59 N. Y. Supp. 865; *Mitchell v. Northern Security Oil & Transp. Co.* (1904) 44 Misc. 514, 90 N. Y. Supp. 60, affirmed in (1904) 99 App. Div. 624, 91 N. Y. Supp. 1104. But see to the contrary *People ex rel. Singer v. Knickerbocker Trust Co.* (1902) 38 Misc. 446, 77 N. Y. Supp. 1000; *People ex rel. Miles v. Montreal & B. Copper Co.* (1903) 40 Misc. 282, 81 N. Y. Supp. 974. In *Re Rappleye* (N. Y.) *supra*, the court said: "The member's right to inspect the books of a foreign corporation depends upon the law of that corporation's being, and can only be enforced by the courts of its legal existence. The foreign corporation, as a legal entity, is not here, although its officers, property, and books may be found here." But the court may compel an agent of a foreign corporation, having custody within the state of the transfer books of the company, to permit a stockholder to examine such books in a proper case. *Kennedy v. Chicago, R. I. & P. R. Co.* (1884) 14 Abb. N. C. (N. Y.) 326. See also

People ex rel. Daniels v. Crawford (1898) 68 Hun, 547, 22 N. Y. Supp. 1025. It is otherwise, however, if the books are not within the state. *People ex rel. Hoffman v. Tedcastle* (1895) 12 Misc. 468, 34 N. Y. Supp. 257.

In a Pennsylvania decision, *Kinney v. Mexican Plantation Co.* (1911) 233 Pa. 232, 82 Atl. 93, the court denied a writ of mandamus to a stockholder to require the officers of a foreign corporation to permit the relator to examine the books and records of the corporation, containing the names and addresses of the stockholders of the corporation.

8. *Payment of dividends.*

In the matter of payment of dividends it has been held that a court will not interfere to restrain a foreign corporation from making such payment, in the absence of a showing of fraud. *Howell v. Chicago & N. W. R. Co.* (1868) 51 Barb. (N. Y.) 378. See also *Edwards v. Schillinger* (1910) 245 Ill. 231, 33 L.R.A. (N.S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048.

And the view has been taken that, where the officers and place of business of the corporation are not within the jurisdiction of the court, a decree for the payment of dividends will not be made because of the inability of the court to secure obedience thereto. *Williston v. Michigan S. & N. I. R. Co.* (1866) 13 Allen (Mass.) 400.

So, in *Berford v. New York Iron Mine* (1888) 24 Jones & S. 286, 4 N. Y. Supp. 836, it is held that, as there is no remedy by which a decree can be enforced, jurisdiction will not be assumed to compel the payment of dividends by a foreign corporation.

But where the right to a dividend is clear and fixed by contract, but action by the directors is necessary before it can be asserted by a suit at law, and a restraint by injunction is essential to maintain the right of the stockholder, the interposition of a court of equity is a proper exercise of its power, and not an improper interference with the internal affairs of a foreign corporation. *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157.

So a court will enjoin a foreign corporation from paying dividends in

violation of contract. *Prouty v. Michigan S. & N. I. R. Co.* (1874) 1 Hun (N. Y.) 655.

9. *Contract of insurance.*

Where, in a suit by a policyholder against a foreign life insurance company for an accounting with respect to certain accumulations to which the former is entitled, the company appears generally, a decree may be rendered in accordance with the prayer of the bill. *Pierce v. Equitable Life Assur. Soc.* (1887) 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858. See also *Clark v. Equitable Life Assur. Co.* (1898) 76 Miss. 22, 23 So. 453.

But where the officers and principal place of business of the corporation are in another jurisdiction, the court, it has been held, will not interfere, by mandamus or injunction, with the act of an insurance company in declaring void a policy of insurance held by a resident. *Clark v. Mutual Reserve Fund Life Asso.* (1899) 14 App. D. C. 154, 43 L.R.A. 390; *North State Copper & Gold Min. Co. v. Field* (1885) 64 Md. 151, 20 Atl. 1039; *Smith v. Mutual L. Ins. Co.* (1867) 14 Allen (Mass.) 336; *Royal Fraternal Union v. Lunday* (1908) 51 Tex. Civ. App. 637, 113 S. W. 185; *Taylor v. Mutual Reserve Fund Life Asso.* (1899) 97 Va. 60, 45 L.R.A. 621, 33 S. E. 385; *Tolbert v. Modern Woodmen* (1915) 83 Wash. 287, 145 Pac. 183.

In *Clark v. Mutual Reserve Fund Life Asso.* (D. C.) *supra*, the court said: "For the disregard or violation of an injunction, the ordinary remedy is a proceeding and punishment for contempt. But how could that be made effectual as against parties beyond the jurisdiction of the court, and who claim to be proceeding in accordance with what may be legal authority derived from their own state? It is very clear, therefore, that this prayer for an injunction could not be granted."

"The fact that the statutes of a state make provisions for admitting of foreign life insurance associations to do business therein, and for appointment of an agent upon whom service of process may be made, does not enable the courts of the state to exercise

extraterritorial jurisdiction to the extent of controlling the internal affairs of such association." *Tolbert v. Modern Woodmen* (Wash.) *supra*.

So, it has been held that the court cannot restrain a foreign life insurance company from demanding and collecting mortuary calls from one of its members. *Howard v. Mutual Reserve Fund Life Asso.* (1899) 125 N. C. 49, 45 L.R.A. 853, 34 S. E. 199.

10. Reorganization of corporation.

In a case where a stockholder in a foreign corporation declined to assent to a reorganization thereof, and retained his original stock, it was held that a local court would not take jurisdiction of his action to recover accumulated dividends. *Hogue v. American Steel Foundries* (1915) 247 Pa. 12, 92 Atl. 1073, wherein the court said: "The position taken by plaintiffs is one which ignores entirely the effect of the reorganization of the corporation. The claim which is advanced is that, out of any dividends which may have been declared, the plaintiffs, as holders of original preferred stock, were entitled to be paid, in accordance with the terms of the original certificate, before anything was to be awarded to the holders of any other stock issued by the company. The determination of the question thus raised would require us to investigate and determine the validity of the plan of reorganization, and would require us to ascertain and pronounce upon the rights of the original shareholders, as between themselves and their own corporation. These questions are, we think, for the New Jersey courts to determine, as arising under the local law. If any wrong has been done to plaintiffs, by the process of reorganization, that wrong must be ascertained, and the remedy applied, according to the law of the domicile of the corporation. The action of which plaintiffs here complain is not something which affects merely their own individual rights. It concerns the rights of all the nonassenting holders of preferred stock. The validity of the action taken by the company depends upon the legality of the reorganization proceedings, under which

the old preferred stock, and the old common stock, were retired, and new stock of but one class was issued in lieu thereof. It seems clear that the prosecution of such an inquiry would involve interference with the management of the internal affairs of a foreign corporation."

11. Dissolution of corporation.

A court of one state has no power to dissolve a corporation created by the laws of another state. The corporation retains its legal existence until dissolved by a proceeding in the state which created it.

United States.—*Republican Mountain Silver Mines v. Brown* (1893) 24 L.R.A. 776, 7 C. C. A. 412, 19 U. S. App. 203, 58 Fed. 648; *Parks v. United States Bankers' Corp.* (1905) 140 Fed. 160.

Alabama.—*Importing & Exporting Co. v. Locke* (1874) 50 Ala. 382.

Delaware.—*Swift v. State* (1886) 7 *Houst.* 351, 40 *Am. St. Rep.* 127, 6 *Atl.* 856, 32 *Atl.* 143.

Georgia.—*Dodge v. Pyrolusite Mangane Co.* (1882) 69 *Ga.* 665.

Illinois.—*Young v. Farwell* (1891) 139 *Ill.* 326, 28 *N. E.* 845; *Edwards v. Schillinger* (1910) 245 *Ill.* 240, 33 *L.R.A.(N.S.)* 895, 137 *Am. St. Rep.* 308, 91 *N. E.* 1048; *Mead v. Davies* (1899) 84 *Ill. App.* 562; *Heitkamp v. American Pigment & Chemical Co.* (1910) 158 *Ill. App.* 587.

Maryland. — *Wilkins v. Thorne* (1883) 60 *Md.* 253.

Massachusetts.—*Richardson v. Clinton Wall Trunk Mfg. Co.* (1902) 181 *Mass.* 580, 64 *N. E.* 400.

New York.—*Barclay v. Talman* (1843) 4 *Edw. Ch.* 123; *Redmond v. Enfield Mfg. Co.* (1872) 13 *Abb. Pr. N. S.* 332. Compare *Hyde v. Scott* (1912) 75 *Misc.* 487, 183 *N. Y. Supp.* 904.

In one of the leading cases establishing this rule the court said: "It would be a strange anomaly in our system of jurisprudence if the courts of one state could be vested with the power to dissolve a corporation created by another, and assume control over its property for the purpose of distributing it among those claim-

ing to be its stockholders." *Wilkins v. Thorne* (Md.) *supra*.

And the fact that the officers and some of the property of the corporation are within reach of the process of the court does not affect the question. *Redmond v. Enfield Mfg. Co.* (1872) 13 Abb. Pr. N. S. (N. Y.) 332, wherein the court said: "To attempt, by a judgment of this court, to compel a foreign corporation to distribute its assets among stockholders, because some of the directors were resident here, or because some of the funds were within the jurisdiction of the court, would be assuming a power which the court ought not to exercise, and rendering a judgment which could not be enforced against the company in the place of its existence."

So a court will not entertain jurisdiction to enjoin the business of a foreign corporation, where the injunction would practically suspend the corporate franchise. *Way v. Keyport & M. P. S. B. Co.* (1863) 16 Abb. Pr. (N. Y.) 320.

But it has been held under the Canadian Winding-up Act that a Canadian court has power to wind up the affairs of a foreign corporation, so far as they are within its territorial jurisdiction. *Hyde v. Scott* (N. Y.) *supra*.

12. Appointment of receiver.

Generally, a court has no jurisdiction to appoint a receiver with power to liquidate the affairs of a foreign corporation. *Leary v. Columbia River & P. S. Nav. Co.* (1897) 82 Fed. 777; *Sidway v. Missouri Land & Live-Stock Co.* (1900) 101 Fed. 486; *Parks v. United States Bankers' Corp.* (1905) 140 Fed. 160; *Heitkamp v. American Pigment & Chemical Co.* (1910) 158 Ill. App. 587; *State ex rel. Minnesota Mut. L. Ins. Co. v. Denton* (1910) 229 Mo. 187, 138 Am. St. Rep. 417, 129 S. W. 709; *Dreyfus v. Charles Seale & Co.* (1899) 37 App. Div. 351, 55 N. Y. Supp. 1111, reversing (1896) 18 Misc. 551, 41 N. Y. Supp. 875; *Acken v. Coughlin* (1905) 103 App. Div. 1, 34 N. Y. Civ. Proc. Rep. 200, 92 N. Y. Supp. 700; *Day v. United States Car Spring Co.* (1853) 2 Duer (N. Y.) 608;

Stafford v. American Mills Co. (1881) 13 R. L. 310.

In *Sidway v. Missouri Land & Live-Stock Co.* (1900) 101 Fed. 481, it was said: "The question . . . arises whether or not a court of equity, in the jurisdiction where the foreign corporation has a situs for transacting its business and where its property is situated, and without the presence of its nonresident directors, has jurisdiction, at the suit of a minority stockholder who complains alone of the internal management of its affairs, whereby the value of his stock has been diminished and is threatened with further prospective injury, to appoint a receiver for such corporation, and thereby assume the management of its business, with a view to winding up its affairs and distributing its assets. While there are persuasive reasons which appeal to a chancellor to exert to the utmost his powers to come to the relief of the resident stockholder, and save him the trouble, expense, and possible unequal chances of seeking redress in a distant foreign jurisdiction, it is sufficient for this court to say that, in the absence of a statute conferring such jurisdiction, the settled rules of equity seem to answer this question in the negative."

In *Leary v. Columbia River & P. S. Nav. Co.* (Fed.) *supra*, the court said that it deemed it unwise, and a dangerous precedent, for a court of equity to take control of the property of a foreign corporation, with a view of experimenting to ascertain if a stockholder's investment might not be made more profitable to him by having the business of the corporation conducted by a receiver, instead of by officers and agents chosen by a majority of the stockholders.

In *Acken v. Coughlin* (1905) 103 App. Div. 1, 34 N. Y. Civ. Proc. Rep. 200, 92 N. Y. Supp. 700, the court said: "A court of this state has no authority to appoint a general receiver of the corporation, and to enjoin it from exercising the powers granted by a sister state or a foreign government. Its judgment can affect only property in this state, which, of course, includes property of the corporation in the

possession of its officers or agents who are in this state, and over whom the court has acquired jurisdiction."

But a receiver of the assets of a foreign corporation, as distinguished from a receiver of the corporation, will be appointed to prevent waste or dispersion of the assets.

United States.—*Palmer v. Texas* (1909) 212 U. S. 118, 53 L. ed. 435, 29 Sup. Ct. Rep. 230, affirming (1907) 22 L.R.A.(N.S.) 316, 85 C. C. A. 603, 158 Fed. 705; *Shinney v. North American Sav. Loan & Bldg. Co.* (1899) 97 Fed. 9; *Lewis v. American Naval Stores Co.* (1902) 119 Fed. 396 (power of Federal court to appoint receiver, where corporation has submitted to jurisdiction of court); *Sims v. United Wireless Tele. Co.* (1910) 179 Fed. 540.

Arkansas.—*Culver Lumber & Mfg. Co. v. Culver* (1906) 81 Ark. 114, 118 Am. St. Rep. 17, 99 S. W. 391.

Connecticut.—*Fawcett v. Supreme Sitting, O. I. H.* (1894) 64 Conn. 170, 24 L.R.A. 815, 29 Atl. 614.

District of Columbia.—*Barley v. Gittings* (1899) 15 App. D. C. 427; *Mitchell Min. Co. v. Emig* (1910) 35 App. D. C. 527.

Florida.—*John H. McGowan Co. v. Ingalls* (1910) 60 Fla. 116, 53 So. 932.

Georgia.—*Merchants' & P. Nat. Bank v. Masonic Hall* (1879) 63 Ga. 549.

Idaho.—*Idaho Fruit Land Co. v. Great Western Beet Sugar Co.* (1909) 17 Idaho, 273, 105 Pac. 562.

Illinois.—*Holbrook v. Ford* (1894) 153 Ill. 643, 27 L.R.A. 324, 46 Am. St. Rep. 917, 39 N. E. 1091.

Indiana.—*Security Sav. & L. Asso. v. Moore* (1898) 151 Ind. 174, 50 N. E. 869.

Louisiana.—*Van Vleet v. Evangeline Oil Co.* (1911) 129 La. 406, 56 So. 343.

Minnesota.—*Tasler v. Peerless Tire Co.* (1919) 144 Minn. 150, 174 N. W. 731.

New Jersey.—*National Trust Co. v. Miller* (1880) 33 N. J. Eq. 155; *Minchin v. Second Nat. Bank* (1883) 36 N. J. Eq. 436; *Albert v. Clarendon Land Invest. & Agency Co.* (1895) 53 N. J. Eq. 623, 23 Atl. 8.

New York.—*MacNabb v. Porter Air-Lighter Co.* (1899) 44 App. Div. 102,

60 N. Y. Supp. 694; *Popper v. Supreme Council, O. C. F.* (1901) 61 App. Div. 405, 70 N. Y. Supp. 637; *Reusens v. Manufacturing & Selling Co.* (1904) 99 App. Div. 214, 90 N. Y. Supp. 1010; *Hall v. Holland House Co.* (1895) 12 Misc. 55, 33 N. Y. Supp. 50; *Redmond v. Hoge* (1874) 3 Hun, 171; *Mosher v. Supreme Sitting, O. I. H.* (1895) 88 Hun, 394, 34 N. Y. Supp. 816; *Phoenix Foundry & Mach. Co. v. North River Constr. Co.* (1884) 6 N. Y. Civ. Proc. Rep. 106; *Woerishoffer v. North River Constr. Co.* (1884) 6 N. Y. Civ. Proc. Rep. 113, affirmed in (1885) 99 N. Y. 398, 2 N. E. 47; *Burgoyne v. Eastern & W. R. Co.* (1890) 19 N. Y. Civ. Proc. Rep. 384, 13 N. Y. Supp. 537; *Glines v. Supreme Sitting, O. I. H.* (1892) 22 N. Y. Civ. Proc. Rep. 437, 20 N. Y. Supp. 275; *Murray v. Vanderbilt* (1863) 39 Barb. 140; *De Bemer v. Drew* (1890) 57 Barb. 438, 39 How. Pr. 466; *Patten v. Accessory Transit Co.* (1857) 4 Abb. Pr. 139.

North Carolina.—*Summit Silk Co. v. Kinston Spinning Co.* (1911) 154 N. C. 421, 70 S. E. 820, Ann. Cas. 1912A, 897.

Tennessee.—*Smith v. St. Louis Mut. L. Ins. Co.* (1880) 6 Lea, 564, affirming (1876) 3 Tenn. Ch. 502.

Texas.—*Waters-Pierce Oil Co. v. State* (1907) 47 Tex. Civ. App. 299, 105 S. W. 851.

England.—*Re Federal Bank* [1893] W. N. 46, affirmed in [1893] W. N. 77.

Thus, in *Reusens v. Manufacturing & Selling Co.* (1904) 99 App. Div. 214, 90 N. Y. Supp. 1010, the court said: "There is a radical distinction between an action which seeks to have a receiver appointed of the property and assets of a corporation, in order that they may be preserved from unlawful disposition and waste, and an action for the appointment of a receiver of the corporation. In the former case it is settled by an abundance of authority that the action will lie."

So, if an insolvency statute authorizes proceedings against nonresidents, the court has jurisdiction of a proceeding in involuntary insolvency against a foreign corporation, the object of which is to subject the property of the corporation within the state to the payment of its creditors.

Re Castle Dome Min. & Smelting Co. (1888) 3 Cal. Unrep. 1, 18 Pac. 794.

And the courts of one state have jurisdiction over the officers and corporate assets, within its own borders, of a foreign corporation, so far as to be empowered to appoint a receiver to take possession of its property and sell it for the purpose of paying the debts of local creditors. Flory Mfg. Co. v. Bangor Slate Co. (1908) 18 Pa. Dist.

R. 564. See also Stockley v. Thomas (1899) 89 Md. 663, 43 Atl. 766.

Thus, where a general appearance has been made in a suit to have a receiver appointed, the court has discretion to decide the merits of the case, notwithstanding it involves the internal affairs of a foreign corporation. Chicago Title & T. Co. v. Newman (1911) 109 C. C. A. 263, 187 Fed. 573. L. F. C.

BELZONI HARDWOOD LUMBER COMPANY

v.

MRS. NELLIE LANGFORD.

Mississippi Supreme Court (Division A) — December 5, 1921.

(— Miss. —, 89 So. 919.)

Death — husband — damages — effect of misconduct of wife.

1. In a suit by the wife for the death of her husband, it is error to instruct the jury that the marital relations, or misconduct of the wife at the time of and prior to the husband's death, should be considered by the jury in estimating the amount of damages, because her conduct could not affect the amount due her as "damages to the decedent," expressly allowed by statute.

[See note on this question beginning on page 1409.]

Master and servant — employee away from station — injury — liability.

2. The employer is liable for negligent injury to an invitee, or to an employee of another department, who is negligently injured while at a place where he had a right to be, or where he habitually served with the sanction

of the employer, though not employed for that particular work.

[See 18 R. C. L. 580.]

Damages — death — inadequacy.

3. A judgment for \$1,500 as damages for the wrongful death of a person thirty-five years of age, earning \$4 per day, is grossly inadequate.

[See 8 R. C. L. 852.]

Headnotes by HOLDEN, J.

CROSS APPEALS from a judgment of the Circuit Court for Humphreys County (Davis, J.) in favor of plaintiff in an action brought to recover damages for the death of her husband; defendant appealing from so much of the judgment as held it liable, and plaintiff appealing from the amount of damages assessed. *Affirmed on direct appeal. Reversed on cross appeal.*

The facts are stated in the opinion of the court.

Mr. J. M. Cashin for defendant.

Messrs. Fulton Thompson, Jesse D. Jones, R. H. Thompson, and J. H. Thompson, for plaintiff:

Langford's death resulted in consequence of the improper loading of the car.

Yazoo & M. Valley R. Co. v. McCaskell, 118 Miss. 629, 79 So. 817; Gulfport & M. Coast Traction Co. v. Faulk, 118 Miss. 894, 80 So. 340.

The verdict of the jury was for an inadequate amount.

(— Miss. —, 89 So. 919.)

Coccora v. Vicksburg Light & Trac-
tion Co. 126 Miss. 718, 89 So. 257.

Holden, J., delivered the opinion
of the court:

The appellee, Mrs. Nellie Lang-
ford, recovered a judgment of
\$1,500 against the appellant as dam-
ages for the death of her husband,
who was killed while in the employ-
ment of appellant, from which judg-
ment the appellant directly appeals,
and the appellee cross appeals.

Langford, the husband of appel-
lee, was employed by the appellant
Hardwood Lumber Company as a
log loader, was earning \$4 per day,
and was thirty five years of age.
The appellant operated a sawmill
at Belzoni for the manufacture of
hardwood lumber. It owned a tract
of timberland some miles out on the
east side of the Yazoo river, from
which it obtained its logs to be
sawed at its sawmill. It would send
its logging train out into the woods
daily, where the logs were loaded
upon the flat cars and transported
back to the mill. The deceased was
employed to load logs upon the cars
with a log-loader machine. He
would go out on the train daily, and
return with it to the mill when the
cars were loaded with logs. On the
day of his fatal injury he had start-
ed out on the logging train, when
the crew of the train stopped to pick
up a flat car loaded with square
bridge timbers to take out on the
logging line for repair purposes.
He assisted the train crew in switch-
ing the car of square timbers onto
the main line by a method known as
"poling" the car, so that the engine
could couple to it and take it with
the train. While assisting the crew
in "poling" or switching this car of
timber into the train, or immedi-
ately after the "poling" of the car had
been done, and while Langford was
standing near the car, one of the
heavy timbers fell from the top of
the car, striking him upon the head
and killing him.

The testimony in the record
shows that the car was improperly
and negligently loaded with the
heavy square timbers, and that the

timber fell when the car was jarred
by the engine, or shortly thereafter,
because of the negligent manner of
its loading without standards,
braces, or any means of holding the
timber upon the car. There is scant
room for dispute as to the evidence
showing negligence on the part of
the appellant, which caused the
death of Langford.

On direct appeal the appellant
urges reversal on the ground that
Langford was killed while acting as
a volunteer in assisting to switch
the car into the train; that he was
not acting within the scope of his
employment because he was employ-
ed as a log loader, and not employed
in the moving or switching of the
train when he was killed, and there-
fore there is no liability of appel-
lant, because it owed him no duty
except to not wilfully injure him.

But this contention of appellant
can avail nothing; for the reason
that the evidence in the record clear-
ly shows that Langford had the
right to ride upon the train in going
to his work, and therefore had a
right to be at the place where he was
killed; and, even though he was
acting outside of his
employment at the
time, still he was, at
least, an invitee, toward whom the
appellant should have used reason-
able care not to injure, and should
not have invited him into a situation
which was not a reasonably safe
place.

Master and
servant—
employee away
from station—
injury—liability.

Furthermore, the testimony
shows that Langford had habitually
and daily assisted the train crew
in switching the cars in and about
the train, and had assisted in doing
any other necessary thing, so as to
aid in getting the train out into the
woods and back to the mill. This
daily train service by Langford was
with the knowledge and sanction of
the officers of appellant; conse-
quently it will not do for appellant
to contend that it owed no duty to
use reasonable care to prevent in-
jury to Langford. Therefore, the
lower court did not err in refusing

a peremptory instruction for appellant, and the judgment of the lower court on direct appeal is affirmed as to liability.

The cross appellant, Mrs. Langford, complains that the amount of damages assessed is grossly inadequate, and seeks a reversal as to the amount of damages only. The cross appellee opposes this contention on the ground that no motion for a new trial was made in the lower court, and that, therefore, complaint as to the amount of damages cannot be made now. The position of cross appellee in this regard is well taken, and would settle the cross point raised if that were all that cross appellant relied upon. *Coccora v. Vicksburg Light & Traction Co.* 126 Miss. 713, 89 So. 257.

But it is urged by cross appellant that the court erred in its ruling with reference to the measure of damages in its instructions to the jury, and in erroneously admitting certain evidence which influenced the jury to render a verdict for an inadequate amount. The court permitted the cross appellee lumber company to show that Mrs. Langford had been separated from her husband for several years prior to his death, and that she, on one occasion in Memphis, had introduced to the witness a man whom she said was her husband. The court also instructed the jury, which is claimed to be error and damaging to cross appellant, that, "in estimating the amount of damages to be awarded plaintiff, they should take into consideration the marital relations existing between Langford [the decedent] and the plaintiff at the time of his death and prior thereto," and it is contended that this testimony submitted to the jury, together with the said instruction, resulted in serious injury to the cross appellant's case, with reference to the amount of damages recoverable in the case. It is unnecessary for us to decide whether or not the testimony complained of was admissible,

because we are convinced that the granting of the instruction was error, and, considered in connection with the testimony, undoubtedly prejudiced the rights of the cross appellant with reference to the amount of damages that should have been assessed by the jury. We are led to this view on the reasoning that the statute provides for the recovery of "all damages of every kind to the decedent." Certainly the fact, if it were a fact, that Mrs. Langford was guilty of misconduct in any way as a wife, could not alter the amount of "damages to the decedent," since her conduct could not affect her right to recover "all damages of every kind to the decedent," as expressly provided by the statute. So, she being the wife, the law gives to her the "damages to the decedent," regardless of "the marital relations existing between the parties at the time of his death and prior thereto." The instruction ingeniously points at the conduct of the wife, and tells the jury to take her conduct into consideration in fixing the amount of damages. This was not correct as to the damages due for the death of the husband.

We do not say that the conduct of the wife, or the strained relations existing between a man and his wife, might not affect the right to recover for some of the elements of damages that are allowed under the statute in such cases. However, we decide nothing in this regard, as it is unnecessary to go further than announced above in order to reverse on cross appeal. The judgment of \$1,500 is grossly inadequate.

The judgment on cross appeal as to the amount of damages is reversed, and the cause remanded for a new trial on the question of the amount of damages only. Affirmed on direct appeal.

Death—husband—damages—effect of misconduct of wife.

Damages—death—inadequacy.

ANNOTATION.

Damages for wrongful death of spouse as affected by personal relations of the spouses, or the marital misconduct of either spouse.

- I. In general, 1409.
- II. Abandonment:
 - a. By husband, 1409.
 - b. By wife, 1410.
- III. Effect of living apart, 1410.
- IV. Effect of wife's contemplated proceedings for divorce, 1412.
- V. Effect of immorality on part of wife, 1412.
- VI. Effect on wife's action of husband's relations with relative of defendant, 1413.

I. In general.

The relations between the spouses, or the misconduct of either of them not culminating in a divorce, do not defeat or destroy the right of the survivor to maintain an action for the negligent death of the other, though they may affect the amount of recovery, and in extreme cases, where the survivor by misconduct had forfeited his or her marital rights, may so conclusively negative the sustaining of substantial damages from the death as to leave no question for the jury in that regard.

*II. Abandonment.**a. By husband.*

The legal liability of a father and husband to contribute to the support of his wife and minor child may be the basis of assessing damages against one who has negligently caused his death, although he had deserted the wife and child, and they did not know his whereabouts, and were being supported by the wife's father. *Ingersoll v. Detroit & M. R. Co.* (1910) 163 Mich. 268, 32 L.R.A. (N.S.) 362, 128 N. W. 227.

And the *Ingersoll* Case was followed in *Andrus v. Louisiana Western R. Co.* (1917) 112 La. 318, 76 So. 727, as authority for the right of a wife to maintain an action on behalf of herself and her minor child for the wrongful death of her husband, although for some time previous to his death they had not lived together, nor had he contributed to their support.

18 A.L.R.—89.

And in *Falk v. Chicago & N. W. R. Co.* (1916) 133 Minn. 41, 157 N. W. 904, an action for the negligent death of a husband, it was held that although the husband's obligation to support his wife, whom he has abandoned, may rest lightly upon him, and although there may be little likelihood of his resuming the burden, yet there is a legal liability which the wife may enforce, and the recovery is not limited to nominal damages.

In *Dallas & W. R. Co. v. Spicker* (1884) 61 Tex. 427, 48 Am. Rep. 297, in holding that there was no error in refusing to charge that if deceased a year or more before his death left his wife, and after that had no further communication with her, and the jury believed from the evidence that he had abandoned her for good, and that at the time of his death she had no reasonable expectation of deriving any aid or advantage from the continuance of his life, so far as the widow was concerned they should either find for the defendant or allow her nominal damages, the court said: "So long as the marital relation existed, without reference to the will of the husband,—the wife not being shown to have forfeited her rights thereto by her own wrong,—she was entitled to a decent support, in accordance with her station in life, from her husband. The marital relation created this right, and it would have continued to exist so long as the relationship continued, and so without reference to the will of the husband. There is no legal presumption that such relation would ever have been dissolved prior to the time when one of the parties thereto, in the ordinary course of events, would have died. The wrong of the appellant terminated the relationship by causing the death of the husband prior to the time when, in the ordinary course of events, he would have died, and thereby deprived the wife

of that pecuniary support and benefit which the law would have entitled her to from her husband so long as they remained husband and wife."

Upon the authority of the last case it was held, in *Holland v. Closs* (1912) — Tex. Civ. App. —, 146 S. W. 671, error to charge that the wife could not recover if deceased had left her for the purpose of a permanent abandonment, and the jury believed that he would not have contributed to her support and the support of their infant child.

Abandonment by a man of his family will not defeat a recovery by them for his death under the Federal Employers' Liability Act, if his legal liability still remained, and earning power and capacity on his part existed, so that, had he lived, the legal right to pecuniary assistance might have been enforced as a thing real and measurable. *Fogarty v. Northern P. R. Co.* (1915) 85 Wash. 90, L.R.A.1916C, 803, 147 Pac. 652, 11 N. C. C. A. 84.

Evidence of such abandonment may, however, be taken into consideration in determining the amount of pecuniary loss of the wife and child. *Holland v. Closs* (Tex.) supra.

So, in *Gilliam v. Southern R. Co.* (1917) 108 S. C. 195, 93 S. E. 865, an action under the Federal Employers' Liability Act to recover for death of husband, it was held that, since only actual pecuniary loss may be recovered, an instruction on the measure of damages is erroneous which fails to take into account the fact that the husband had, some years prior to his decease, abandoned his wife, and had not thereafter contributed to her support.

So, in *Creamer v. Moran Bros. Co.* (1906) 41 Wash. 636, 84 Pac. 592, a verdict for \$13,500, awarded in an action brought by a widow and three children for the death of the husband and father, was held excessive and reduced to \$8,000, where it appeared that the deceased was forty-eight years old, was earning \$3.50 a day, and that he had once abandoned his family for a time, and had again left his home some time prior to the

accident, and his wife did not know of his whereabouts and did not learn of the accident until several days thereafter.

b. By wife.

An instruction that "if from the evidence you believe that the plaintiff . . . voluntarily abandoned her husband with the fixed purpose of never returning to him, and fully repudiated the relation of wife, . . . and had determined not to receive any benefit or aid from him had he lived, then his death, under such circumstances, inflicted no injury upon her, and consequently, though you may believe . . . death was the result of negligence on the part of defendant, no recovery can be had by her," was held in *Houston & T. C. R. Co. v. Bryant* (1903) 31 Tex. Civ. App. 483, 72 S. W. 885, to have been properly refused, as a clear invasion of the right of the jury to pass upon the facts and determine whether the wife was damaged by the death of her husband.

III. Effect of living apart.

The fact that a wife may have separated from her husband before his death will not exclude her from recovering damages for his death.

United States.—*Dunbar v. Charleston & W. C. R. Co.* (1911) 186 Fed. 175.

Delaware.—*Wood v. Philadelphia, B. & W. R. Co.* (1910) 1 Boyce, 336, 76 Atl. 613.

Louisiana.—*Williams v. Nona Mills Co.* (1911) 128 La. 811, 55 So. 414.

Minnesota.—*Boos v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1914) 127 Minn. 381, 149 N. W. 660.

Mississippi.—*BELZONI HARDWOOD LUMBER CO. v. LANGFORD* (reported herewith) ante, 1406.

Pennsylvania.—*Kephart v. Pennsylvania R. Co.* (1855) 16 Pa. Dist. R. 756.

Texas.—*International & G. N. R. Co. v. Jones* (1901) — Tex. Civ. App. —, 60 S. W. 978; *Galveston, H. & S. A. R. Co. v. Murray* (1907) — Tex. Civ. App. —, 99 S. W. 144; *Gulf, C. & S. F. R. Co. v. Saint* (1918) — Tex. Civ. App. —, 204 S. W. 1021.

Canada. — *Scarlett v. Canadian P. R. Co.* (1913) 15 Can. Ry. Cas. 184, 4 Ont. Week. 718, 23 Ont. Week. N. 948, 9 D. L. R. 780.

So, the fact that the wife is separated from her husband, pending his suit for divorce on the alleged ground of adultery, is not such desertion as will preclude a recovery by her for the wrongful death of her husband. *Williams v. Nona Mills Co.* (La.) *supra*. The court stated that voluntary separation of either party, pending a divorce suit, cannot be deemed a desertion, since such separation is justified.

In *Kephart v. Pennsylvania R. Co.* (Pa.) *supra*, an action by a father to recover damages for the death of his son, a compulsory nonsuit was ordered, since the son left a widow and minor children, and so the right of action, if any, was in the widow for the benefit of herself and the minor children, even though at the time of the husband's decease he was living apart from his wife.

Nothing short of desertion by the wife may be inquired into to defeat a recovery or in mitigation of damages. *Boos v. Minneapolis, St. P. & S. Ste. M. R. Co.* (Minn.) *supra*.

In *Gulf, C. & S. F. R. Co. v. Saint* (Tex.) *supra*, the court stated that the jury may take into consideration the probability of a reconciliation, as well as the wife's right to be supported by the husband in a proper case, and the probability of such support, and her community interest in any property that he may acquire, notwithstanding such separation.

The fact that a husband and wife were separated at the time of the former's death is material only as it bears upon the loss of support as claimed by her. *Wood v. Philadelphia, B. & W. R. Co.* (1910) 1 Boyce (Del.) 336, 76 Atl. 613.

The apportionment of damages for wrongful death between a widow and the mother of deceased, under the Fatal Accident Act, is not affected by the fact that the widow was separated from her husband, so long as he continued liable for her support.

Scarlett v. Canadian P. R. Co. (Can.) *supra*.

A wife who was separated from her husband, who was a deaf-mute, at the time of his death, and who had supported herself, was held in *International & G. N. R. Co. v. Jones* (1901) — Tex. Civ. App. —, 60 S. W. 978, to be entitled to recover damages for his death. In this case, however, the court considered that a verdict of \$1,500 was too large, and that it should be reduced to \$500, in view of the deceased's limited earning capacity, and the probability that it would have decreased as he grew older.

The fact that shortly before deceased met his death he and his wife had separated will not preclude the latter from recovering damages for wrongful death under the Employers' Liability Act. *Dunbar v. Charleston & W. C. R. Co.* (1911) 186 Fed. 175.

And in *New Orleans & N. E. R. Co. v. Harris* (1918) 247 U. S. 367, 62 L. ed. 1167, 38 Sup. Ct. Rep. 535, an action for death under the Federal Employers' Liability Act, which makes the widow the sole beneficiary when there is no child, it was held that, since it is only in the absence of both widow and child that the parents of deceased may be considered, where deceased leaves a widow, proof of the mother's pecuniary loss will not support a recovery under the act, where, although deceased and his wife had lived apart, no claim is made that rights and liabilities consequent upon marriage had disappeared under the local law.

But a husband who had lived separate from his wife for over eight years, and with whom, although they lived within a few doors of each other, he had not exchanged a spoken word, was held in *Harrison v. London & N. W. R. Co.* (1885) Cab. & El. (Eng.) 540, an action under Lord Campbell's Act for the wrongful death of the wife, not to have had any reasonable prospect of pecuniary benefit from his wife if she had lived, so as to entitle him to an action for damages for her death.

A wife who separated from her hus-

band soon after their marriage, the husband not thereafter contributing to her support, is entitled to recover substantial damages for his wrongful death, and not nominal damages merely, where there has been no divorce, and nothing appears to show that she might not at any time have enforced her conjugal rights under the laws of the state of which they are residents. *Southern R. Co. v. Miller* (1920) 267 Fed. 376, certiorari denied in (1920) 254 U. S. 646, 65 L. ed. 455, 41 Sup. Ct. Rep. 17, citing, as authority, *New Orleans & N. E. R. Co. v. Harris* (1918) 247 U. S. 367, 62 L. ed. 1167, 38 Sup. Ct. Rep. 535.

And in *Baltimore & O. R. Co. v. State* (1895) 81 Md. 371, 32 Atl. 201, it was held that a wife's recovery for the wrongful death of her husband was not limited to nominal damages only, by the fact that for a period of about twelve years immediately preceding his death he had been separated from his family, and had contributed nothing to their support. The court stated: "The marital relation still continued to exist between the parties at the time of the death of the husband, and while they had not, for the period stated, lived together as man and wife, her legal right had suffered no change or impairment. It is very clear from the testimony in the record that the wife had not by her own wrong forfeited her right to additional support from her husband in accordance with her station in life. The marital relation created this right, and it continued to exist in law until the death of the husband, and this, too, without reference to the will or wishes of the husband."

But *Goen v. Baltimore & O. S. W. R. Co.* (1913) 179 Ill. App. 566, is to the effect that it is necessary for a widow to prove that she received some support or pecuniary aid from her husband, or had reason to believe that she would thereafter receive such support, before she will be entitled to recover more than nominal damages.

In *Chicago, R. I. & P. R. Co. v.*

Downey (1901) 96 Ill. App. 398, where it appeared that the deceased, who was sixty years old, and earned about \$40 per month, left a widow about his age, who for some time had not been living with him, but lived in a house of her own, and, so far as appeared, did not receive anything from him, and also left four children all of whom were over twenty years of age, and who had received no fixed or regular allowance from their father, it was held that a verdict of \$5,000 for his death was excessive.

IV. Effect of wife's contemplated proceedings for divorce.

The fact that a wife has consulted counsel as to her right to obtain a divorce will not affect her right to recover for the death of her husband through the negligence of another. *Abel v. Northampton Traction Co.* (1905) 212 Pa. 329, 61 Atl. 915.

V. Effect of immorality on part of wife.

Under a statute providing that in case of death through negligence a right of action shall accrue to the widow of the person killed, his lineal heirs, etc., the decedent's widow may recover, although she has separated from her husband, and has lived in adultery. *Cole v. Mayne* (1901) 122 Fed. 836. The court stated that in the absence of a divorce dissolving the bonds of matrimony, which in this country is a civil contract, her status is that of his widow, and she would be entitled to dower in his estate in the absence of a statute forfeiting the right on account of desertion and adultery.

And in *Consolidated Stone Co. v. Morgan* (1902) 160 Ind. 241, 66 N. E. 696, an action for the wrongful death of one who left a widow and child, it was held that evidence of acts and habits and moral character of the widow of the deceased was properly excluded, since the statute under which the action was brought provided that the damages recovered must inure to the exclusive benefit of the widow and the children, and they do not in any wise depend upon the character or conduct of one or more

of the persons who might or might not be entitled to share in the distribution.

And see the reported case (*BELZONI HARDWOOD LUMBER Co. v. LANGFORD*, ante, 1406), which held that the wife's misconduct could not affect her right to recover damages, under a statute allowing recovery of "all damages of every kind to the decedent."

On the other hand, in *Stimpson v. Wood* (1888) 59 L. T. N. S. (Eng.) 218, 57 L. J. Q. B. N. S. 484, 36 Week. Rep. 734, 52 J. P. 822, an action brought under Lord Campbell's Act by a widow, to recover damages for her husband's death, it was held that she could not recover, since at the time of the husband's death she was living apart from him and in open adultery with another. In distinguishing this case, the court in *Cole v. Mayne* (Fed.) supra, said: "This was based on the theory that the design of that act was to secure compensation to those who by law were entitled to support from the deceased, or had reasonable ground of expectation of support at his hands while living. There is a radical difference between Lord Campbell's Act and the statute under consideration. The former is for the benefit of the husband, wife, parent, and child. The designated parties yet living are joint beneficiaries in the right of action. Each named beneficiary has a separate independent interest. The executor or administrator brings the action in the name of the beneficiary for his or her proportion, and the jury makes the apportionment on the basis of compensation, dependent upon the relation of dependents and expectancy of the beneficiaries in the life of the deceased. But under a statute like the one in question, giving a sole right of action to a designated person, eo nomine, to the exclusion of other designated beneficiaries, so long as the first in right under the statute is living, no misconduct of such preferred person constitutes a disqualification to maintain the action, unless imposed by the legislature which gives the right."

And in *Orendorf v. New York C. &*

H. R. R. Co. (1907) 119 App. Div. 638, 104 N. Y. Supp. 222, where a statute awarded only such sum as was deemed "to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death, to the person or persons for whose benefit the action is brought," in an action by the widow of the deceased, it was held competent to show that she had not lived with the deceased for a number of years, and was, at the time of his death, living in open adultery with another man. The court stated that this evidence had a material bearing upon the question of how much the husband would have contributed to the support of the wife.

So, too, in *Ft. Worth & D. C. R. Co. v. Floyd* (1893) — *Tex. Civ. App.* —, 21 S. W. 544, a verdict in favor of a wife for the death by wrongful act of her husband was set aside, where it was shown that at the time of his death she was living separate from him and in a house of prostitution, the court stating that she had forfeited all right to support from her deceased husband, and that the evidence failed to show any reason on her part to expect that he would ever again have contributed anything toward her support, had he not been killed. The court added that there might be a case of such misconduct on the part of the husband as would preclude such a defense, but that no such case was here presented.

But the appellate court will go extremely slow in reversing a judgment in favor of a woman for the death of her husband because of evidence tending to show that she had forfeited all right to support by a dissolute life, where the verdict, based on conflicting evidence, has been approved by the trial judge. *Fogarty v. Northern P. R. Co.* (1915) 85 Wash. 90, L.R.A.1916C, 803, 147 Pac. 652, 11 N. C. C. A. 84.

VI. Effect on wife's action of husband's relations with relative of defendant.

Evidence that deceased had rav-

defendant in the widow's action to recover damages for his death is inadmissible, where compensatory damages only are sought. *Gilfillan v. McCrillis* (1900) 84 Mo. App. 576. The court stated: "Unquestionably, if the plaintiff had sought to recover both compensatory and punitive damages, then it would have been competent for the defendant to show that the circumstances of the homicide were of such a mitigating character as that the plaintiff should be restricted in her recovery to damages of the former kind, or, which is the same thing, to such as were the necessary result of the homicide. Where a plaintiff, for the purpose of recovering damages exceeding a compensatory sum, introduces evidence tending to show circumstances of an aggravating character, the defendant in such case may show, by evidence, mitigating or extenuating circumstances to diminish or reduce the recovery to the necessary injuries resulting from the wrong. In this state the rule seems to be fairly well settled that, in actions of tort, mitigating circumstances may be shown in evidence in reduction of punitive

actual damages."

In a wife's action to recover damages for the wrongful killing of her husband, the fact that the deceased had had improper relations with the daughter of the defendant, which relations led to defendant's killing deceased, is admissible, but in mitigation of exemplary damages only. *Holland v. Closs* (1912) — Tex. Civ. App. —, 146 S. W. 671. The court stated: "If the killing was unlawful—that is, neither justified nor excused in law—circumstances which would tend to mitigate the moral wrong ought not to affect the recovery of such actual pecuniary loss as appellants have suffered. Exemplary damages, however, are given in punishment of the offender, and it is entirely proper that such evidence be received and considered by the jury upon this issue; but the court in its charge should instruct the jury that, if the killing was neither justifiable nor excusable in law (and in the present case the only attempt to justify or excuse in law was under the plea of self-defense), such evidence could only be considered in mitigation of exemplary damages." J. H. B.

MRS. LULU BUCHANAN, Appt.,

v.

WESTERN UNION TELEGRAPH COMPANY, Respt.

South Carolina Supreme Court — October 12, 1920.

(115 S. C. 433, 106 S. E. 159.)

Master and servant — liability of telegraph company for act of messenger delivering message.

A telegraph company is liable for an insult offered by the messenger by whom it is delivering a telegram to the addressee in her own home, although it grows out of a matter purely personal to the messenger.

[See note on this question beginning on page 1416.]

Messrs. Tillman & Mays, for appellant:

The action of Moseley, the delivery boy of the telegraph company, in insulting the plaintiff, constituted a tort for which the company is responsible.

Jones v. Atlantic Coast Line R. Co. 108 S. C. 217, 94 S. E. 490; Dunn v. Western U. Teleg. Co. 2 Ga. App. 845, 59 S. E. 189; Jones, Teleg. & Teleph. Companies, 236; Fields v. Lancaster Cotton Mills, 77 S. C. 546, 11 L.R.A. (N.S.) 822, 122 Am. St. Rep. 593, 58 S. E. 608; Magouirk v. Western U. Teleg. Co. 79 Miss. 632, 89 Am. St. Rep. 663, 31 So. 206; Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922; Dillingham v. Russell, 73 Tex. 47, 3 L.R.A. 634, 15 Am. St. Rep. 757, 11 S. W. 139.

Mr. J. William Thurmond also for appellant.

Messrs. John Gary Evans and Grier, Park, & Nicholson for respondent.

Fraser, J., delivered the opinion of the court:

This is an action for damages. The plaintiff lived, at the time set up in the complaint, in Greenwood, in this state. The plaintiff's husband was working in Columbia, and sent to his wife, through the defendant company, \$11.50. The agent of the defendant sent a check for the money to the plaintiff by one of its regular messengers. The messenger found the plaintiff at home alone. While the plaintiff was in the act of signing the receipt the messenger is alleged to have made an indecent proposal to her. There is also evidence that the plaintiff offered to strike the messenger, but the messenger at first advanced towards the plaintiff, and then seized the receipt and ran away. The question is the liability of the defendant for the conduct of its messenger.

At the close of the testimony, the defendant moved for direction of a verdict in its favor. The presiding judge directed the verdict for the defendant, but said, "I am rather disposed to think that it is a step that the law ought to take, but it hasn't taken yet." The majority of

this court think that the principle has been settled.

We are unable to differentiate this case, in principle, from the case of Jones v. Atlantic Coast Line R. Co. 108 S. C. 217, 94 S. E. 490. The fact that the defendant undertook to transact its business in the home of the plaintiff, instead of in its own office, makes no difference. Certainly, none in favor of the defendant. It is more in keeping with the spirit of the law to protect the homes of the people than railway, express, and telegraph offices. A consignee may send another to get his freight, as Jones did. The communication of the telegraph company is with the person to whom the message is sent. The appearance of their messenger to most people is startling. It indicates an urgent necessity for immediate action; otherwise, the mail will do. The appearance of their messenger throws caution to the winds and opens almost every door. May it admit, with impunity, a thief, a murderer, a rapist? It seems to us that it is going to the extreme limit to say that if the messenger is sent to the house of A, and he turns aside and enters the house of B, then the telegraph company is not responsible, because the transaction with B was not within the scope of his employment. The transaction with A is certainly within the scope of his employment, or there is no ground for responsibility for any delict. The servant in Jones's Case was writing a card to his wife, which was a purely private matter. The interruption of that private matter caused the difficulty. It was not within the scope of the servant's employment to write to his wife, or to abuse and threaten those who came for their freight, and yet the employer was held responsible. Here the injury was inflicted while the business for which the messenger was sent was being transacted.

The injury was committed in the home of the plaintiff, to which the

Master and servant—liability of telegraph company for act of messenger delivering message.

servant of the defendant had gained admission by reason of this very business, and inflicted in its performance.

The judgment appealed from is reversed.

Watts and Gage, JJ., concur.

Hydrick, J., dissenting:

We think the ruling was right. The law is well settled that the master is liable for the wrongful acts of his servant within the scope of his employment. The converse of the proposition is equally well settled—that the master is not liable for the conduct of his servant which is not within the scope of his employment; that is, for his servant's acts which are not done about, or in furtherance of, the master's business.

The conduct here complained of was entirely foreign to the master's business, or the purpose for which the boy was employed. It had no connection with or relation to the master's business, but was the boy's own personal escapade, wholly unconnected with the duty for which he was employed; and therefore, as

to that act, he was not defendant's servant. *McClenaghan v. Brock*, 39 S. C. L. (5 Rich.) 17; *Simmons v. Okeetee Club*, 86 S. C. 73, 68 S. E. 131; *Knight v. Laurens Motor Car Co.* 108 S. C. 179, L.R.A.1918B, 151, 93 S. E. 869; *Thomp. Neg.* § 525; *Savannah Electric Co. v. Hodges*, 6 Ga. App. 470, 65 S. E. 322, and authorities cited by the court in a clear and well-reasoned opinion.

The fact that the boy was admitted to plaintiff's house because he was defendant's servant, and the fact that at that place and time he was about his master's business in delivering the money and getting a receipt for it, are not determinative of the question whether his wrongful conduct was within the scope of his employment. In some circumstances, time and place may be elements to be considered in determining that question, but here they are mere incidents, and the nature of the wrong complained of is the prime factor to be considered in solving the question.

Gary, Ch. J., concurs.

Petition for rehearing denied.

ANNOTATION.

Liability for misconduct or negligence of messenger not directly related to the service.

This annotation is intended to include only cases which have considered the liability of one furnishing messenger service, for acts of a messenger which have no direct relation to the service which he was performing, and so cases of liability for loss or theft of property intrusted to the messenger are not within its scope.

Misconduct.

Aside from the reported case, no other case has been found which has considered the master's liability for indecent conduct on the part of one of its messengers.

The liability of the employer for the negligence of one of its messengers, causing a personal injury,

has been presented in a number of cases.

In an action against a telegraph company for personal injuries alleged to have been caused by being run into by a messenger boy on a bicycle, it is necessary for the plaintiff to show, in order to enable him to recover, that the boy who collided with him was not only in the employ of the telegraph company, but was acting within the scope of his employment as one of its messenger boys at the time. *Western U. Teleg. Co. v. Lamb* (1918) 140 Tenn. 107, 203 S. W. 752.

One employed by a telegraph company to collect and deliver messages is its servant, so as to render it liable for injuries inflicted by him up-

on a pedestrian, by the bicycle which he was riding while engaged in delivering a message, although he furnished his own uniform and bicycle and was paid a commission for each message delivered. *Postal Telegraph Co. v. Murrell* (1918) 180 Ky. 52, L.R.A.1918D, 357, 201 S. W. 462. In holding that the manner of payment, or the fact that the boy owned and rode his own bicycle in performing the messenger service, did not affect the question of the company's liability, the court said: "He was under the control of the telegraph company in the sense that it directed him when to go, and when to return, and what to do; he had no discretion of his own to exercise, except that he might select the route to be traveled in attending to the business committed to his care; but whatever route he selected, or whatever means of conveyance he adopted, his employer controlled his movements to the extent that it derived certain results therefrom, and the accomplishment of these results consisted in doing what his employer told him to do." The decision in this case, it will be seen, turned upon whether, under the facts, the messenger boy was an independent contractor for whose negligence the telegraph company would not be liable. No other reported case has been found where that question is considered with regard to a messenger boy.

A messenger company and a telegraph company, which occupied the same office and had the same agent, were held in *Western U. Teleg. Co. v. Rust* (1909) 55 Tex. Civ. App. 359, 120 S. W. 249, to be liable for injuries to one as the result of a collision with a bicycle ridden by a messenger sent by the telegraph company to perform services for a patron, and without charge to him, as against the contention of the messenger company and the telegraph company that such patron was liable, where the messenger's wages were paid by the messenger company, and the telegraph company paid the messenger company for any services the messenger boy performed at its request, and the patron

in this case neither paid the boy, nor had any control over him, beyond indicating what services were to be performed.

A messenger boy in the employ of a telegraph company is acting within the scope of his employment in obeying a summons of his superior to report at the office to deliver a message, after having been given the evening off, so as to render the company liable for injuries to one who collided with the wheel ridden by the boy, the wheel being his own and ridden with the knowledge and assent of the company, but not by its requirement, although the actual purpose of the summons was that he might relieve the night operator, who called him, which was not one of his duties. *Kueh-michel v. Western U. Teleg. Co.* (1914) 125 Minn. 74, L.R.A.1918D, 355, 145 N. W. 788.

In an action against a telegraph company for personal injuries alleged to have been caused by being run into by one of the company's messenger boys while he was on the business of the company, the jury will be warranted in inferring that the boy was on the business of his employer, where it is shown that the boy passed immediately from the scene of the accident to the offices of the company. *Western U. Teleg. Co. v. Lamb* (Tenn.) supra.

But the allegations of a petition of one who sued a telegraph company for personal injuries that he was run over by a bicycle messenger boy in the service of the company were not sustained by evidence that the plaintiff was struck by "a boy on a wheel;" that "the boy had a blue uniform and cap from the Western Union Company;" that he, the witness, "did not know whether it was the Western Union Company's wheel, or not, but the rider had a uniform on." *Clower v. Western U. Teleg. Co.* (1916) 18 Ga. App. 775, 90 S. E. 730.

A telegraph company, it was held in *Phillips v. Western U. Teleg. Co.* (1917) 270 Mo. 676, L.R.A.1917F, 489, 195 S. W. 711, 16 N. C. C. A. 71, is not liable for an injury caused to one standing on a public highway, by a

from a newboy, and in an attempt to escape runs heedlessly against the person injured. The court distinguished cases of assault by employees in carrying out the instructions of the employer, and also distinguished cases where the injury was inflicted by some instrumentality furnished by the employer for the performance of the employee's duties, such as a horse to ride, or an automobile to transport him in. The court added: "The most of us frequently send our servants to the postoffice or the store, or, if we have no one regularly employed to do these errands, expend a nickel or a dime for a special messenger for such purposes. The traveling salesmen in the employ of commercial houses go from store to store and house to house in pursuance of their calling. Boys engaged in this employment frequently encounter their juvenile enemies, and we who employ them do not think of worrying over our financial responsibility for the result. The youth who goes to the postoffice with our letter on a 4th-of-July morning may carry a bundle of firecrackers and distribute them freely along the route; or the festive drummer, on a holiday occasion, may fall over a slight and quiet traveler; or the boy who carries a parcel may, at the same time, try to control his boon companion, the bull pup, with a string. Many of us have seen painful accidents resulting from such conditions, but have seen no legal authority for holding the master liable in damages growing out of the rollicking movements of his servants on the street, even though his own business may have taken them to the very place at that very time, unless he instigates the wrong which caused the injury. Nor are we prepared to hold that a corporation is, in this respect, subject to a more stringent rule of liability than a natural person."

This case, in effect, overrules *Phillips v. Western U. Teleg. Co.* (1916) 194 Mo. App. 458, 184 S. W. 958, an

ferred by him because of injuries to his wife, which upheld the liability of the telegraph company, basing its decision upon the fact that, though the boy deviated from his course when he snatched the newspaper, he had returned to it at the time the accident occurred.

In *St. Louis, I. M. & S. R. Co. v. Robinson* (1915) 117 Ark. 37, 173 S. W. 822, it was held that the fact that a railway call boy, who was not required by the company to use a bicycle or furnished with one, for his own convenience, and with the knowledge of the company, used his own wheel, did not warrant a jury in finding that the call boy necessarily used the bicycle in making his calls, so as to make it liable for injury to one struck by the wheel while it was being ridden by the boy in the performance of his duties. The only question in this case was as to whether the use of the bicycle was authorized, actually or impliedly, by the company; the question of employment, or whether the boy was on his master's business, not being involved. The decision turned on the fact that the limited territory covered by the call boy did not call for the use of a bicycle, so as to make its use by the boy for his own convenience, though known to the company, an implied authorization of the use thereof by the master, or sufficient evidence of the necessity therefor, and so, perhaps, distinguishes this case from those of telegraph messenger boys who are required to cover a more extended territory. The court in this case did say that, "if the service required of the call boy could not have been performed in the time given therefor without the aid of the instrumentality used,—the bicycle,—it would have occasioned a necessity; and the knowledge by the agent of such use in the performance of the service would have amounted to an implied authorization thereof, making the railroad liable for a negligent injury thereby."

J. H. B.

CHARLES NEAD, Plff. in Err.,
v.
PHILIP HERSHMAN.

Ohio Supreme Court — June 21, 1921.

(— Ohio St. —, 132 N. E. 19.)

Trial — motion for directed verdict — right to jury.

Where a motion by defendant for a directed verdict is made at the close of plaintiff's testimony and overruled, and then renewed at the close of all the testimony, followed by a like motion on the part of plaintiff, and the court passes on the latter motion first, sustaining it, and then overrules defendant's motion, and thereupon, and next in order of procedure, defendant requests the withdrawal of his motion and the submission of the case to the jury, there being a jury issue, the refusal of the court to submit the issue to the jury under proper instructions is error.

[See note on this question beginning on page 1433.]

Headnote by the COURT.

ERROR to the Court of Appeals for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff and overruling a motion for new trial, in an action brought to recover damages for failure of defendant to deliver to plaintiff a general warranty deed for his property. *Reversed.*

Statement by Hough, J.:

This case came on for trial to the court and jury in the court of common pleas of Hamilton county, Ohio, upon the issues joined by the petition and answer.

At the close of the plaintiff's testimony, the defendant, plaintiff in error here, moved the court for a directed verdict, which was overruled. At the close of all the testimony, the motion was renewed, and thereupon the plaintiff, defendant in error here, also moved the court for an instructed verdict in his behalf.

Next in the order of procedure, according to the record, the two motions pending having been made in the order above named, the court passed upon the latter, sustaining it, and stating that he would direct the jury to bring in a verdict for the plaintiff. After which the court proceeded to overrule the motion of the defendant for a directed verdict. Thereupon counsel for the

ant withdrew, or offered to withdraw, the motion theretofore made by him, and requested the court to send the case to the jury for the jury's determination of the facts.

This the court declined to do, but directed the jury to return a verdict for the plaintiff, which was done, and judgment was entered on the verdict. Motion for a new trial was overruled, and error prosecuted to the court of appeals, where the judgment was affirmed.

Messrs. James G. Stewart and Harry H. Shafer for plaintiff in error.

Messrs. Moses Ruskin and Charles S. Bell, for defendant in error:

It was not error to instruct the jury to return a verdict for the plaintiff, after the merits of the case were submitted to him.

Turner v. Pope Motor Car Co. 79 Ohio St. 153, 86 N. E. 651; First Nat. Bank v. Hayes, 64 Ohio St. 100, 59 N. E. 893; Strangward v. American Brass Bedstead Co. 82 Ohio St. 121, 91 N. E. 988; Perkins v. Putnam County, 88 Ohio St. 495, 103 N. E. 377.

Hough, J., delivered the opinion of the court:

The principal ground of error relied upon in this court, and the only one that it will be necessary to consider, is a question of procedure.

The plaintiff in error contends that the court erred in refusing to allow his motion to withdraw his former motion for a directed verdict, and erred in refusing to submit the case upon that motion to the jury, under proper instructions.

The defendant in error, on the other hand, contends that the application, made after the court had indicated his decision, came too late, and that the submission of a motion by each party to the suit at the conclusion of all the testimony, asking for a directed verdict, was in effect a waiver of a jury, and a final submission of the whole controversy to the court.

In *Turner v. Pons Motor Car Co.*

other party sustained, give evidence in support of his case."

Although this may be considered as an authority to sustain the contention of the defendant in error, it still does not present the identical question made in this record.

A case nearer in point is that of *First Nat. Bank v. Hayes*, 64 Ohio St. 100, 59 N. E. 893. The first proposition of the syllabus in that case reads: "Where, at the conclusion of the evidence in a case, each party requests the court to instruct the jury to render a verdict in his favor, the parties thereby clothe the court with the functions of a jury, and where the party whose request is denied, does not thereupon request to go to the jury upon the facts, the verdict so rendered should not be set aside by a reviewing court, unless clearly against the weight of the evidence."

In the above case no motion was

defendant's motion. At this juncture, and next in order as appears from the record, defendant's counsel requested the withdrawal of his motion, and the submission of the case to the jury.

From the record, as it appears, we are of the opinion that this request to submit the case to the jury came at the earliest moment at which it could consistently have been made. Had the court passed upon the motions in the order in which they were offered, as was done in the case of Perkins v. Putnam County, 88 Ohio St. 495, 103 N. E. 377, and, after the overruling of his motion, counsel for defendant had then delayed until the court had disposed of the motion of the other party, there might be some merit in the contention of the defendant in error.

It appears to us, in the light of what was actually done as disclosed

by the record, that the defendant was entitled to have the case submitted to the jury, and that the refusal of the court so to do is a violation of a constitutional provision that the action of the court in this respect was error.

The judgment will be reversed and the cause remanded to the Court of Common Pleas for proceedings according to law.

Marshall, Ch. J., and
Wanamaker, Robinson,
Matthias, JJ., concur.

NOTE

The effect of a request for a directed verdict of submission of the case is treated in the annotation MANSKA v. SAN BENITO I 1433. Specifically, as to the question to go to the jury, a case, see subd. I. b and c

ROBERT J. MCCLURE, Appt.,

v.

CHARLES A. WILSON et al., Respts.

Washington Supreme Court (Department No. 1) — December 22

(109 Wash. 166, 186 Pac. 302.)

Trial — denial of motion for directed verdict — power of court of case.

1. The denial of motions by both parties for directed verdict of submission of the case to the jury deprive the court of power to decide the case upon the merits as to questions of fact.

[See note on this question beginning on page 1433.]

— question for jury — negligence and contributory negligence.

2. The jury must determine the question of negligence and contributory negligence, where a street car passenger, after leaving the car at the front end and reaching the sidewalk, returns to the rear end of the car to pay the conductor his fare, and, although knowing that an automobile is approaching a block away, immediately after paying the fare, turns

again towards the side for ascertaining the whereabouts of the automobile, and the driver, seeing his action, continues without warning or apprising him of his speed, and strikes the passenger with the front end of the street car, the driver is liable for the injury to the passenger without duty to look out for persons from street cars.

[See 2 R. C. L. 1186 Supp. 725.]

APPEAL by plaintiff from a judgment of the Superior Court for King County (Frater, J.) in favor of defendants, notwithstanding a verdict for plaintiff in an action brought to recover damages for personal injuries, alleged to have been caused by the negligent operation of an automobile by defendant Wilson. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Paul Shaffrath and Arthur C. Dresbach, for appellant:

Plaintiff is entitled to a reversal and a direction to the trial court to enter judgment on the verdict.

Hull v. Seattle, R. & S. R. Co. 60 Wash. 162, 110 Pac. 804; Hines v. Chicago, M. & St. P. R. Co. 105 Wash. 178, 177 Pac. 795; Roe v. Standard Furniture Co. 41 Wash. 546, 83 Pac. 1109; Davies v. Rose-Marshall Coal Co. 74 Wash. 565, 134 Pac. 180; Lautenschlager v. Seattle, 77 Wash. 12, 137 Pac. 323; Withiam v. Tenino Stone Quarries, 48 Wash. 127, 92 Pac. 900; Spokane Grain Co. v. Great Northern Express Co. 55 Wash. 545, 104 Pac. 794; Donaldson v. Great Northern R. Co. 89 Wash. 162, 154 Pac. 133; Washington Trust Co. v. Keyes, 88 Wash. 287, 152 Pac. 1029; Fobes Supply Co. v. Kendrick, 88 Wash. 284, 152 Pac. 1028; Moore v. Roddie, 103 Wash. 386, 174 Pac. 648; Norris-Short Co. v. Everson Mercantile Co. 103 Wash. 399, 174 Pac. 645.

The court must jealously guard the rights of litigants against the apparent predilection of the trial judges to enter judgments contrary to the verdicts reached by juries.

Wagner v. Northern L. Ins. Co. 75 Wash. 106, 134 Pac. 685; Brown v. Walla Walla, 76 Wash. 670, 136 Pac. 1166; Kiebert v. Seattle, 84 Wash. 196, 146 Pac. 400; Okazaki v. Sussman, 79 Wash. 623, 140 Pac. 904; Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490; Mathis v. Granger Brick & Tile Co. 85 Wash. 634, 149 Pac. 3; Paich v. Northern P. R. Co. 86 Wash. 381, 150 Pac. 814; McDonnell v. Shine, 86 Wash. 393, 150 Pac. 817; Carkonen v. Columbia & P. S. R. Co. 86 Wash. 473, 150 Pac. 1162; Jorgenson v. Crane, 97 Wash. 676, 167 Pac. 49.

Messrs. Morris B. Sachs and W. R. Crawford for respondents.

Parker, J., delivered the opinion of the court:

The plaintiff, McClure, commenced this action in the superior court for King county, seeking recovery of damages which he claims to have suffered as a result of the

negligent operation of an automobile by the defendant Wilson, while driving the same as agent for the defendant Matheny, the owner thereof. A trial upon the merits in the superior court, sitting with a jury, resulted in a verdict awarding the plaintiff recovery in the sum of \$2,780. Thereafter the court rendered in favor of the defendants a judgment notwithstanding the verdict, upon motion timely made in that behalf by their counsel. From this disposition of the cause the plaintiff has appealed to this court.

The main question here to be decided is whether or not the trial court erred in refusing to render judgment in favor of appellant in accordance with the verdict, and in rendering the judgment against him notwithstanding the verdict. In view of the contention made by counsel for respondents that the condition of the record is such as to call for the conclusion that the trial court rendered its decision upon the questions of both law and fact, and that it was warranted in so doing, as if the case had been tried before the court without a jury, it seems necessary that we first determine the viewpoint the trial judge was required or permitted to assume in rendering his decision upon the motion for judgment notwithstanding the verdict; that is, whether he was required to dispose of that motion as in any other ordinary jury case where a verdict is rendered, or whether he was, because of prior motions by counsel for the respective parties and the peculiar circumstances of the trial, authorized to dispose of the motion as if he were then deciding the case upon the merits, upon questions of both law and fact. If the judge was required to dispose of the motion for judgment notwithstanding the verdict purely

as such, having in mind that the verdict of the jury would be controlling unless wrong as a matter of law, it is plain we must test the correctness of his decision by determining whether or not there is evidence to support the verdict; while if the judge was, by reason of prior motions made by counsel for both parties and the peculiar circumstances of the trial, authorized to dispose of the motion as if he were deciding the case upon the merits, as to questions of fact as well as law, it is equally plain we must test the correctness of his decision by determining whether or not the weight of the evidence preponderates against it.

The facts determinative of the correctness of the decision upon this preliminary question may be summarized as follows: At the conclusion of the introduction of all of the evidence upon the trial, both sides having rested, a motion was made in behalf of respondents for an instructed verdict in their favor, rested upon the ground, in substance, that the evidence would not support any finding of negligence on the part of respondents; that appellant's injuries were conclusively proven to be the result of his own contributory negligence, and that, therefore, it should be so decided as a matter of law. This motion was immediately heard and denied. Immediately thereafter a motion was made in behalf of appellant, as follows: "We ask at this time, also, for an instructed verdict for the plaintiff, for the reason and upon the ground that the evidence distinctly shows by Mr. Wilson himself that he deliberately, wilfully, ran this man down." This motion was also immediately heard and denied. Thereupon the trial judge instructed the jury, submitting to it the question of respondents' negligence and of appellant's contributory negligence, the instructions fully and fairly covering these questions, including a fair statement of the law relative to the burden of proof as to each. Thereupon counsel for the respective parties made their arguments to the

jury, and a verdict was returned in favor of appellant as already noticed.

Counsel for respondents now contend that the motions for directed verdict made at the close of the evidence by counsel for the respective parties constituted, in effect, a consent on the part of each that the trial judge should dispose of the case upon the merits as to questions of both law and fact, and that such consent warranted the judge in so disposing of the motion for judgment notwithstanding the verdict, even after the denial of the motions for directed verdict before the submission of the case to the jury. Counsel invoke what they insist is the general rule that, when at the conclusion of a jury trial, before the submission of the case to the jury, motions for directed verdict are made by counsel upon both sides, such action on their part becomes, in effect, a waiver of trial by the jury, and a consent to the submission of the case to the trial judge, to be decided by him upon the merits as to questions of both law and fact,—citing our decisions in *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131, *Easterly v. Mills*, 54 Wash. 356, 28 L.R.A. (N.S.) 952, 103 Pac. 475, and *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

Had the trial judge taken the case from the jury and decided it upon the merits, as to questions of both law and fact, at the time of disposing of the motions for instructed verdict, before the submission of the case to the jury, we may concede for present purposes that he would have been warranted in so disposing of the case; but we are of the opinion that since these motions were denied, and the judge did, as a matter of fact, submit the case to the jury, fully and fairly submitting to it the questions of respondent's negligence and appellant's contributory negligence, the disposition of the motions for directed verdict, made before such sub-

Trial—denial of motion for directed verdict—power of court to dispose of case.

mission of the case to the jury, is a closed incident in the trial, which can have no effect upon the subsequent proceedings therein. This is a law case of the purest kind, no relief being sought other than a money judgment for damages. It is not a question, therefore, of the verdict of the jury being merely advisory, as may occur in an equity case. After the disposition of the motions for directed verdict, the trial judge proceeded in the usual course of the trial of a law action, fully and fairly submitting all the issues in the case to the jury, which were proper to be submitted to the jury in such a case. It seems quite clear to us that the jury's verdict was as binding upon the judge in this case as in any other law case, and that we must now test the correctness of his disposition of the motion for judgment notwithstanding the verdict, in the same manner as if the prior motions for directed verdict had not been made. That is, in so far as the question here to be decided is concerned, we must wholly ignore the making and disposition of these motions. It follows that we are now called upon to determine, as a matter of law, the questions of whether or not there was evidence to support the verdict rendered by the jury, and whether or not contributory negligence on the part of appellant, preventing his recovery, was conclusively proven.

At the time appellant was injured he was walking upon the paved portion of the roadway for vehicles on Alaska street, on the north side of the street car track, in or very near the intersection of that street with Thirty-eighth avenue southeast, in Seattle. Alaska street runs east and west, while Thirty-eighth avenue crosses it at right angles, running north and south. Appellant lives on the east side of Thirty-eighth avenue, a short distance north of Alaska street. The street car track is approximately 15 feet from the curb on the north side of Alaska street, which 15-foot space is occupied by the paved roadway on the north side of the car track. The portion of

Alaska street within the car track, and to the south thereof, is unimproved, and unused by wheeled vehicles.

Late in the afternoon of the day in question appellant was going to his home, riding on a street car proceeding west on Alaska street. When he got on the car it was very much crowded with passengers, and apparently by the direction of the conductor he got on the front platform. He rode there until the car stopped at Thirty-eighth avenue, the car stopping as usual with the front platform near the east line of Thirty-eighth avenue. He then stepped off the front platform on the north side, and proceeded north along the line of the sidewalk on the east side of Thirty-eighth avenue, towards his home. When he reached the curb at the northeast corner of the street intersection, he was reminded of the fact that he had not paid his fare to the conductor, who was on the rear platform of the street car. He then started back to the car to pay his fare, the car starting about the same time. He reached the rear end of the car as it was proceeding across the street intersection, and somewhat hurriedly walked or ran west along the north side of the moving car for a distance of about 15 feet, and handed his fare to the conductor, who was still on the rear platform. He then turned to his right, which would be to the north or northwest, to go across the roadway to the north side of Alaska street. Just after he had so turned, and reached a point near the center line of the paved roadway some 6 or 7 feet from the car, and evidently while still facing more to the west than to the north or east, he was struck from the rear by the front left corner of the automobile being driven by respondent Wilson, being struck by the front left fender and the left end of the guard or bumper on the front of the automobile, and severely injured. He was struck a blow of such force as to indicate that the automobile was moving at a considerable rate of speed. The speed

of the automobile was, by various witnesses, estimated at from 10 to 20 miles per hour. The evidence was, in any event, such that the jury might well have believed that the speed of the automobile was at that time at least 15 miles per hour, and might also have believed from the testimony of witnesses that the speed of the automobile was 25 miles or more per hour just before reaching the street intersection.

Appellant says that when he started back to the street car from the curb at the northeast corner of the street intersection, to pay his fare, he noticed an automobile headed west, standing near the north curb of Alaska street, about 20 feet east of Thirty-eighth avenue, and that he looked at that automobile with a view of making sure that it was not going to start west along the roadway across which he was proceeding. He also says he saw the automobile which struck him, when it was coming from the east, while it was about a block away. It seems evident that he could not then know or appreciate, with any degree of accuracy, the speed at which it was coming. This seems to have been observed by him just before he reached the street car to pay his fare. The evidence is not in harmony as to just how far west appellant was when the automobile struck him, but it seems evident that he was well within the boundaries of the intersection, somewhere between the middle of Thirty-eighth avenue and the west boundary thereof. He says he did not see the on-coming automobile between the time he saw it to the east about a block away and almost at the instant it struck him, and we may assume, as it is claimed, that he did not look during that period to the east, to observe the on-coming automobile, seemingly resting in the belief that it would in no event reach him before he would pay his fare and get back across the roadway to the north on his way home. The evidence was sufficient, we are quite con-

vinced, to have warranted the jury in believing that the automobile did not, upon its approach to the street intersection and while it was crossing the street intersection, decrease its speed below 15 miles per hour. Wilson, the driver of the automobile, when at a considerable distance before reaching the intersection, plainly saw appellant and his actions, saw appellant hurry across the roadway and alongside the street car for some little distance, and hand the conductor something, during which time it must have been apparent to Wilson that appellant was facing west, with his back to the east, intent on giving something to the conductor on the platform, and as the jury, we think, might well believe, such situation should have caused Wilson to anticipate that appellant intended to, immediately after handing the something to the conductor, again cross the roadway to the north. We think the evidence was such as to warrant the jury in believing the facts and drawing inferences therefrom as above summarized. We do not say that were we the triers of the facts we would necessarily arrive at these same conclusions. We only say that the jury could reasonably do so, and that is as far as we are permitted to go.

We conclude, then, in view of the fact that this unfortunate accident occurred at a public street crossing, where it was just as much the duty of Wilson, the driver of the automobile, to look out for appellant, a pedestrian, as it was for appellant to look out for the automobile; in view of the speed at which the jury might believe the automobile was running, both immediately before and at the time of the accident; in view of the situation in which appellant was at the time, his necessary haste, his seeming confidence—well-founded, as the jury might well believe—that the on-coming automobile would in no event reach him before he would be back across the roadway to the north—that neither the question of respondent's negligence nor appel-

lant's contributory negligence could be determined as a matter of law; but that both, under all the circumstances, were for the jury to determine. Our decisions in the following cases, we think, support this conclusion: *Hull v. Seattle, R. & S. R. Co.* 60 Wash. 162, 110 Pac. 804; *Richmond v. Tacoma R. & Power Co.* 67 Wash. 444, 122 Pac. 351; *Davies v. Rose-Marshall Coal Co.* 74 Wash. 565, 134 Pac. 180; *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323; *Fobes Supply Co. v. Kendrick*, 88 Wash. 284, 152 Pac. 1028; *Hines v. Chicago, M. & St. P. R. Co.* 105 Wash. 178, 177 Pac. 795.

We are of the opinion that the judgment notwithstanding the verdict rendered in favor of respondents must be reversed, and the case remanded to the Superior Court,

with directions to enter its judgment in favor of appellant, awarding him recovery as found by the verdict of the jury.

It is so ordered.

Holcomb, Ch. J., and Mackintosh, Mitchell, and Main, JJ., concur.

NOTE

The effect of a request by both parties for a directed verdict as a waiver of submission to jury is considered in the annotation following *MANSKA v. SAN BENITO LAND CO.* post, 1433. It will be observed, however, that in the reported case (*McCLURE v. WILSON*, ante, 1421) the fact that the questions of fact were submitted to the jury after the denial of motion of both parties removed the case from the operation of the majority rule on that subject.

E. H. MASON

v.

GEORGE SAULT.

Vermont Supreme Court — October 7, 1919.

(93 Vt. 412, 108 Atl. 267.)

Trial — motion for directed verdict — effect.

1. A mere motion for a directed verdict does not impair any right possessed by the moving party to have the case submitted to the jury.

[See note on this question beginning on page 1433.]

Appeal — failure to brief — effect.

2. An exception not briefed is waived.

Trial — absence of conflict in evidence — question for court.

3. In the absence of conflict in the evidence or dispute as to the facts, the only questions are of law, to be determined by the court.

[See 16 R. C. L. 189.]

— direction of verdict.

4. Where plaintiff's evidence makes a prima facie case, and defendant offers no evidence, the court should, on motion, direct a verdict for plaintiff.

[See 26 R. C. L. 1069; see also note in 8 A.L.R. 802.]

Bankruptcy — injury to mortgaged property — ownership.

5. Mortgaged personalty is the property of the mortgagee within the meaning of the clause of the Bankruptcy Act denying discharge for debts which are liabilities for wilful and malicious injury to the property of another.

Mortgage — conversion by mortgagor.

6. A mortgagor of personalty cannot sell the mortgaged property and appropriate the proceeds to his own use.

Bankruptcy — sale of mortgaged property as wilful injury.

7. The sale of the property by a mortgagor of personalty, and appro-

priation of the proceeds to his own use, is a wilful and malicious injury to the property of the mortgagee, within the meaning of the Bankruptcy Act, preventing discharge from liability for such injury.

Mortgage — conversion of property — remedy.

8. A mortgagee is not bound to pursue the mortgaged property when it

is wrongfully sold by the mortgagor, but may proceed against him for damages for the conversion.

[See 5 R. C. L. 446.]

Bankruptcy — discharge — liability for conversion of property.

9. A conversion of property may be committed under such circumstances that liability therefor will be barred by a discharge in bankruptcy.

EXCEPTIONS by defendant to rulings of the Orange County Court (Stanton, J.) made during the trial of an action brought to recover damages for the alleged conversion of a mare, which resulted in a verdict for plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. H. H. Blanchard, H. G. Tupper, and Charles Batchelder, for defendant:

The court erred in directing a verdict for the plaintiff.

Seaver v. Lang, 92 Vt. 501, 104 Atl. 877; Fitzsimmons v. Richardson, 86 Vt. 229, 84 Atl. 811.

The evidence did not justify the finding of the judge that the cause of action arose from a wilful and malicious injury done by defendant to the personal property of plaintiff, and that the defendant ought to be confined in close jail.

Flanders v. Mullin, 80 Vt. 124, 66 Atl. 789, 12 Ann. Cas. 1010; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600; Re Ennis & Stoppani, 22 Am. Bankr. Rep. 679, 171 Fed. 755.

Mr. March M. Wilson for plaintiff.

Taylor, J., delivered the opinion of the court:

The action is trover for the conversion of a mare. The trial was by jury, resulting in a directed verdict for the plaintiff, and the defendant brings exceptions.

The plaintiff introduced evidence tending to show that the defendant executed and delivered to him a mortgage of the mare in question to secure the payment of a promissory note of even date therewith; that the mortgage was duly recorded; that the mare was, at the time the mortgage was executed, in the defendant's possession, and so remained until some ten months later, when, without leave or knowledge of the plaintiff, the defendant sold

her at public sale to a person residing at Montpelier, Vermont, receiving and retaining the purchase price. It was in evidence that the plaintiff had not demanded possession of the mare of the defendant. The defendant introduced no evidence, but rested at the close of the plaintiff's evidence, and moved the court for a directed verdict on the ground that there was no evidence of a demand by the plaintiff. While the defendant's motion was pending, the plaintiff moved that a verdict be directed in his favor, whereupon the court directed the jury to return a verdict for the plaintiff. The defendant was allowed exceptions, both to the overruling of his motion and to the granting of the plaintiff's motion.

The defendant waives the exception to the overruling of his motion for a directed verdict by not briefing Appeal—failure to brief—effect. it. Nor does he

contend in his brief that the evidence did not make a case for the plaintiff. His sole claim under the latter exception is that it is for the court to direct such a verdict as in its judgment the evidence requires only when it affirmatively appears that neither party wishes to go to the jury, and that he did not waive his right thereto by moving for a directed verdict in his favor.

The mere fact that a party moves

the court to direct a verdict in his favor does not amount to a waiver of the right, if such he has, to have the case submitted to the jury. Such a motion is in the nature of a demurrer to the evidence of the adverse party, and challenges his right to go to the jury; but the moving party does not thereby concede that the case should be taken from the jury and submitted to the court on the evidence. *Seaver v. Lang*, 92 Vt. 503, 512, 104 Atl. 877. The province of the court on such a motion is pointed out in *Bass v. Rublee*, 76 Vt. 395, 400, 57 Atl. 965. It does not follow, however, that the court erred in directing a verdict for the plaintiff. In stating his claim the defendant overlooks an important prerequisite to the right to go to the jury. If there is no conflict in the evidence, or any dispute as to

—absence of
conflict in evi-
dence—question
for court.

the facts, there is nothing for the jury. The only questions to be determined upon the evidence are then questions of law, which can be determined only by the court. *St. Johnsbury v. Thompson*, 59 Vt. 300, 311, 59 Am. Rep. 731, 9 Atl. 571. The evidence tended to support the complaint and admittedly made a prima facie case for the plaintiff.

—direction of
verdict.

The defendant offered no evidence, so there was no issue of fact to be determined by the jury, and it was the plain duty of the court on motion to direct a verdict for the plaintiff.

On motion by the plaintiff at the time of rendering judgment, and solely upon consideration of the evidence introduced on the trial, the court found and certified as follows: "It is found and adjudged from the evidence in this case that the cause of action in said case arose from a wilful and malicious injury done by the defendant to the personal property of the plaintiff, and that said defendant ought to be confined in a close jail."

The defendant was allowed an exception to this certificate, and now contends that the evidence did not justify such a finding. The finding was evidently phrased with a view to its effect upon possible discharge in bankruptcy. The question for decision then depends upon the proper construction to be given the provisions of the Bankruptcy Act, excepting certain provable debts from the operation of such a discharge. *Wellman v. Mead*, 93 Vt. 322, 107 Atl. 396, 404. See also *Larrow v. Martell*, 92 Vt. 437, 104 Atl. 826.

The act declares that a discharge in bankruptcy "shall release a bankrupt from all his provable debts, except such as . . . are liabilities . . . for wilful and malicious injury to the person or property of another." Act July 1, 1898, chap. 541, § 17, 30 Stat. at L. 550 (as amended by 32 Stat. at L. 798, chap. 487, Comp. Stat. § 9601, 1 Fed. Stat. Anno. 2d ed. p. 708). The mare in question was the property of the plaintiff in contemplation of this exception. It does not appear whether or not the condition of the mortgage had been broken, but at least the general title was in the plaintiff. The mortgage operated as an absolute sale by the defendant to the plaintiff, subject to the right to redeem according to the terms of the contract. *Mower v. McCarthy*, 79 Vt. 142, 148, 7 L.R.A.(N.S.) 418, 118 Am. St. Rep. 942, 64 Atl. 578. It passed the general property to the plaintiff; and, if the condition of the mortgage should not be duly performed, the whole title would then vest absolutely at law in the plaintiff, subject to the defendant's right in equity to redeem. *Thompson v. Fairbanks*, 75 Vt. 361, 370, 104 Am. St. Rep. 899, 56 Atl. 11; *Wood v. Dudley*, 8 Vt. 430. His possession, even, was permissive, and not a matter of right. *McLoud v. Wakefield*, 70 Vt. 558, 43 Atl. 179. It follows that he had no better

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gaged property—
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right to sell the animal and appropriate the proceeds of the sale to his own use than he would have had to thus dispose of any other of plaintiff's property that might come into his possession permissively. It remains to consider whether the unauthorized sale of the mare, in the circumstances disclosed in the evidence, was "a wilful and malicious injury" thereto within the meaning of the Bankruptcy Act.

Prior to the pronouncement by the Supreme Court of the United States in *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. ed. 205, 37 Sup. Ct. Rep. 38, there was a conflict respecting this matter in the decisions of the inferior courts. But that case has clarified the situation, and renders the holdings of other courts to the contrary of no force as precedents. That was a case in error to the court of appeals of New York. Plaintiff in error was a member of a firm engaged in business as brokers. The partnership received certain stock certificates owned by the defendant in error to hold as security for his indebtedness, amounting to less than one sixth of their market value. Within a few weeks, without authority and without his knowledge, they sold the stocks and appropriated the avails to their own use. Shortly thereafter both the firm and its members were adjudged bankrupts. After his discharge in bankruptcy suit was instituted against the plaintiff in error for the wrongful conversion of the stock. He relied upon such discharge in bar of the action. The trial court held that the liability was for wilful and malicious injury to property, and expressly excluded from release by the provision of the Bankruptcy Act here in question. A judgment for damages was affirmed by the appellate division, and, in turn, by the court of appeals. The case was argued in the supreme court in May, 1915, and reargued in October, 1916. In an opinion affirming the judgment

below, without dissent speaking through Mr. Reynolds, said: "To other of his property deliberately disposing of it without semblance of authority is certainly an injury thereto without acceptance of the words

The court disposes of the words in question by saying: "The court disposes of the words in question by saying: find no sufficient reason for a narrow construction.

of subserving the purposes of the statute, it tends to bring about not irrational, results. example, should a ba had stolen a watch escaped damages, but remains for one maliciously brought

The court reaffirmed of a wilful and malicious injury within the meaning of the exception previously given in *Colwell*, 193 U. S. 754, 24 Sup. Ct. Rep. 754, to which see *Wellman* supra), and held that conversion of the stock in the circumstances disclosed was sufficient to constitute a wilful and malicious injury to property, for which the error remained liable to damages notwithstanding the charge in bankruptcy. The authoritative holding was by Mr. Loveland in *Bankruptcy*, wherein "An ordinary liability for conversion is barred by discharge, but may not be based on malice or fraud, *Bankr.* 1365.

Some of the cases holding conversion to be within the exception must amount to hold that such is not the holding in *Kavanaugh*. The rule deducible therefrom is that the disposal of another's property without his knowledge or consent, intentionally in disregard of his duty, to

injury, is a wilful and malicious injury to property within the meaning of the Bankruptcy Act. See *Covington v. Rosenbusch*, 148 Ga. 459, 97 S. E. 78. It is said that the plaintiff's rights were in no way affected by the sale; that he could follow the property in the hands of third parties, either by foreclosure or by a proper action. But that his rights were invaded by the sale is too evident to admit of controversy. He was not obliged to follow the security converted by the defendant, if perchance it happened to be within his reach, but could pursue his remedy against him for damages for the conversion, which implies the injury contemplated. See *Smith v. Turner*, 141 Ga. 313, 80 S. E. 993, 32 Am. Bankr. Rep. 864.

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conversion of
property—
remedy.**

the property of the plaintiff. It was held that it was only in an equitable sense that the bank had any interest therein.

It may properly be noticed in passing that a conversion of property may be committed in such circumstances as to be barred by a discharge in bankruptcy. But a simple conversion and a conversion which shows design or willingness to inflict a wrong upon another, or the reckless disregard of the other's rights, are entirely different in character. *Kavanaugh v. McIntyre*, 128 App. Div. 722, 112 N. Y. Supp. 987.

**Bankruptcy—
discharge—
liability for
conversion of
property.**

We hold that the evidence before the court was sufficient to support the finding excepted to.

Judgment affirmed.

NOTE.

The effect of a request by both parties for a directed verdict as waiver of submission of the case to the jury is treated in the annotation following *MANSKA v. SAN BENITO LAND CO.* post, 1433. For the minority view on this subject which was adopted in the reported case (*MASON v. SAULT*, ante, 1426) see subd. II. of that annotation.

C. A. MANSKA,

v.

SAN BENITO LAND COMPANY, Appt.

Iowa Supreme Court—September 30, 1921.

(— Iowa, —, 184 N. W. 345.)

Trial — motion for directed verdict — effect on right to jury.

The fact that both parties move for directed verdict at the close of the evidence does not authorize the court to take the case from the jury if there is evidence to be submitted to them.

[See note on this question beginning on page 1433.]

APPEAL by defendant from a judgment of the District Court for Monona County (Jepson, J.) in favor of plaintiff in an action brought to recover

a commission alleged to have been earned by him as defendant's agent in a sale of certain real estate. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Zumbrunn & Meyer and Miles W. Newby for appellant.

Messrs. Prichard & Prichard for appellee.

Weaver, J., delivered the opinion of the court:

It is the claim of the plaintiff that defendant, being the owner of 435 acres of land in Monona county, employed or authorized him as its agent to find a purchaser for said property at the stated price of \$85 per acre, for which service, when performed, defendant agreed to pay plaintiff a commission of \$2.50 per acre. Plaintiff alleges that, acting upon such appointment and authority, he did find and produce the defendant a purchaser, ready, able, and willing to buy the land at the price of \$85 per acre, thereby earning the agreed commission, but defendant neglects and refuses to pay the same.

The defendant denies the allegations of the petition. A jury was impaneled for the trial of the issues joined, and at the close of the plaintiff's evidence in chief the defendant moved for a directed verdict in its favor on the ground that the evidence was clearly insufficient to sustain a verdict for the plaintiff. The motion was denied and defendant proceeded to introduce evidence to sustain its defense. At the close of all the evidence, defendant renewed its motion for a directed verdict. The plaintiff also moved for a directed verdict against the defendant.

On these filings being made, the court denied the defendant's motion, sustained the motion filed by the plaintiff, and directed the jury to find for plaintiff for the full amount claimed by him. On the verdict so returned judgment was entered, and defendant appeals.

The position taken by the court on the questions so presented will be better understood by one or two brief citations from the record upon which this appeal has been present-

ed. In denying defendant's motion for a verdict filed in chief, the court, after stating the situation as it has then been developed by plaintiff's testimony, said that "under the state of the record there is a question for the jury." When both motions had been filed at the close of all the evidence, the court announced its ruling in favor of plaintiff, saying:

"There are facts in this case in my judgment that, if a motion had not been made by both sides, would have warranted the court in submitting this case to the jury.

"Both sides having asked for a directed verdict, that is a concession by both sides that it is a question of law only; that is, the uncontroverted evidence on one side or the other entitles one side or the other to a directed verdict.

"The court does not know that it can say any more in ruling on this motion than it has suggested to counsel in the way of suggestions, during the trial, and during the argument.

"The court is of the opinion that if Mr. Maska had the conversation with Mr. Doffing that he claims to have had, that the jury might well find that when he found a purchaser, Kehoe & Kempmeyer were in a position to take care of the transaction.

"As stated before, a great deal of counsel's argument would have full force was this an action between Mr. Mohr and Mr. Doffing to compel the performance of Mohr's contract. But it is not. This is simply an action to recover a commission for finding a purchaser, and *both sides having asked for a directed verdict, the motion on the part of the plaintiff will be sustained.*"

The italics in this quotation are ours, and the language so emphasized clearly indicates the controlling influence upon the mind of the court of the fact that each of the parties had asked a directed verdict,

while the ruling, in its entirety, makes it equally clear that were it not for the fact that both had so moved, the issues would necessarily have been submitted to the jury. If there was error in this ruling, it will necessitate a reversal without consideration of other errors assigned. The question is not a new one in our practice, and has had the attention of the court on several occasions. The rule stated by the trial court has the support of precedents in some jurisdictions; but in other jurisdictions, including our own, it has been expressly disapproved. In *First Nat. Bank v. Mt. Pleasant Mill Co.* 103 Iowa, 524, 72 N. W. 689, after stating the proposition and saying it seems to be established by the weight of authority, we expressly refrain from passing upon it. In a later case (*German Sav. Bank v. Bates Addition Improv. Co.* 111 Iowa, 432, 82 N. W. 1005), we said: "This court has never passed upon the question of application of the rule in our state, and we understand that the practice with us has been different;" and we refused to recognize it in the case there decided. Later, in *German Sav. Bank v. Bates Addition Improv. Co.* 111 Iowa, 435, 82 N. W. 1005, the point was again considered. There, as here, at the close of all the evidence the plaintiff and defendant each moved for a directed verdict in its favor; the court held with plaintiff and directed a verdict against defendant. There, as here, also, it was argued that both parties having asked a directed verdict, it was tantamount to an express waiver by each of the right to go to the jury, but we held otherwise. Such motions do not indicate any agreement or mutual concession by the parties, but rather an irreconcilable difference. Neither is willing as against the motion of the other to waive a jury, and there is no implication of such waiver from the mere fact that each thinks he has ground for asking a peremptory in-

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struction. This holding was re-affirmed in *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* 113 Iowa, 428, 53 L.R.A. 775, 85 N. W. 614; *Teeple v. Hawkeye Gold Dredging Co.* 137 Iowa, 214, 114 N. W. 906; and again in *Hamill v. Joseph Schlitz Brewing Co.* 165 Iowa, 294, 143 N. W. 110, 145 N. W. 511. In the latter case we said the point "must be considered settled." For similar holdings in other states, see *Wolf v. Chicago Sign Printing Co.* 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369; *Poppitz v. German Ins. Co.* 85 Minn. 118, 88 N. W. 438; *Hite v. Keene*, 149 Wis. 207, 134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D, 251; *Lonier v. Ann Arbor Sav. Bank*, 153 Mich. 253, 116 N. W. 1088; *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 26 L.R.A. (N.S.) 217, 106 Pac. 866. .

In the *Wolf Case*, supra, the Illinois court, after a careful consideration of the conflicting precedents upon the question of practice, says that to hold "that a request to the court to decide a pure question of law clothes the court with power to decide controverted questions of fact would be both illogical and inconsistent with the nature of the motion. . . . When one party asks the court to direct a verdict in his favor, the fact that the other party makes a similar motion cannot in any way affect the rights of the first party."

In our own case, *Teeple v. Hawkeye Gold Dredging Co.* 137 Iowa, 214, 114 N. W. 906, the court was urged to disapprove or overrule our former precedents to this effect; but we said: "It is true that the rule is different in many jurisdictions, but in our view the ends of justice will in general be subserved by adhering to the rule we have entered upon."

We find no sufficient reason in the present case to depart from the settled practice in this respect.

Counsel cite us to the opinion in *Conkling v. Knights & Ladies Security*, 183 Iowa, 665, 166 N. W. 384, as sustaining the ruling of the trial court in this case. An exam-

nation of the opinion referred to demonstrates it is not an authority for that contention. It there appears that a motion for directed verdict, having been made by both plaintiff and defendant, counsel for plaintiff, in answer to a question, by the court, said, "Yes, that waives a jury," and defendant's counsel did not contend otherwise or except that this was held a waiver of the right to go to the jury. It is also to be noticed, as was there pointed out in the opinion, that the objection to the ruling was not presented or argued to this court as required by the rule and statute, and what is there said was at best dictum. Nor is any authority in support of appellee's position to be found in the other cited case, *Murray v. Brotherhood of American Yeomen*, 180 Iowa, 626, 163 N. W. 421. The opinion there expressly concedes the general rule in this state to be as we have hereinbefore stated it, but says there are "some exceptions, as where both

sides of the case either expressly or impliedly consent to a disposition of the case by the court." It is sufficient here to say there is in the instant case no showing of an express consent by the defendant to the decision of the fact issue by the court, and nothing from which such consent is necessarily to be implied.

The assignment of error upon the order directing a verdict is well taken. That except for the supposed effect of the filing of the two motions the record presented an issue of fact for the jury was conceded by the trial court, and that there was such an issue an inspection of the record makes very plain.

The error in directing a verdict was necessarily prejudicial to the appellant, and the judgment appealed from must be and it is reversed, and the cause remanded for a new trial.

Evans, Ch. J., and Preston and De Graff, JJ., concur.

ANNOTATION.

Request by both parties for directed verdict as waiver of submission to jury.

I. Majority rule:

- a. Rule stated, 1433.
- b. Effect of request to go to jury, 1444.
- c. Timeliness of request to go to jury, 1449.
- d. Questions presented for review, 1451.

II. Minority rule:

- a. Rule stated, 1455.
- b. Exception to rule, 1458.

III. Rule in Georgia, 1460.

IV. Rule in Kansas, 1460.

I. Majority rule.

a. Rule stated.

In a majority of the jurisdictions wherein the question has arisen, it has been held that where each of the parties to an action requests the court to direct a verdict in his favor, and makes no request that the jury shall be allowed to determine any question of fact, the parties will be presumed to have waived the right to a trial by

jury, and to have constituted the court a trier of questions both of law and of fact.

United States.—*Chrystie v. Foster* (1894) 9 C. C. A. 606, 26 U. S. App. 67, 61 Fed. 551; *Merwin v. Magone* (1895) 17 C. C. A. 361, 35 U. S. App. 741; *Magone v. Origet* (1895) 17 C. C. A. 363, 35 U. S. App. 744, 70 Fed. 776, 778; *Bradley Timber Co. v. White* (1903) 58 C. C. A. 55, 121 Fed. 779, affirming (1902) 119 Fed. 989; *United States v. Bishop* (1903) 60 C. C. A. 123, 125 Fed. 181; *McCormick v. National City Bank* (1906) 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544; *Mead v. Darling* (1908) 86 C. C. A. 552, 159 Fed. 684; *Sena v. American Turquoise Co.* (1911) 220 U. S. 497, 55 L. ed. 559, 31 Sup. Ct. Rep. 488; *Pensacola State Bank v. Merchants' & Farmers' Bank* (1910) 180 Fed. 504, affirmed on other grounds in (1911) 105 C. C. A. 634, 183 Fed. 1022; *American Nat.*

Bank v. Miller (1911) 107 C. C. A. 456, 185 Fed. 338, affirmed on other grounds in (1913) 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. Rep. 883; *Melton v. Pensacola Bank & Trust Co.* (1911) 111 C. C. A. 166, 190 Fed. 126; *Lawton v. Carpenter* (1912) 115 C. C. A. 264, 195 Fed. 362, certiorari denied in (1912) 225 U. S. 710, 56 L. ed. 1267, 32 Sup. Ct. Rep. 840; *Re Iron Clad Mfg. Co.* (1912) 116 C. C. A. 642, 197 Fed. 280; *Murch Bros. Constr. Co. v. Johnson* (1913) 121 C. C. A. 353, 203 Fed. 1; *Stratton's Independence v. Howbert* (1912) 207 Fed. 419, affirmed in (1914) 127 C. C. A. 667, 211 Fed. 1023, on mandate of Supreme Court (1913) 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136, in response to questions certified; *United States v. Two Baskets* (1913) 123 C. C. A. 310, 205 Fed. 37; *Schlottman v. E. I. Du Pont de Nemours Powder Co.* (1913) 210 Fed. 356, affirmed on other grounds in (1914) 134 C. C. A. 161, 218 Fed. 353, which has writ of certiorari denied in (1915) 235 U. S. 705, 59 L. ed. 434, 35 Sup. Ct. Rep. 282; *New York v. Third Nat. Bank* (1915) 137 C. C. A. 75, 221 Fed. 175, certiorari denied in (1915) 238 U. S. 628, 59 L. ed. 1496, 35 Sup. Ct. Rep. 791; *Williams v. Vreeland* (1918) 250 U. S. 295, 63 L. ed. 989, 3 A.L.R. 1038, 39 Sup. Ct. Rep. 438, affirming judgment (1917) 156 C. C. A. 632, 244 Fed. 346; *Michigan Copper & Brass Co. v. Chicago Screw Co.* (1920) 269 Fed. 502; *Richman v. Mulcahy & Gibson* (1921) 269 Fed. 786. See also *St. Louis Southwestern R. Co. v. S. Samuels & Co.* (1914) 128 C. C. A. 188, 211 Fed. 588.

Alabama.—*Nashville, C. & St. L. R. Co. v. Cody* (1902) 137 Ala. 597, 34 So. 1003.

Arkansas.—*St. Louis S. W. R. Co. v. Mulkey* (1911) 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339; *Bankers Surety Co. v. William Miller & Sons Co.* (1912) 105 Ark. 697, 150 S. W. 570; *St. Louis, I. M. & S. R. Co. v. McMillan* (1912) 105 Ark. 25, 150 S. W. 112; *Home F. Ins. Co. v. Wilson* (1913) 109 Ark. 324, 159 S. W. 1113; *Sims v. Everett* (1914) 113 Ark. 198, L.R.A. 1918C, 7, 168 S. W. 559, Ann. Cas. 1916C, 629; *Ozark Diamond Mines*

Corp. v. Townes (1915) 117 Ark. 552, 174 S. W. 151; *Nutt v. Fry* (1915) 119 Ark. 450, 177 S. W. 1137; *Hill v. Kavanaugh* (1915) 118 Ark. 134, 4 A.L.R. 1, 176 S. W. 336; *Miellnier v. Toledo Scale Co.* (1917) 128 Ark. 211, 193 S. W. 497; *Wells, F. & Co. Exp. v. Townsend & F. Co.* (1918) 134 Ark. 560, 204 S. W. 417; *Gibson v. Allen-West Commission Co.* (1919) 138 Ark. 172, 211 S. W. 142; *Oil Trough Gin Co. v. Hines* (1919) 141 Ark. 133, 216 S. W. 310; *Security L. Ins. Co. v. Bates* (1920) 144 Ark. 345, 222 S. W. 740; *Sanderson v. Marconi* (1921) — Ark. —, 231 S. W. 554; *Watkins v. Louisiana State L. Ins. Co.* (1922) — Ark. —, 237 S. W. 89. See also *Gee v. Hatley* (1914) 114 Ark. 376, 170 S. W. 72.

Colorado.—*Saxton v. Perry* (1909) 47 Colo. 263, 107 Pac. 281; *Butcher v. Butcher* (1912) 21 Colo. App. 416, 122 Pac. 397.

Indiana. *Deeter v. Burk* (1914) 59 Ind. App. 449, 107 N. E. 304; *Indianapolis Traction & Terminal Co. v. Vaughn* (1917) 65 Ind. App. 581, 117 N. E. 673.

Michigan.—*Culligan v. Alpern* (1910) 160 Mich. 241, 125 N. W. 20; *Hatch v. Calhoun County* (1912) 170 Mich. 322, 136 N. W. 350; *Germain v. Loud* (1915) 189 Mich. 38, 155 N. W. 373; *Kyselka v. Northern Assur. Co.* (1916) 194 Mich. 430, 160 N. W. 559; *Superior Steel Spring Co. v. New Era Spring & Specialty Co.* (1921) — Mich. —, 184 N. W. 440.

Montana.—*Fifty Associates Co. v. Quigley* (1919) 56 Mont. 348, 185 Pac. 155; *Bank of Commerce v. United States Fidelity & G. Co.* (1920) 58 Mont. 236, 194 Pac. 158.

Nebraska.—*Dorsey v. Wellman* (1909) 85 Neb. 262, 122 N. W. 989; *Martin v. Harvey* (1911) 89 Neb. 173, 130 N. W. 1039; *Howell v. Bowman* (1911) 89 Neb. 389, 131 N. W. 597; *Segear v. Westcott* (1909) 83 Neb. 515, 120 N. W. 170; *Henton v. Sovereign Camp, W. W.* (1910) 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869; *Kreck v. Supreme Lodge, F. V.* (1914) 95 Neb. 428, 145 N. W. 859; *Fairbanks, M. & Co. v. Austin* (1914) 96 Neb. 137, 147 N. W. 126, rehearing denied and opinion modified in (1914) 96 Neb.

139, 148 N. W. 332; *Hamilton v. North American Acci. Ins. Co.* (1916) 99 Neb. 579, 157 N. W. 111, Ann. Cas. 1917C, 409; *Modern Woodmen v. Berry* (1917) 100 Neb. 820, 161 N. W. 534; *Merchants' Mechanics' First Nat. Bank v. Cavers Elevator Co.* (1920) 105 Neb. 321, 180 N. W. 588.

New Mexico.—*Home Sav. Bank v. Woodruff* (1908) 14 N. M. 502, 94 Pac. 957; *De Burg v. Armenta* (1917) 22 N. M. 443, 164 Pac. 838. See also *Bank of Commerce v. Broyles* (1910) 16 N. M. 414, 120 Pac. 670.

New York.—*Leggett v. Hyde* (1874) 58 N. Y. 272, 17 Am. Reg. 244; *Koehler v. Adler* (1879) 78 N. Y. 287; *Briggs v. Waldron* (1881) 83 N. Y. 582, affirming (1879) 9 N. Y. Week. Dig. 219; *Dillon v. Cockroft* (1882) 90 N. Y. 649; *Stratford v. Jones* (1885) 97 N. Y. 586; *Provost v. McEncroe* (1886) 102 N. Y. 650, 5 N. E. 795; *Kirtz v. Peck* (1889) 113 N. Y. 222, 21 N. E. 130; *National City Bank v. Westcott* (1890) 118 N. Y. 468, 16 Am. St. Rep. 771, 23 N. E. 900; *Reck v. Phenix Ins. Co.* (1891) 130 N. Y. 160, 29 N. E. 137; *Daly v. Wise* (1892) 132 N. Y. 306, 16 L.R.A. 236, 30 N. E. 837; *Clason v. Baldwin* (1897) 152 N. Y. 204, 46 N. E. 322; *Porter v. Traders Ins. Co.* (1900) 164 N. Y. 504, 52 L.R.A. 424, 58 N. E. 641; *Sigua Iron Co. v. Brown* (1902) 171 N. Y. 488, 64 N. E. 194, affirming (1901) 58 App. Div. 436, 69 N. Y. Supp. 295; *Beach v. Supreme Tent, K. M.* (1904) 177 N. Y. 100, 69 N. E. 281, affirming (1902) 74 App. Div. 527, 77 N. Y. Supp. 770; *Prentice v. Goodrich* (1896) 1 App. Div. 15, 36 N. Y. Supp. 740; *McGuire v. Hartford F. Ins. Co.* (1896) 7 App. Div. 575, 40 N. Y. Supp. 300, affirmed in (1899) 158 N. Y. 680, 52 N. E. 1124; *Persons v. Hawkins* (1899) 41 App. Div. 171, 58 N. Y. Supp. 831; *Ranken v. Donovan* (1899) 46 App. Div. 225, 61 N. Y. Supp. 542, affirmed in (1901) 166 N. Y. 626, 60 N. E. 1119; *Lyman v. Mead* (1900) 56 App. Div. 582, 67 N. Y. Supp. 254; *Paul v. Delaware, L. & W. R. Co.* (1902) 72 App. Div. 449, 76 N. Y. Supp. 552, affirmed in (1903) 175 N. Y. 478, 67 N. E. 1087, which has reargument denied in (1903) 175 N. Y. 513, 67 N. E. 1087; *Leggat v. Leggat* (1903) 79 App. Div.

141, 80 N. Y. Supp. 327, affirmed in (1903) 176 N. Y. 590, 68 N. E. 1119; *Cullinan v. Fidelity & C. Co.* (1903) 84 App. Div. 292, 82 N. Y. Supp. 695, affirmed in (1904) 177 N. Y. 574, 69 N. E. 1122; *Rosenstein v. Vogemann* (1905) 102 App. Div. 39, 92 N. Y. Supp. 86, affirmed on other grounds in (1906) 184 N. Y. 325, 77 N. E. 625, 6 Ann. Cas. 13, 20 Am. Neg. Rep. 148; *Zirinsky v. Post* (1906) 112 App. Div. 74, 98 N. Y. Supp. 132; *Zeller v. Leiter* (1906) 114 App. Div. 148, 99 N. Y. Supp. 624, reversed on other grounds in (1907) 189 N. Y. 361, 82 N. E. 158; *Johnston v. Trask* (1886) 40 Hun, 417, affirmed in (1889) 116 N. Y. 136, 5 L.R.A. 630, 15 Am. St. Rep. 394, 22 N. E. 377; *Reilly v. Lee* (1891) 61 Hun, 627, 16 N. Y. Supp. 313; *Banker v. Knibloe* (1893) 69 Hun, 539, 23 N. Y. Supp. 1091; *Benjamin v. Welch* (1893) 73 Hun, 371, 26 N. Y. Supp. 156; *Smith v. Weston* (1895) 88 Hun, 25, 34 N. Y. Supp. 557, affirmed in (1899) 159 N. Y. 194, 54 N. E. 38; *Cohen v. Moshkowitz* (1896; Sup. Ct. App. T.) 17 Misc. 389, 39 N. Y. Supp. 1084; *Krautman v. Friedman* (1899; Sup. Ct. App. T.) 26 Misc. 821, 57 N. Y. Supp. 84; *Schreyer v. Jordan* (1900; Sup. Ct. App. T.) 30 Misc. 764, 61 N. Y. Supp. 889; *Edgar v. Clason* (1900; Sup. Ct. App. T.) 31 Misc. 763, 64 N. Y. Supp. 359; *Griffin v. Interurban Street R. Co.* (1905; Sup. Ct. Tr. T.) 46 Misc. 328, 94 N. Y. Supp. 854; *Hagaman v. Burr* (1876) 9 Jones & S. 423; *Marcus v. Thornton* (1879) 12 Jones & S. 411; *Green v. Shute* (1889; City Ct. Gen. T.) 26 N. Y. S. R. 114, 7 N. Y. Supp. 69, affirmed in (1889) 15 Daly, 358, 361, 7 N. Y. Supp. 645, 646; *Bradley Fertilizer Co. v. South Pub. Co.* (1891; N. Y. City Ct. Gen. T.) 39 N. Y. S. R. 218, 14 N. Y. Supp. 917, reversed on other grounds in (1892; C. Pl. Gen. T.) 44 N. Y. S. R. 119, 17 N. Y. Supp. 587; *Nesbit v. Mathews* (1891; City Ct. Gen. T.) 41 N. Y. S. R. 89, 16 N. Y. Supp. 202; *Gitty v. Allen* (1901) 62 App. Div. 622, 71 N. Y. Supp. 88; *Baker v. Appleton* (1905) 107 App. Div. 358, 95 N. Y. Supp. 125, affirmed without opinion in (1907) 187 N. Y. 548, 80 N. E. 1104; *Sturmdorf v. Saunders* (1907) 117 App. Div. 762, 102 N. Y. Supp. 1042, affirmed

without opinion in (1908) 190 N. Y. 555, 84 N. E. 1132; Colaneri v. General Acci. Assur. Corp. (1908) 126 App. Div. 591, 110 N. Y. Supp. 678; Sandel v. Sommers (1909) 131 App. Div. 537, 115 N. Y. Supp. 357; Coffey v. Burke (1909) 132 App. Div. 128, 116 N. Y. Supp. 514; Clancy v. New York, N. H. & H. R. Co. (1909) 133 App. Div. 119, 117 N. Y. Supp. 233, reversed on other grounds in (1911) 201 N. Y. 235, 94 N. E. 867; Secor v. Ardsley Ice Co. (1909) 133 App. Div. 136, 117 N. Y. Supp. 414, affirmed in (1911) 201 N. Y. 603, 95 N. E. 1139; Buffalo Glass Co. v. Assets Realization Co. (1909) 133 App. Div. 775, 117 N. Y. Supp. 1087; Fairbanks v. Nichols (1909) 135 App. Div. 298, 119 N. Y. Supp. 752; New York v. Thirty-Fourth Street Crosstown R. Co. (1910) 137 App. Div. 644, 122 N. Y. Supp. 344; Marus v. Central R. Co. (1916) 175 App. Div. 783, 161 N. Y. Supp. 546; Gertner v. Glens Falls Ins. Co. (1920) 193 App. Div. 836, 184 N. Y. Supp. 669; Durham v. Stuyvesant Ins. Co. (1920) 112 Misc. 440, 182 N. Y. Supp. 887, reversed on other grounds in (1921) 196 App. Div. 924, 187 N. Y. Supp. 659. See also Ormes v. Dauchy (1880) 82 N. Y. 443, 37 Am. Rep. 583; Guenther v. Amsden (1900) 16 App. Div. 607, 44 N. Y. Supp. 982, affirmed in (1897) 162 N. Y. 601, 57 N. E. 1111; Burges v. Jackson (1897) 18 App. Div. 296, 46 N. Y. Supp. 326, affirmed in (1900) 162 N. Y. 632, 57 N. E. 1105; Frecking v. Rolland (1871) 1 Jones & S. 499; Harrison v. Vermont Manganese Co. (1892; City Ct. Gen. T.) 1 Misc. 402, 20 N. Y. Supp. 894; Sewell v. Home Ins. Co. (1909) 131 App. Div. 131, 115 N. Y. Supp. 345; People ex rel. Ross v. Dooling (1909) 132 App. Div. 50, 116 N. Y. Supp. 371; Forschirm v. Mechanics' & T. Bank (1910) 137 App. Div. 149, 122 N. Y. Supp. 168, reversed in (1912) 206 N. Y. 745, 100 N. E. 1127; Kinner v. Whipple (1910) 198 N. Y. 585, 92 N. E. 1088, reversing (1908) 128 App. Div. 736, 113 N. Y. Supp. 337, on dissenting opinion of Mr. Justice Cochrane; Lord v. Woolley (1913) 82 Misc. 656, 144 N. Y. Supp. 385; Newcomb v. La Roe (1915) 167 App. Div. 566, 152 N. Y. Supp. 635; A. E. McBee

Co. v. Shoemaker (1916) 174 App. Div. 291, 160 N. Y. Supp. 251, affirmed on other grounds in (1918) 225 N. Y. 621, 121 N. E. 852; Landau v. Veith (1917) 164 N. Y. Supp. 230; McCormack v. Security Mut. L. Ins. Co. (1917) 220 N. Y. 447, 116 N. E. 74, reversing order in (1914) 161 App. Div. 33, 146 N. Y. Supp. 613; Riess v. Supreme Conclave, I. O. H. (1917) 177 App. Div. 845, 164 N. Y. Supp. 878.

North Dakota.—**New England Mortg. Secur. Co. v. Great Western Elevator Co.** (1897) 6 N. D. 407, 71 N. W. 130; **Bank of Park River v. Norton** (1904) 12 N. D. 497, 97 N. W. 860; **Larson v. Calder** (1907) 16 N. D. 248, 113 N. W. 103; **Aber v. Twitchell** (1908) 17 N. D. 229, 116 N. W. 95; **Duncan v. Great Northern R. Co.** (1908) 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826; **Citizens Nat. Bank v. Osborne-McMillan Elevator Co.** (1911) 21 N. D. 335, 131 N. W. 266; **Van Woert v. Modern Woodmen** (1915) 29 N. D. 441, 151 N. W. 224; **Foote v. L. C. Smith & Bros. Typewriter Co.** (1919) 43 N. D. 33, 172 N. W. 833. See also **Umsted v. Colgate Farmers' Elevator Co.** (1909) 18 N. D. 309, 122 N. W. 390; **Gooler v. Eidsness** (1909) 18 N. D. 338, 121 N. W. 83.

Ohio.—**Victoria First Nat. Bank v. Hayes** (1901) 64 Ohio St. 100, 59 N. E. 893; **Snow v. Modern Woodmen** (1902) 24 Ohio C. C. 142; **Richter v. Phoenix Bldg. & Loan Co.** (1905) 27 Ohio C. C. 793; **Strangward v. American Brass Bedstead Co.** (1910) 82 Ohio St. 121, 91 N. E. 988; **McHenry v. Old Citizens Nat. Bank** (1911) 85 Ohio St. 203, 38 L.R.A.(N.S.) 1111, 97 N. E. 395; **Schenck v. Cleveland, C. C. & St. L. R. Co.** (1919) 11 Ohio App. 164. See also **Canton v. Pryke** (1916) 5 Ohio App. 364.

Oregon.—**Patty v. Salem Flouring Mills Co.** (1909) 53 Or. 356, 96 Pac. 1106, modified on rehearing (1909) 53 Or. 357, 98 Pac. 521, second rehearing denied in (1909) 53 Or. 362, 100 Pac. 298; **First Nat. Bank v. Bach** (1920) 98 Or. 332, 193 Pac. 1041.

South Dakota.—**Grigsby v. Western U. Teleg. Co.** (1894) 5 S. D. 561, 59 N. W. 734; **Yankton F. Ins. Co. v. Fremont, E. & M. Valley R. Co.** (1895) 7

S. D. 428, 64 N. W. 514; Sundling v. Willey (1905) 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644; McComb v. Baskerville (1906) 20 S. D. 353, 106 N. W. 300; Lindquist v. Northwestern Port Huron Co. (1908) 22 S. D. 298, 117 N. W. 365; Farman v. United States Exp. Co. (1910) 25 S. D. 96, 125 N. W. 575; Bower v. Jones (1910) 26 S. D. 414, 128 N. W. 470; Rice v. Bennett (1912) 29 S. D. 341, 137 N. W. 359; Share v. Coats (1912) 29 S. D. 603, 137 N. W. 402; Black Hills Trust & Sav. Bank v. Plunkett (1918) 40 S. D. 130, 166 N. W. 527; Langbehn v. American Ins. Co. (1919) 41 S. D. 581, 171 N. W. 820. See also Lumley v. Miller (1909) 23 S. D. 16, 119 N. W. 1014; Redman v. Lasell (1921) — S. D. —, 183 N. W. 996.

Washington. — Knox v. Fuller (1900) 23 Wash. 34, 62 Pac. 131; East-erly v. Mills (1909) 54 Wash. 356, 28 L.R.A.(N.S.) 952, 103 Pac. 475; Sevier v. Hopkins (1918) 101 Wash. 404, 172 Pac. 550. See also MCCLURE v. WILSON (reported herewith) ante, 1421, where, however, the rule was not applied, as the questions of fact were submitted to the jury after the denial of both motions for a directed verdict.

Wisconsin.—See Jones v. Citizens Sav. & T. Co. (1919) 168 Wis. 646, 171 N. W. 648 (under statute). Compare Thompson v. Brennan (1899) 104 Wis. 564, 80 N. W. 947; National Cash Register Co. v. Bonneville (1903) 119 Wis. 222, 96 N. W. 558; Hite v. Keene (1912) 149 Wis. 207, 134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D, 251, and Calder v. Crowley (1889) 74 Wis. 157, 42 N. W. 266.

Wyoming. — Sneider v. Big Horn, Mill Co. (1921) — Wyo. —, 200 Pac. 1011.

Where, after all the evidence has been submitted, each party requests the court to direct a verdict in his favor, the requests operate as an affirmation on the part of each that there is no material disagreement as to the facts of the case which will affect the application of the law. Anderson County v. Beal (1885) 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; Robertson v. Edelhoff (1890) 132 U. S. 614, 33 L. ed. 477, 10 Sup. Ct. Rep. 186;

Potts v. Wallace (1892) 146 U. S. 689, 36 L. ed. 1135, 13 Sup. Ct. Rep. 196; Insurance Co. of N. A. v. Wisconsin C. R. Co. (1905) 67 C. C. A. 300, 134 Fed. 794; West v. Roberts (1905) 68 C. C. A. 58, 135 Fed. 350; Love v. Scatcherd (1906) 77 C. C. A. 1, 146 Fed. 1; Fifty Associates Co. v. Quigley (1919) 56 Mont. 348, 185 Pac. 155.

The reason of the general rule and of the contrary view, as well as of the limitation of the rule where a seasonable request is made for a submission of the facts to the jury, was stated in Share v. Coats (1912) 29 S. D. 603, 137 N. W. 402, wherein the court, in holding in accord with the general rule, said: "It has been long settled in this state that when each party, at the close of all the evidence, presents a motion for direction of a verdict, this, in effect, is a submission of questions, both of law and fact, to the court. . . .

The trial court has power, even in cases where a jury trial is a matter of legal right, to direct a verdict, when requested by both parties. . . .

This rule is unquestionably sustained by the weight of authority. . . .

Appellant's contention is that defendant's motion for direction of a verdict challenged only the legal sufficiency of the evidence to sustain a verdict for plaintiff, conceding the testimony of plaintiff's interested witness to be absolutely true; and that the credibility of plaintiff's testimony was not thereby submitted to the trial court, but remained a question upon which defendant was entitled to a verdict of the jury. Appellant's line of reasoning has been adopted in states whose courts have expressly disapproved the New York rule. . . .

The reasoning of these cases, as stated in Stauff v. Bingenheimer (1905) 94 Minn. 309, 102 N. W. 694, is: That 'sanction by either party to an action that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or as an agreement to submit them to the trial judge, in case the motion is denied.' The reasoning upon which the New York rule is founded is that parties have the right to

by both parties for direction of a verdict are sufficient evidence of an intention to waive that right. The latter rule has been too long acted upon and settled in this state to warrant the adoption of the rule contended for by appellant. It has never been held in this state, however, that motions by both parties constitute a conclusive waiver of the right to demand a submission to the jury of questions of fact which may properly arise upon the evidence, where the contrary intention of the parties not to submit questions of fact to the court may be evidenced by a seasonable request that the facts be submitted to the jury. . . . The reason for the rule giving parties the right to submit questions of fact to the jury upon request, after an adverse ruling upon a motion for a directed verdict, is that every party is entitled to present to the court such legal questions as he thinks arise upon the testimony, without the penalty of losing his right to have the jury pass upon evidence which comes from interested witnesses, or is of such character that honest men might differ in the conclusions to be drawn therefrom. Otherwise, it is said, it would never be safe to ask for direction of a verdict. *Switzer v. Norton* (1896) 3 App. Div. 173, 38 N. Y. Supp. 350. It is apparent, therefore, that a party desirous of preserving his right to have the jury pass upon the evidence, where it is of such a character as to be properly submitted to a jury, may preserve that right by a seasonable and proper request, after the motions for directed verdicts have been ruled upon by the court. Such request would ordinarily be a conclusive rebuttal of the presumption that, by motions for directed verdicts, the parties intended to submit questions of both law and fact to the court. Under the rule adopted by this court, however, when no such request is made, the presumption that parties intended to submit to the court all questions, both of law and fact, becomes conclu-

having moved for the direction of a verdict upon all the testimony introduced at the trial, appellant is not in position to urge that the evidence was conflicting, and ought to have been submitted to the jury. By these motions for a directed verdict, the respective parties tacitly admitted that the evidence was free from conflict, and waived their right to a jury trial, and consented to have both questions of law and fact determined by the court. . . . The submission of no question of fact to the jury being requested and both parties having rested the case on issues of law, the result of the action is sustainable if no reversible errors of law occurred at the trial and the evidence is legally sufficient to justify the judgment." To the same effect, see *McComb v. Baskerville* (1906) 20 S. D. 353, 106 N. W. 300; *Love v. Scatcherd* (1906) 77 C. C. A. 1, 146 Fed. 1.

In *St. Louis Southwestern R. Co. v. Mulkey* (1911) 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339, a much cited case in point, which seems to be the basis of most of the decisions in Arkansas, it was said: "It is also true that the parties had the right to waive a jury and submit the matter to the court for trial in the first instance, and, each having requested the court to direct a verdict in his favor and not having requested any other instruction, they in effect agreed that the question at issue should be decided by the court, and waived the right to a decision of a jury, and the court's decision and direction have the same effect as would have been given to the verdict of the jury upon the question at issue, without such direction."

In *Deeter v. Burk* (1914) 59 Ind. App. 449, 107 N. E. 304, each party having requested that a verdict should be directed in his favor and no demand for the submission of any question to the jury having been made, it was said: "It follows that both parties to the litigation, in effect, placed themselves in the same situation they

he court, together with the verdict of he jury returned thereunder, were in ffect the decision of the court, with ll the presumptions in its favor that ould have existed in favor of the verdict returned by the jury in the egular way, or the decision of the court, had the cause been submitted o it for trial in the first instance." it was held that there was no error in he giving of the peremptory instruc- tion unless there was a complete fail- ure of the proof necessary to support the verdict returned.

In *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* (1911) 21 N. D. 835, 131 N. W. 266, motions were made by both parties for a directed verdict. The court said: "Appellant's position is that, by making such motion, it did not waive its right to a jury trial of the issues involved. The identical question has been repeatedly decided in this court adversely to the conten- tion of the appellant. The last pro- nouncement is found, we think, in *Duncan v. Great Northern R. Co.* (1908) 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826, where, in conform- ity with previous decisions of this court, it was held that when both par- ties, after the submission of all their evidence, make motions for a directed verdict, and neither one requests the submission of any fact to the jury, they thereby waive any right they might otherwise have to an undirected verdict, and are estopped from as- signing error for not submitting the facts to the jury. . . . In the in- stant case the motions were made without qualification, and no request was made for the submission of any fact to the jury. Appellant cites *Umsted v. Colgate Farmers' Elevator Co.* (1909) 18 N. D. 309, 122 N. W. 390, in support of its contention, but such au- thority is not in its favor. In that case one of the motions was qualified, and under the circumstances sur- rounding it the court held that it was insufficient to waive the submission of questions of fact not covered by the motion, to the jury, but expressly rec- ognized the former decisions of this court to the effect that a submission to the jury is waived when nothing

equivalent to a request tl or facts be submitted to made." The court likewise a point of practice in t language: "There is, k point of difference betwe of the court in the cas these motions, and those the authorities pointed case at bar the court di jury and took the case u ment, and, in due time, n of fact and conclusions tically as though no ju been impaneled, and enter thereon. It is suggested t being a literal complian motion of either party, in was not permitted to go form of returning a ver cedure was erroneous. material distinction be method and the one follo of the former cases. The parties had a constitution trial by jury in no manne case. Authorities are t that they, by the motions case from the jury, waive jury, and that, not havin requested the submission or questions to the jur estopped from predicating the action of the court in ting the jury to find the is not essential that the turning a written verdic the foreman of the jury, in such case. If the cour to direct the jury, it coul a more direct manner to t by finding the facts its *Bank of Park River v. N.* 12 N. D. 497, 97 N. W. last-named case the pro identical with that in the except that the trial cou motions were made, asked if they desired to stand up tions, and, upon receivin ative response, the jur charged and the court m This action was sustained no difference whatever in tween the two cases. could waive their right t silence as plainly as by v

members of this court think, however, that, while both methods are proper, it is better practice to require the jury to return a formal verdict under the direction of the court."

In *Lawton v. Carpenter* (1912) 115 C. C. A. 264, 195 Fed. 362, the general rule was applied and the judgment below affirmed where, though there was some conflict in the evidence, yet there was some evidence supporting the judgment below. In that case the earlier Federal decisions on this point were reviewed and explained, the court saying: "There are a number of assignments of error, but it is insisted by the plaintiff that, inasmuch as both parties made motions for the direction of a verdict, they thereby submitted all questions of law and fact to the court, and, having directed a verdict in favor of the plaintiffs, the court is presumed to have found all facts necessary to a judgment for them. This question has been passed upon by the Supreme Court of the United States in the case of *Beuttell v. Magone* (1895) 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566. In that case, Mr. Justice White, who delivered the opinion of the court, in discussing this question, said: "The contention is advanced that, as each party below requested the court to instruct the jury to return a verdict in his favor, this was equivalent to a stipulation waiving a jury and submitting the case to decision of the court. From this premise two conclusions are deduced: First, that, there being no written stipulation, the decision below cannot be reviewed upon writ of error; second, that, even if the request in open court, made by both parties, be treated as a written stipulation, the correctness of the decision below cannot be examined, because it is in the form of a general finding on the whole case, and findings of the court upon the evidence are reviewable only when they are special. The request, made to the court by each party to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of

Rev. Stat. §§ 649, 700, Comp. Stat. §§ 1587, 1668, 6 Fed. Stat. Anno. 2d ed. pp. 130, 205. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. *Lehnen v. Dickson* (1893) 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; *Runkle v. Burnham* (1894) 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. Rep. 837. The same question was also passed upon by this court in the case of *Charlotte Nat. Bank v. Southern R. Co.* (1910) 103 C. C. A. 261, 179 Fed. 769. *Goff, J.*, speaking for the court in this case, said: "We are impelled to the conclusion that the learned judge of the court below was in error when he held that the rule announced by the Supreme Court in *Beuttell v. Magone* (1895) 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, was applicable to the conditions shown by the record to have existed in the case at bar at the time he directed the verdict complained of. It appears that not only the plaintiff, but also the defendant below, at the close of the testimony, requested peremptory instructions in their favor, and that they also at the same time asked for special instructions—to be given in the event the peremptory requests were denied—some of them relating to the conflicting evidence from which it was apparent that divergent inferences could be drawn. . . ." In that case it appears that the plaintiff as well as the defendant, at the close of the testimony, requested the court to give peremptory instructions in their favor. However, both plaintiff and defendant at the same time requested that the court give special instruc-

tions in the event of the peremptory instructions were denied. Many of these instructions related to conflicting evidence, and it was obvious that more than one inference could be drawn from the same. The request for special instructions, and, in addition thereto, peremptory instructions, clearly distinguishes that case from the case of *Beuttell v. Magone* (U. S.) supra. The decision in the case of the *Charlotte Nat. Bank v. Southern R. Co.* (Fed.) supra, is in harmony with the case of *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* (1908) 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70, in which the court, among other things, said: ". . . It was settled in *Beuttell v. Magone* (U. S.) supra, that where both parties request peremptory instructions and do nothing more, they thereby assume the facts to be undisputed, and in effect submit to the trial judge the determination of the inferences proper to be drawn from the same. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell v. Magone*, by causing it to embrace a case not within the ruling of that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell v. Magone* has been pointed out in several recent decisions of circuit courts of appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the circuit court of appeals for the sixth circuit, in *Minahan v. Grand Trunk Western R. Co.* (1905) 70 C. C. A. 463, 138 Fed. 37, 41, and was also lucidly stated in the concurring opinion of Shelby, Circuit Judge, in *McCormick v. National City Bank* (1906) 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544. These cases, however, are analogous to the case at bar.

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parties requested the court to submit certain instructions to the jury in addition to the peremptory instructions. In this case counsel for the plaintiffs moved for judgment upon the facts, and a similar motion was made by counsel for the defendant. It was evidently the intention of counsel for both parties to have the court pass upon the facts of the case, and consequently all facts were submitted to the court, which clearly brings it within the rule announced in the case of *Beuttell v. Magone* (U. S.) supra. If the doctrine in *Beuttell v. Magone* rested on that case alone, we might well restrict the doctrine to cases in which there is no conflict of evidence. But *Sena v. American Turquoise Co.* (1911) 220 U. S. 497, 501, 55 L. ed. 559, 561, 31 Sup. Ct. Rep. 488, is a case in which the doctrine of *Beuttell v. Magone* was held applicable, and in that case there was conflicting testimony on an important point in the case,—the location of plaintiff's southern boundary."

Where, following the request of both parties for peremptory instructions, the court exercises its power to direct a verdict, the fact that the case has been partially argued to the jury has no effect on the power of the court. *La Crosse Plow Co. v. Pagenstecher* (1918) 165 C. C. A. 644, 253 Fed. 46, writ of certiorari denied in (1918) 248 U. S. 572, 63 L. ed. 427, 39 Sup. Ct. Rep. 11.

In *Beuttell v. Magone* (U. S.) supra, it was held that while both parties, by requesting that a verdict should be directed, affirmed that there was no question of fact in dispute which would deflect the law of the case, yet the requests did not bring the case within the meaning of the statute (U. S. Rev. Stat. 649, Comp. Stat. § 1587, 6 Fed. Stat. Anno. 2d ed. p. 130), providing for the submission of a cause to the court without the intervention of a jury by a stipulation waiving a jury. See to the same effect, *Minahan v. Grand Trunk Western R. Co.* (1905) 70 C. C. A. 463, 138 Fed. 37; *McCormick v. National City Bank* (1906) 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544.

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In the absence of a request for a jury it has been held that the action of both parties in moving the court to direct a verdict is virtually an agreement between the parties that the court shall determine the fact in dispute. *Mehrhof Bros. Brick Mfg. Co. v. Wood* (1891; N. Y. City Ct. Gen. T.) 14 N. Y. Supp. 142; *Rogers v. Hardy* (1895; Brooklyn City Ct. Gen. T.) 14 Misc. 220, 35 N. Y. Supp. 671, affirmed in (1899) 158 N. Y. 738, 53 N. E. 1131. Conversely an agreement between the parties that the jury be discharged, and that a finding of fact be made by the court, is equivalent to a motion by both parties that the court direct a verdict. *Cutler v. Parsons* (1897) 13 App. Div. 376, 43 N. Y. Supp. 187.

In *Secor v. Ardsley Ice Co.* (1909) 133 App. Div. 136, 117 N. Y. Supp. 414, affirmed in (1911) 201 N. Y. 603, 95 N. E. 1139, the general rule was applied. The facts were thus stated by the court: "When defendant rested, defendant's counsel moved for the direction of a verdict, stating various grounds. Plaintiff's counsel likewise moved for the direction of a verdict. With both these motions pending the court said: 'I will direct a verdict and take your briefs as to how the verdict should be directed, whether for the defendant or for the plaintiff. In other words, I will direct a verdict now, but whether it shall be for the plaintiff or for the defendant I will determine after reading your briefs.' The jury was then discharged, and on the 30th of March, subsequent to the end of the term at which the case was tried, the learned trial justice wrote a memorandum and directed a verdict for the plaintiff for the full amount demanded, with an additional allowance of 5 per cent thereon." The court then said: "It is now urged by the defendant that the court could not direct a verdict after the jury had been dismissed and after the close of the term, and this is probably technically correct; but where both parties move for the direction of a verdict, and neither party asks to go to the jury on any question of fact, there is, in effect, an agreement that the court may determine the facts and the

law, as though the jury had been waived in the first instance, and the mere form of the verdict, in a case where the plaintiff was either entitled to recover the full amount claimed or nothing, is not important. Both parties acquiesced in the proposition of the court, which, it is claimed and not denied, was at the request of defendant's counsel that he might submit a brief, and it would be a perversion of justice to now permit the result to be disturbed because of any mere irregularity."

In *Foote v. L. C. Smith & Bros. Typewriter Co.* (1919) 43 N. D. 33, 172 N. W. 833, it was said: "Both parties having made a motion for a directed verdict without reservation, the trial court had the right to determine the facts concerning the damages, as well as the law applicable as the measure thereof. It could do this as well by directing a verdict, pursuant to the motion of one of the parties, as by making findings of fact."

It has been held that where the action of the court in directing a verdict is based on the oral motions of both parties to that effect, the fact that the defeated party's motion is also filed in writing, but not until after the direction of the verdict, is of no consequence or assistance to him. *Michigan Copper & Brass Co. v. Chicago Screw Co.* (1920) 269 Fed. 502.

In *Dilcher v. Nellany* (1907) 52 Misc. 364, 102 N. Y. Supp. 264, appeal dismissed for failure to prosecute in (1908) 125 App. Div. 904, 109 N. Y. Supp. 1128, where a third person claiming to be the real party in interest instead of the plaintiff moved the court to direct a verdict in his favor, and the defendant also requested the direction of a verdict, but the plaintiff did not specify that the verdict should be directed in his own favor or in favor of the third person, the court held that it had power to decide the questions of fact as well as those of law.

In *Redman v. Lasell* (1921) — S. D. —, 183 N. W. 996, the court, in discussing the question whether a certain question of fact had in effect been submitted to the trial court, said:

"The rule is well settled by many decisions of this court that a motion for a directed verdict at the close of plaintiff's evidence is wholly ineffective for the purpose after the receipt of further evidence, unless renewed at the close of all the evidence. Plaintiff's motion was not renewed at the close of defendants' evidence, and was therefore ineffective under the rule that mutual motions at the close of all the evidence constitute a waiver of the right to submit questions of fact to a jury."

In *Canton v. Pryke* (1916) 5 Ohio App. 364, a variation of the general rule was presented. The defendant moved for a directed verdict immediately after the plaintiff had offered his testimony and rested his case. The plaintiff made a similar motion, and the court below overruled the defendant's motion, granting that of the plaintiff and directing a verdict in his favor. This action of the trial court was held to be error. The appellate court pointed out that the General Code provision for the conduct of the trial of a cause in the court of common pleas specified that "the party who would be defeated, if no evidence were offered on either side, first must produce his evidence, and the adverse party must then produce his evidence," and that the action of the defendant in moving for a directed verdict was in a sense equivalent to a demurrer to the evidence. It was said: "A motion by the defendant to direct a verdict at the close of plaintiff's case is not a submission of the defendant's case, and cannot be made so by the plaintiff's joining in such motion. He had nothing to submit that was not already submitted when he had offered his evidence and rested his case. His joining in defendant's motion does not change the nature of it. It is still a motion testing the sufficiency of the plaintiff's evidence, and is in no wise a submission of defendant's case." The court, however, said that if the defendant had gone on and introduced his evidence, or, refusing to do so, had rested his case, and if at that time both parties had renewed their motions for a directed

verdict, it would be a submission of the whole case to the court as a matter of law without the intervention of the jury. Continuing, it was said: "A case cannot be submitted and adjudicated on the submission of one side only. If it is submitted on the evidence, it must be submitted on the whole evidence, and the record must so show." It was further held that none of the defendant's rights were waived by his statement, following the direction of the verdict for the plaintiff: "We object and insist that this is not the correct procedure."

In *Germain v. Loud* (1915) 189 Mich. 38, 155 N. W. 373, the case for the waiver of submission to the jury was strengthened by the fact that counsel for both parties specifically agreed with the statement of the court that it understood the requests for directed verdicts to mean that both parties considered the question as one of law for the judge. See to much the same effect, *Kyselka v. Northern Assur. Co.* (1916) 194 Mich. 430, 160 N. W. 559. And in *Hatch v. Calhoun County* (1912) 170 Mich. 322, 136 N. W. 350, the court said: "The concession of appellant, when he moved the court for a directed verdict at the close of the trial, that there was no dispute upon the evidence in the case, precludes him from claiming before this court that there was a question for the jury."

Wisconsin has been brought into conformity with the general rule by virtue of a statute (Stat. § 2857a, Laws 1915, chap. 219, § 3) which provides as follows: "Whenever in an action tried before a jury all the parties to the action shall, without reservation, move the court to direct a verdict, such motions shall, unless otherwise directed by the court before the discharge of the jury, be considered as equivalent to a stipulation by the parties waiving a jury trial and submitting the entire case to the court for decision of the facts as well as the law." In *Jones v. Citizens Sav. & T. Co.* (1919) 168 Wis. 646, 171 N. W. 648, the court said: "Both parties having moved for a directed verdict, the court might well have, under § 2857a,

Stat., ordered judgment for plaintiff, without submitting to the jury the questions which it did." Prior to this statute, however, the Wisconsin cases which discussed the point had refused to follow the majority rule, which they spoke of as the New York doctrine. Thus it was said in *Thompson v. Brennan* (1899) 104 Wis. 564, 80 N. W. 947, that "it is certainly a strained construction to hold that an assertion that there is no evidence against one is an admission that there is none in his favor; yet that is the result of the New York doctrine that a motion to direct a verdict is an admission that there is no question of fact for the jury." And after a further repudiation of the New York doctrine it was said: "We adhere to the rule, so often stated, that before directing a verdict the court must look at all the facts in the most favorable light for the other party in which the jury would be at liberty to find them, and then be able to say there is no evidence which would justify a verdict in his favor."

b. Effect of request to go to jury.

No waiver of submission of the case to the jury is presumed from a request for a directed verdict on the part of both parties to an action, where there is coupled with that request a request for other instructions or a petition to go to the jury on a disputed question of fact.

United States.—*Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* (1908) 210 U. S. 1, 52 L. ed. 981, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70, affirming (1906) 77 C. C. A. 601, 147 Fed. 457; *Charlotte Nat. Bank v. Southern R. Co.* (1910) 103 C. C. A. 261, 179 Fed. 769; *Re Iron Clad Mfg. Co.* (1910) 116 C. C. A. 642, 197 Fed. 280; *Chesapeake & O. R. Co. v. McKell* (1913) 126 C. C. A. 336, 209 Fed. 514; *Breakwater Co. v. Donovan* (1914) 134 C. C. A. 148, 218 Fed. 340; *Southern P. Co. v. United States* (1915) 137 C. C. A. 584, 222 Fed. 46; *Sampliner v. Motion Picture Patents Co.* (1919) 170 C. C. A. 220, 259 Fed. 152, denying rehearing (1918) 168 C. C. A. 202, 255 Fed. 242, which affirmed (1917) 243

Fed. 277; *Michigan Copper & Brass Co. v. Chicago Screw Co.* (1920) 269 Fed. 502; *Fire Asso. of Phila. v. Mechlowitz* (1920) 266 Fed. 322. See also *Pensacola State Bank v. Merchants' & Farmers' Bank* (1910) 180 Fed. 504, affirmed on other grounds in (1911) 105 C. C. A. 664, 183 Fed. 1022; *Farmers' & Merchants' Bank v. Maines* (1910) 105 C. C. A. 329, 183 Fed. 37; *American Nat. Bank v. Miller* (1911) 107 C. C. A. 456, 185 Fed. 338, affirmed on other grounds in (1913) 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. Rep. 883; *Lawton v. Carpenter* (1912) 115 C. C. A. 264, 195 Fed. 362.

Arkansas.—*Gee v. Hatley* (1914) 114 Ark. 376, 170 S. W. 72; *St. Louis, I. M. & S. R. Co. v. Ingram* (1915) 118 Ark. 377, 176 S. W. 692; *Interstate Business Men's Acci. Asso. v. Sanderson* (1920) 144 Ark. 271, 222 S. W. 51.

Michigan.—*Lonier v. Ann Arbor Sav. Bank* (1908) 153 Mich. 253, 116 N. W. 1088; *Kane v. Detroit L. Ins. Co.* (1918) 204 Mich. 357, 170 N. W. 35.

Montana.—*Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 508, 107 Pac. 499.

New Mexico.—*Bank of Commerce v. Broyles* (1910) 16 N. M. 414, 120 Pac. 670.

New York.—*Switzer v. Norton* (1896) 3 App. Div. 173, 38 N. Y. Supp. 350; *Campbell v. Prague* (1896) 6 App. Div. 554, 39 N. Y. Supp. 558; *Bendheim v. Herter* (1899) 40 App. Div. 462, 58 N. Y. Supp. 106; *German-American Bank v. Cunningham* (1904) 97 App. Div. 244, 89 N. Y. Supp. 836; *First Nat. Bank v. McConnell* (1892) 44 N. Y. S. R. 25, 17 N. Y. Supp. 422; *Cravath v. Baylis* (1906) 113 App. Div. 666, 99 N. Y. Supp. 973, affirmed in (1908) 192 N. Y. 559, 85 N. E. 1107; *Zwecker v. Levine* (1909) 135 App. Div. 432, 120 N. Y. Supp. 425; *Peniston v. Coleman* (1910) 141 App. Div. 676, 126 N. Y. Supp. 736; *Strohm v. Zoellner* (1908) 61 Misc. 56, 112 N. Y. Supp. 1063; *Reid v. America Co.* (1912) 136 N. Y. Supp. 75; *Mann v. Franklin Trust Co.* (1913) 158 App. Div. 491, 143 N. Y. Supp. 660; *International Battery Co. v. Westreich* (1918)

182 App. Div. 843, 170 N. Y. Supp. 149. See also *Kinner v. Whipple* (1908) 128 App. Div. 736, 118 N. Y. Supp. 337, reversed in (1910) 198 N. Y. 585, 92 N. E. 1088; *White v. Kenny* (1911) 146 App. Div. 803, 181 N. Y. Supp. 416, reversing (1910) 69 Misc. 631, 126 N. Y. Supp. 123; *A. C. & H. M. Hall Realty Co. v. Eisler* (1921) 190 N. Y. Supp. 701. Compare *Gitty v. Allen* (1901) 62 App. Div. 622, 71 N. Y. Supp. 88.

North Dakota.—*Stanford v. McGill* (1897) 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938; *Umsted v. Colgate Farmers Elevator Co.* (1909) 18 N. D. 309, 122 N. W. 390; *Gooler v. Eidsness* (1909) 18 N. D. 338, 121 N. W. 88.

Ohio.—*Perkins v. Putnam County* (1913) 88 Ohio St. 495, 103 N. E. 377; *Nead v. Hershman* (1921) — Ohio St. —, 132 N. E. 19, reversing 12 Ohio App. 410.

South Dakota.—See *Share v. Coats* (1912) 29 S. D. 603, 137 N. W. 402.

In *Minahan v. Grand Trunk Western R. Co.* (1905) 70 C. C. A. 463, 138 Fed. 37, it was held that the rule that a request by both parties to have a verdict directed is tantamount to an affirmation that there are no material facts in dispute, as laid down in *Beuttell v. Magone* (1895) 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, does not apply where there is a conflict in the evidence. To deprive a party of a trial by jury because of making the request would amount to a penalty. This is especially true where it appears that the party, when making the request for a verdict, coupled with it requests for other instructions.

In *International Battery Co. v. Westreich* (1918) 182 App. Div. 843, 170 N. Y. Supp. 149, the court said: "The theory upon which the motion for a directed verdict is deemed a consent to a determination by the court of the questions of fact is that a party, by not asking to go to the jury after making the motion, consents to such determination by the court. But a request to go to the jury after the determination of the motion for a directed verdict negatives that implied assent."

In *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* (1908) 210 U. S.

1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70, affirming (1906) 77 C. C. A. 601, 147 Fed. 457, it was held that a plaintiff who, after his motion for a direction of a verdict had been denied, requested the trial judge to give the jury certain instructions and took exceptions to the refusal to give them, did not waive his right to go to the jury, and that the question to be reviewed was not whether there was evidence legally sufficient to support the finding of the trial judge, but whether the state of the proof was such as to have made it the duty of the trial court to set aside a verdict of the jury in favor of the plaintiff if the case had been submitted to them. The Supreme Court in that case disapproved the decision of the circuit court of appeals on this question, but affirmed the judgment because the evidence was not sufficient to sustain a verdict in favor of the plaintiff.

In *Fire Asso. of Phila. v. Mechlowitz* (1920) 266 Fed. 322, an exception taken to the direction of a verdict, followed by a motion for the submission of the case to the jury, was held to preserve the right to go to the jury, the court basing its decision on *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* (U. S.) supra.

In the case of *Re Iron Clad Mfg. Co.* (1910) 116 C. C. A. 642, 197 Fed. 280, the court said: "The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court, so as to deprive either party of the right to ask other instructions, and to except to the refusal to give them, or to deprive him of the right to have questions of fact submitted to the jury, where the evidence on the issues joined is conflicting, or divergent inferences can be drawn therefrom. . . . But if the evidence is of such a conclusive character that upon it as a whole the court would feel constrained to set aside a verdict, if one were rendered in favor of one party, it may direct a verdict in favor of the other party, although there be conflicting evidence as to details not essential to a conclusion. *Empire State*

Cattle Co. v. Atchison, T. & S. F. R. Co. (U. S.) supra.

In *Sampliner v. Motion Picture Patents Co.* (1919) 170 C. C. A. 220, 259 Fed. 152, it was declared that counsel, after having taken the position that the question involved was one of law for the court to determine, no question of fact being included, could not thereafter request the submission of the case to the jury, on questions of fact, "if any there be."

In *Southern P. Co. v. United States* (1915) 137 C. C. A. 584, 222 Fed. 46, both parties having requested a directed verdict, and the defendant having made the further request that, if the motion were denied, leave should be granted to go to the jury, it was said: "The validity of the peremptory instruction in favor of the plaintiff must therefore depend upon whether the evidence was so undisputed, or was of such a conclusive character, as would have made it the duty of the court to set aside the verdict if the case had been given to the jury and a verdict returned in favor of the defendant."

In *Bank of Commerce v. Broyles* (1910) 16 N. M. 414, 120 Pac. 670, the court said with respect to the holding in the case of *Beuttell v. Magone* (1895) 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566: "We deem the full import of this holding developed, however, by the recent case of *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. (U. S.) supra*, where it was said: 'It was settled in *Beuttell v. Magone (U. S.) supra*, that where both parties request a peremptory instruction, and do nothing more, they thereby assume the facts to be undisputed and in fact submit to the trial judge the determination of the inferences proper to be drawn from them; but nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury where the evidence is conflicting or the inferences to be drawn from the testimony are divergent.'" And in accordance with that view the court

held (syllabus) that "a motion for a peremptory instruction by both parties does not constitute a final waiver by either of jury trial where the evidence is conflicting, and where after adverse ruling upon his request for peremptory instruction such party thereupon insists upon a trial by jury."

In *Gooler v. Eidsness* (1909) 18 N. D. 338, 121 N. W. 83, the distinction between cases arising under this qualification and those under the general rule is recognized. The court said: "While both parties, when the defendant rested, submitted motions to direct a verdict, the respondent objected to the court finding the facts and insisted that they be submitted to the jury if his motion was overruled. This objection and request take the case out of the rule that where both parties submit motions for a directed verdict, without any request that any question of fact be submitted to the jury, they thereby waive findings by the jury. Hence the court was not justified in directing a verdict if any substantial conflict existed in the evidence on any material issue."

In *St. Louis, I. M. & S. R. Co. v. Ingram* (1915) 118 Ark. 377, 176 S. W. 692, it appeared that the defendant, following the refusal of the court to grant the peremptory instruction requested by him, asked that certain other instructions not peremptory be given, which was also denied him, a verdict being directed in favor of the plaintiff by request. It was held that other instructions having been asked on the refusal of peremptory instructions, the defendant's right to go to the jury had not been waived. The case was distinguished from *St. Louis S. W. R. Co. v. Mulkey* (1911) 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1839, the court declaring that it would be an extension of the doctrine of that case to apply it to the case under consideration. It was said: "The decision in that case does not go to the extent of holding that a party may not request a peremptory instruction, and, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission

of the case to the jury, where the evidence is conflicting or reasonable minds might draw different conclusions from it."

Both plaintiff and defendant having moved for a direction of verdict at the close of the testimony, neither can ask to have the cause sent to the jury generally after he has been ruled against. Either may ask to have a particular fact decided, but they have waived the right to have a general verdict by the jury. *Groves v. Acker* (1895) 85 Hun, 492, 33 N. Y. Supp. 406; *Coleman v. Pickett* (1894) 82 Hun, 287, 31 N. Y. Supp. 480; *Lagerquist v. United States Industrial Ins. Co.* (1895) 89 Hun, 25, 35 N. Y. Supp. 38; *Flandreau v. Elsworth* (1897) 151 N. Y. 473, 45 N. E. 853; *Mayer v. Dean* (1889) 115 N. Y. 556, 5 L.R.A. 540, 22 N. E. 261; *Maxwell v. Martin* (1909) 130 App. Div. 80, 114 N. Y. Supp. 349. In *Bowers v. Ocean Acci. & Guarantee Corp.* (1906) 110 App. Div. 691, 97 N. Y. Supp. 485, affirmed in (1902) 187 N. Y. 561, 80 N. E. 1105, the court said: "Where, at the close of the evidence on the trial of an action in which more than one question of fact is involved, each party asks that a verdict be directed in his favor, and, after the decision thereon, the unsuccessful party asks that the case be sent to the jury, without stating any question of fact he desires submitted, a denial of the motion is not error."

If a party wishes have a particular fact decided by the jury he must request it. A request for a general verdict by the jury will not avail him. Thus it has been held that it is not error to refuse to submit the question of the amount of the damages to the jury under a general request. *W. P. Fuller & Co. v. Schrenk* (1901) 58 App. Div. 222, 68 N. Y. Supp. 781, affirmed in (1902) 171 N. Y. 671, 64 N. E. 1126.

But where both parties have requested that a verdict shall be directed, and both motions have been denied, there remain two things which must be done. A juror may be withdrawn, or the case may be submitted to the jury. Under such circumstances it is error for the court to

direct the jury to bring in a finding on a single question over the objection of a party, and announce that it will then find a verdict. The usual practice requires the jury to find a general verdict on all the evidence, and the court cannot withdraw any disputed fact from their consideration without depriving the parties of their right to have the facts on a disputed issue heard before a jury. Both motions having been denied, there is no assumption that a jury has been waived. *Sigua Iron Co. v. Greene* (1898) 31 C. C. A. 477, 59 U. S. App. 555, 88 Fed. 207.

Applying the same principle, the jury should be left to determine every question of fact not included among those expressly left to the court. Thus, where it appeared that in an action on a promissory note in which the question of notice of dishonor had been raised, the court remarked that if both the parties would move to have a verdict directed it would "look at the question of notice," it was held to be prejudicial error under such a motion for the court to pass on other questions, such as one of diligence, as to which there was conflicting evidence. All questions of fact are not necessarily submitted to the court under a motion for direction. *University Press v. Williams* (1900) 48 App. Div. 188, 62 N. Y. Supp. 986.

In *Peniston v. Coleman* (1910) 141 App. Div. 676, 126 N. Y. Supp. 736, it was held that a party has a right to have a ruling on his motion to direct a verdict, so that he may have an opportunity to request a submission to the jury. The court said: "A party who requests a direction of a verdict is not thereby precluded from a request for submission of a question of fact to the jury." In *White v. Kenny* (1911) 146 App. Div. 803, 131 N. Y. Supp. 416, reversing (1910) 69 Misc. 631, 126 N. Y. Supp. 123, the court said: "The judgment was reversed by the appellate term (69 Misc. 631) upon the ground of error claimed to have been committed by the trial court in submitting questions of fact to the jury after both sides had rested and had moved for the direction of

a verdict in their favor. It is well settled that, even after the making of a motion for the direction of a verdict, the party so moving may, at any time before the rendition of the directed verdict, withdraw his motion and request that he be allowed to go to the jury upon specific questions of fact. *Maxwell v. Martin* (1909) 130 App. Div. 80, 114 N. Y. Supp. 349; *Cullinan v. Furthmann* (1902) 70 App. Div. 110, 75 N. Y. Supp. 90; *Eldredge v. Mathews* (1904) 93 App. Div. 356, 87 N. Y. Supp. 652. In this case, while the defendant withdrew his request for a direction of a verdict, he did not ask to be allowed to go to the jury upon any specific question of fact, and therefore the case does not come within the rule just quoted. But the court is not bound by the views of counsel upon the trial as to whether or not an issue of fact exists, and may of its own motion submit the entire issue, or such issues as he deems to exist, to the jury for their determination. In the case at bar it is clear that issues of fact had been raised by the testimony, and the court was clearly right in so submitting them."

A request to go to the jury on "the question raised by the evidence" has been held not to be too general, and it is not necessary to specify the particular questions desired to be submitted, in *Charles H. Brown Paint Co. v. Reinhart* (1918) 210 N. Y. 162, 104 N. E. 124.

In *Stevens v. Mutual L. Ins. Co.* (1918) 183 App. Div. 629, 171 N. Y. Supp. 296, reversed on other grounds in (1920) 227 N. Y. 524, ante, 1141, 125 N. E. 682, both parties asked for a direction of verdict, the defendant's counsel in connection therewith stating that he reserved the right to go to the jury on any question of fact. This, it was said, was not a request to go to the jury, and since at no time was a request for submission of fact to the jury made, it was held that consent was given that the facts should be passed on by the court.

Whether an exception to a motion to direct a verdict made by the opposite party is available as an objec-

tion to a decision on the facts by the court has been decided both ways in New York. The later ruling is that the exception will not take the place of a request for a jury. *Young v. Roberts* (1898) 31 App. Div. 615, 52 N. Y. Supp. 279. Compare *Wombough v. Cooper* (1874) 2 Hun (N. Y.) 428.

However, where a verdict was directed in favor of a party, following requests from both parties for a directed verdict, and an exception taken to such direction, not followed by a request to go to the jury, it was held that the determination of all issues of fact was left to the trial judge. *United States v. Two Baskets* (1913) 123 C. C. A. 310, 205 Fed. 37.

In *Interstate Business Men's Assn. v. Sanderson* (1920) 114 Ark. 271, 222 S. W. 51, wherein it was held that the appellant had saved his right to go to the jury by asking an instruction submitting the issues, although both sides had requested peremptory instructions, it was contended that, since the additional instruction was not correct, it could be of no avail to the appellant. The court, however, seemed to consider the instruction to be correct.

In *Lonier v. Ann Arbor Sav. Bank* (1908) 153 Mich. 253, 116 N. W. 1088, wherein the testimony drawn out on the cross-examination of a witness on whose direct testimony the plaintiff's case rested was inconsistent with that given on his direct examination, it was held that notwithstanding the fact that both sides moved for the direction of a verdict, the judge should have submitted the issue to the jury.

In *Kane v. Detroit L. Ins. Co.* (1918) 204 Mich. 357, 170 N. W. 35, after a colloquy between the court and counsel wherein the latter apparently agreed that the case should be taken from the jury, the defendant's counsel presented a request for a charge on certain facts, which was held to have negated any express or implied consent to waive submission to the jury.

The power of the court to send a disputed question of fact to the jury is not limited by the fact that both

parties have moved for the direction of a verdict. When the court is in doubt it may send a point to the jury for a finding although not asked by either party, and in such a case the finding of the jury is not merely advisory, but is conclusive as to the facts found. *Bank of State v. Southern Nat. Bank* (1902) 170 N. Y. 1, 62 N. E. 677, reversing (1900) 54 App. Div. 99, 66 N. Y. Supp. 349; *Page v. Shainwald* (1900) 52 App. Div. 349, 65 N. Y. Supp. 174, reversed on other grounds in (1901) 169 N. Y. 246, 57 L.R.A. 173, 62 N. E. 356. But neither party, after having requested a verdict, has any right to have an undisputed fact sent to the jury. *Stephens v. Meriden Britannia Co.* (1897) 13 App. Div. 268, 43 N. Y. Supp. 226, reversed on other grounds in (1899) 160 N. Y. 178, 73 Am. St. Rep. 678, 54 N. E. 781. It is not error for the court to deny both motions for a verdict where there is a disputed question of fact. *Lake Superior Iron Co. v. Drexel* (1882) 90 N. Y. 87. Thus it has been held that where there is a question as to the existence of probable cause, the court may properly deny both motions and send the question to the jury. There is no error in sending it to the jury as long as the facts admit of opposing inferences. *Rawson v. Leggett* (1904) 97 App. Div. 416, 90 N. Y. Supp. 5, reversed on other grounds in (1906) 184 N. Y. 504, 77 N. E. 662.

Where, after the parties have once rested, a witness is recalled by consent of the court, a request to go to the jury cannot be denied on the ground that the parties had admitted that there was no question of fact by having both moved for a direction of verdict. *Beiermeister v. City of London F. Ins. Co.* (1891; Sup. Ct. Gen. T.) 39 N. Y. S. R. 741, 15 N. Y. Supp. 133, affirmed in (1892) 133 N. Y. 564, 30 N. E. 1149. Nor can the court withdraw the case from the jury over the objection of a party where both motions have been denied and the parties are proceeding to address the jury. The making of the motion is not of itself a waiver of a jury. *Blair v. Hagemeyer* (1898) 26 App. Div.

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c. Time

A motion made after a verdict is made has not been held to be a waiver of a party. *S. N. Y. 70*
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a verdict, but before it had announced in whose favor the verdict would be directed, the defendant asked leave to withdraw his motion and to go to the jury on two specific questions of fact. The court refused to permit the defendant to withdraw his motion and gave him an exception to such refusal, and directed a verdict for the plaintiff, to which direction the defendant excepted. The appellate court said: "The plaintiff's counsel insists that the defendant was too late in his request to go to the jury, and that there was no exception to the court's refusal to permit him so to do. While in specific words there was no exception to the refusal of defendant's request to go to the jury, the fair construction of what took place is that one was granted. Defendant's request to go to the jury was coupled with his request to withdraw his motion for direction of verdict, and both motions were properly treated as one, to a denial of which the learned court itself announced an exception should be noted. The defendant's request to go to the jury was clearly in time. Where both parties move for a direction of verdict the announcement by the court that it will direct a verdict in favor of the one or the other is not the final determination of the motion. The motion culminates in the rendition of the verdict by the jury at the direction of the court. Each party in moving for a verdict assumes from his point of view that he is entitled to a verdict. When the court decides that one party is entitled to a direction of verdict, the other is not foreclosed from asking to go to the jury upon any specific question of fact which he points out to the court, notwithstanding the motion which he has made. Under such circumstances he cannot ask to go to the jury generally upon all the facts in the case, but he can ask to go to the jury upon any particular question of fact which he points out to the court. . . . Where at the close of the evidence both parties move for a direction of verdict the rule is that the defeated party may ask to go to the jury upon any specific

question of fact at any time before the directed verdict is actually rendered by the jury."

In *Charles H. Brown Paint Co. v. Reinhardt* (1913) 210 N. Y. 162, 104 N. E. 124, the defendant's motion to dismiss was followed by the plaintiff's motion for the direction of a verdict in his favor, which was granted, the defendant directly thereafter saving an exception and requesting leave to go to the jury on questions raised by the evidence and the court. On appeal it was held that the request to go to the jury was not made too late.

To same effect is *Walters v. Wise* (1921) 190 N. Y. Supp. 639.

The *International Battery Co. v. Westreich* (1918) 182 App. Div. 843, 170 N. Y. Supp. 149, wherein the plaintiff asked to go to the jury after the court had indicated an intention to direct a verdict in favor of the defendant, it was said: "A party has a right to an explicit determination of his motion, and an opportunity, after such determination, to make his request to go to the jury; and this right cannot be defeated by any quick action of the court in the direction of a verdict."

It has been held that a request to go to the jury, when made immediately after the refusal of a motion for a directed verdict, both parties having moved to that effect at the end of all the testimony, was made in due time. *Perkins v. Putnam County* (1913) 88 Ohio St. 495, 103 N. E. 377.

In *Nead v. Hershman* (1921) — Ohio St. —, 132 N. E. 19, it was shown that the defendant had moved for a directed verdict at the close of the plaintiff's testimony. The motion being overruled, it was renewed at the close of all the testimony, the plaintiff following with a similar motion, which latter was sustained. The court then proceeded to overrule the defendant's motion, whereupon the defendant's counsel requested to be allowed to withdraw his motion and to submit his case to the jury. It was held that the motion to go to the jury was made at the earliest possible moment, since the court had not

passed on the motions in the order presented, and that the defendant was entitled to have his case submitted to the jury.

In *Strangward v. American Brass Bedstead Co.* (1910) 82 Ohio St. 121, 91 N. E. 988, each party moved for a directed verdict on the pleadings, before the introduction of any evidence. One party, on his motion being overruled, offered to introduce evidence which the court below refused. The court on appeal said: "The offer came too late, the cause having already been submitted to the court, and the court having rendered its judgment on the motions. To allow or refuse the application was within the discretion of the court, and no statement having been made to the court of what the defendant expected to prove, it cannot be claimed that there was an abuse of discretion."

It has been held to be sufficient that counsel, at the time the oral motions for directed verdicts were argued, called the attention of the court to the issues of fact which he desired to have submitted to the jury in case his request for peremptory instructions on particular questions was not sustained, no necessity existing on the part of counsel to interrupt the court during the delivery of its opinion and repeat his prior statements. *Michigan Copper & Brass Co. v. Chicago Screw Co.* (1920) 269 Fed. 502.

A request to go to the jury is not too late if made before the verdict is entered by the clerk. *Bernheimer v. Adams* (1902) 70 App. Div. 114, 75 N. Y. Supp. 93, affirmed in (1903) 175 N. Y. 472, 67 N. E. 1080; *Zajic v. Elian* (1906; Sup. Ct. App. T.) 50 Misc. 289, 98 N. Y. Supp. 652; *Landau v. Veith* (1917) 164 N. Y. Supp. 230.

In *Landau v. Veith* (N. Y.) *supra*, the court directed a verdict in favor of the defendants, the jury answering, "Yes" to the words of the court, "So say you all?" The plaintiff immediately asked to go to the jury on a certain question of fact, but was refused on the ground that his request came too late. It was held that a new trial was properly granted, the higher court pointing out that a request

to go to the jury would be too late when made after the directed verdict of the jury had been actually entered, but apparently considering that the plaintiff was saved by the fact that the proceedings had not reached that stage at the time of his request.

But in *New York v. Thirty-fourth Street Crosstown R. Co.* (1910) 137 App. Div. 644, 122 N. Y. Supp. 344, it was held that after the jury had been discharged by consent, motions for a directed verdict having been made, it was too late to make a motion to go to the jury on a question of fact.

d. Questions presented for review.

As to the questions to be considered by the reviewing court in cases involving a verdict directed by the lower court following requests therefor by both parties, the decisions and statements, while more or less of the same general tenor, are so various and of such different phrasing that it is almost impossible to construct any general rule. However, it may be said that a verdict directed by the court has the same conclusive effect and is governed by the same rules as is one rendered by a jury. If neither party has asked to have a jury the court is clothed with the function of deciding the facts.

United States.—Phoenix Ins. Co. v. Kerr (1904) 64 C. C. A. 251, 66 L.R.A. 569, 129 Fed. 723; *United States v. Two Baskets* (1913) 123 C. C. A. 310, 205 Fed. 37; *Reis v. Rosenfeld* (1913) 122 C. C. A. 480, 204 Fed. 282; *Wilson v. Knowles* (1914) 180 C. C. A. 440, 213 Fed. 782; *Harriman Nat. Bank v. Seldomridge* (1917) 153 C. C. A. 147, 240 Fed. 111; *American Mercantile Corp. v. Spielberg* (1919) 262 Fed. 492; *Cuyamel Fruit Co. v. Johnson Iron Works* (1920) 262 Fed. 387, certiorari denied in (1919) 253 U. S. 485, 64 L. ed. 1025, 40 Sup. Ct. Rep. 481; *Tanner v. Ballard & B. Co.* (1921) 278 Fed. 671.

Arkansas.—Supreme Tribe, B. H. v. Gailey (1915) 117 Ark. 145, 173 S. W. 838; *Farmers' Mut. F. Ins. Co. v. Hodges* (1920) 142 Ark. 577, 219 S. W.

13; *Strange v. Planter's Gin Co.* (1920) 142 Ark. 100, 218 S. W. 188.

Colorado.—*O'Brien v. Galley-Stockton Shoe Co.* (1918) 65 Colo. 70, 173 Pac. 544.

Nebraska.—*Segear v. Westcott* (1909) 83 Neb. 515, 120 N. W. 170; *Henton v. Sovereign Camp, W. W.* (1910) 87 Neb. 552, 138 Am. St. Rep. 500, 127 N. W. 869; *Kreck v. Supreme Lodge, F. U.* (1914) 95 Neb. 428, 145 N. W. 859; *Hamilton v. North American Acci. Ins. Co.* (1916) 99 Neb. 579, 157 N. W. 111, Ann. Cas. 1917C, 409; *Modern Woodmen v. Berry* (1916) 100 Neb. 820, 161 N. W. 534, Ann. Cas. 1918D, 302; *Bank of Benson v. Gordon* (1919) 103 Neb. 508, 172 N. W. 367; *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.* (1920) 105 Neb. 321, 180 N. W. 588.

New York.—*Fogarty v. Hook* (1895) 84 Hun, 165, 32 N. Y. Supp. 555; *Kennedy v. New York* (1904) 99 App. Div. 588, 91 N. Y. Supp. 252; *Baker v. Appleton* (1905) 107 App. Div. 358, 95 N. Y. Supp. 125, affirmed without opinion in (1907) 187 N. Y. 548, 80 N. E. 1104; *Collins v. Burns* (1875) 63 N. Y. 1; *Thompson v. Simpson* (1891) 128 N. Y. 270, 28 N. E. 627; *Meruk v. New York* (1918) 223 N. Y. 271, 119 N. E. 571, modifying (1917) 177 App. Div. 900, 163 N. Y. Supp. 1123; *Ontario Industrial Co. v. New York Air Brake Co.* (1920) 190 App. Div. 894, 179 N. Y. Supp. 940; *Durham v. Stuyvesant Ins. Co.* (1920) 112 Misc. 440, 182 N. Y. Supp. 887.

South Dakota.—*Rice v. Bennett* (1912) 29 S. D. 341, 137 N. W. 359.

In *Harriman Nat. Bank v. Seldomridge* (1917) 153 C. C. A. 147, 240 Fed. 111, reversed on other grounds in (1919) 249 U. S. 1, 63 L. ed. 443, 39 Sup. Ct. Rep. 244, it was said: "As both parties hereto moved for the direction of a verdict, there was no substantial question of fact to be decided."

In *United States v. Two Baskets* (1913) 123 C. C. A. 310, 205 Fed. 37, it was held that questions left for the determination of the trial judge by virtue of both parties moving for directed verdicts were not brought be-

fore the appellate court, which was bound to accept the findings of the trial court in the matter.

In *Rice v. Bennett* (1912) 29 S. D. 341, 137 N. W. 359, it was said: "Where both parties have asked for a directed verdict, the verdict stands precisely as would a verdict returned by a jury upon the same evidence, and, unless the verdict of a jury would be set aside, the verdict directed by the court must stand."

In *Phenix Ins. Co. v. Kerr* (1904) 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723, the court said: "Where each of the parties to a trial by jury requests the court to charge them to return a verdict in his favor, he waives his right to any finding or trial of the issues by the jury, and consents that the court shall find the facts and declare the law. An acceptance of these waivers and a peremptory instruction by the court in favor of either party constitute a general finding by the court of every material issue of fact and of law in favor of the successful party. The case is then in the same situation in which it would have been if both parties had filed a written waiver of a jury and it had been tried by the court. Each party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence, and the only questions which the instruction presents to an appellate court are, Was the court's finding of fact without substantial evidence to sustain it? and, Was there error in its declaration or application of the law?"

Evidence sufficient to support the verdict of a jury is sufficient to support a directed verdict. *Supreme Tribe, B. H. v. Galley* (1915) 117 Ark. 145, 173 S. W. 838.

On review of a verdict rendered by the court after a request by both parties, two proper questions are presented to the court: First, whether there was any substantial evidence to sustain the finding of the court; and second, whether there was any error in the declaration or application of the law. *United States v. Bishop*

(1903) 60 C. C. A. 123, 125 Fed. 181; Phenix Ins. Co. v. Kerr (1904) 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723; Insurance Co. of N. A. v. Wisconsin C. R. Co. (1905) 67 C. C. A. 300, 134 Fed. 794; Western Exp. Co. v. United States (1905) 72 C. C. A. 516, 141 Fed. 28; McCormick v. National City Bank (1906) 73 C. C. A. 350, 142 Fed. 132, 6 Ann. Cas. 544.

In *De Burg v. Armenta* (1917) 22 N. M. 443, 164 Pac. 838, it was said: "The only questions open on appeal are: First, Was there substantial evidence supporting the conclusion of the court? and, second, Did any error of law occur during the trial?"

The rule as to the sufficiency of the evidence to sustain the verdict has been differently stated, but it is generally said that if there is not an entire want of evidence the verdict will not be disturbed on review. *Indianapolis Traction & Terminal Co. v. Vaughn* (1917) 65 Ind. App. 581, 117 N. E. 673; *Stearns v. Farrand* (1899; Sup. Ct. App. T.) 29 Misc. 292, 60 N. Y. Supp. 501; *Davies v. New York Concert Co.* (1891; Sup. Ct. Gen. T.) 13 N. Y. Supp. 739, affirmed in (1891) 128 N. Y. 635, 29 N. E. 147; *Rugh v. Soleim* (1919) 92 Or. 329, 180 Pac. 930.

In *Hall v. Harrel* (1918) 136 Ark. 329, 206 S. W. 435, the court said: "Both sides having asked a peremptory instruction, without asking for a submission of the issue to the jury, the only question is whether the evidence is legally sufficient to sustain the finding in favor of appellees."

Nor will a verdict be reviewed where there was conflicting evidence as long as it appears that there was some evidence to sustain it as found. The reviewing court will not inquire into the reasoning of the trial court as to its finding of facts. *Ropes v. Arnold* (1894) 81 Hun. 476, 30 N. Y. Supp. 997; *Seidenspinner v. Metropolitan L. Ins. Co.* (1902) 70 App. Div. 476, 74 N. Y. Supp. 1108, reversed on other grounds in (1903) 175 N. Y. 95, 67 N. E. 123; *Church v. Foley* (1897) 10 S. D. 74, 71 N. W. 759.

In *J. R. Watkins Medical Co. v. Miller* (1918) 40 S. D. 505, 168 N. W. 373, it was said: "The findings of

the trial court upon such motion are conclusive of the facts, regardless of the weight of contradictory evidence, if such finding is supported by substantial evidence which would sustain a similar verdict by a jury. . . . Nor is this rule affected by the fact that the evidence is conflicting."

A judgment based on a directed verdict following a request therefor from both parties will not be disturbed if there is evidence to support it; a conflict in evidence becoming immaterial. *Lockhart v. Tri-State Loan & T. Co.* (1920) 268 Fed. 523.

Where there has been a directed verdict at the request of both parties the reviewing court will not disturb the verdict where there is sufficient evidence to sustain it, although there is some conflict in the evidence. *Lawton v. Carpenter* (1912) 115 C. C. A. 264, 195 Fed. 362, *supra*, *certiorari denied* (1911) 225 U. S. 710, 56 L. ed. 1267, 32 Sup. Ct. Rep. 840; *McHenry v. Old Citizens' Nat. Bank* (1911) 85 Ohio St. 203, 38 L.R.A.(N.S.) 1111, 97 N. E. 395; *Share v. Coats* (1912) 29 S. D. 603, 137 N. W. 402. See also *Patty v. Salem Flouring Mills Co.* (1909) 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298. In *Share v. Coats* (S. D.) *supra*, it was said: "An exception to an order directing a verdict presents no question for review, except the legal sufficiency of the evidence to sustain the verdict directed. Questions of credibility of witnesses, and of inferences to be drawn from evidence, are deemed submitted to the court by motions of both parties; and the directed verdict has like effect as does a verdict returned by the jury."

In *Buffalo Glass Co. v. Assets Realization Co.* (1909) 133 App. Div. 775, 117 N. Y. Supp. 1087, it was said: "Both parties have moved for a direction of a verdict, and neither having asked that any issue of fact be submitted to the jury, it is practically a concession that none of the essential facts are controverted."

The question for the court to determine on appeal is simply whether there was substantial evidence to sup-

port the finding made. *Moore v. Lee Tire & Rubber Co.* (1921) 273 Fed. 465; *Kansas City Soap Co. v. Illinois Cudahy Packing Co.* (1920) 265 Fed. 108, affirming (1918; D. C.) 247 Fed. 556.

In *O'Brien v. Galley-Stockton Shoe Co.* (1918) 65 Colo. 70, 173 Pac. 544, the court said: "In such case the appellate court does not consider the weight of the evidence. If no reversible error was committed in the admission or rejection of evidence, the directed verdict will be upheld if there is any substantial evidence to support it."

In *La Crosse Plow Co. v. Pagenstecher* (1918) 165 C. C. A. 644, 253 Fed. 46, writ of certiorari denied in (1918) 248 U. S. 572, 63 L. ed. 427, 39 Sup. Ct. Rep. 11, it was said that a direction for verdict having been given for the plaintiff after requests therefor from both parties unaccompanied by any demand for the submission of any question to the jury, the only question before the court on appeal was whether there was any evidence to support the verdict.

In *Williams v. Vreeland* (1919) 250 U. S. 295, 63 L. ed. 989, 3 A.L.R. 1038, 39 Sup. Ct. Rep. 438, affirming (1917) 156 C. C. A. 632, 244 Fed. 346, it was held that a finding of fact by the trial court must stand if substantial evidence is disclosed to support it.

The sole question on appeal is that of the legal sufficiency of the evidence. *Bankers' Surety Co. v. William Miller & Sons Co.* (1912) 105 Ark. 697, 150 S. W. 570; *Sims v. Everett* (1914) 113 Ark. 198, L.R.A. 1918C, 7, 168 S. W. 559, Ann. Cas. 1916C, 629. And see *Segear v. Westcott* (1909) 83 Neb. 515, 120 N. W. 170.

In *McCaull-Dinsmore Co. v. Stevens* (1921) 59 Mont. 206, 194 Pac. 213, it appeared that, following motions by both parties for a directed verdict, the court denied the defendant's motion and then struck out the defendant's evidence, after which it directed a verdict for the plaintiff. The court on appeal, while recognizing the rule that, following requests from both parties for a directed ver-

dict, each is bound by the court's finding, providing there is any substantial evidence in support thereof, held it to be inapplicable in the case at bar, since the motion made by the plaintiff was granted on a record altogether different from the one on which each of the motions was based.

Another statement of the law is that the verdict will not be disturbed unless clearly against the weight of the evidence. *Fifty Associates Co. v. Quigley* (1919) 56 Mont. 348, 185 Pac. 155; *Gilligan v. Supreme Council, R. A.* (1904) 26 Ohio C. C. 43; *Schenck v. Cleveland, C. C. & St. L. R. Co.* (1919) 11 Ohio App. 164; *Deadwood v. Hursh* (1912) 30 S. D. 450, 138 N. W. 1122.

The question presented to the reviewing court is not whether there is any evidence to support the verdict as directed, but whether, on the evidence adduced, the verdict was for the right party. The finding of the court as to the facts of the case is not to be considered on review, because the party waived his right to have a jury decide the facts by not requiring it after the court had directed a verdict against him. A verdict so directed will not be set aside unless clearly against the weight of the evidence. *First Nat. Bank v. Hayes* (1901) 64 Ohio St. 100, 59 N. E. 893.

But it has been held on appeal that where the plaintiff's request to go to the jury was denied, the defendant, in whose favor judgment was given, must sustain his contention that there was no question of fact for submission to the jury. *International Battery Co. v. Westreich* (1918) 182 App. Div. 843, 170 N. Y. Supp. 149.

The reviewing court will determine the case on the theory that the trial court found every disputed fact in favor of the party in whose behalf the verdict was rendered. *Raegener v. Hubbard* (1899) 40 App. Div. 359, 57 N. Y. Supp. 1018, affirmed in (1901) 167 N. Y. 301, 60 N. E. 633; *Northam v. International Ins. Co.* (1899) 45 App. Div. 177, 61 N. Y. Supp. 45, affirmed in (1901) 165 N. Y. 666, 59 N. E. 1127; *Mann v. National Linseed Oil Co.* (1895) 87 Hun, 558, 34 N. Y.

Supp. 481; *Birnstein v. Stuyvesant Ins. Co.* (1903; Sup. Ct. App. T.) 39 Misc. 808, 81 N. Y. Supp. 306, reversed on other grounds in (1903) 83 App. Div. 436, 82 N. Y. Supp. 140; *Reed v. Spear* (1905) 107 App. Div. 144, 94 N. Y. Supp. 1007; *Zirinsky v. Post* (1906) 112 App. Div. 74, 98 N. Y. Supp. 132; *Sutter v. Vanderveer* (1890) 122 N. Y. 652, 25 N. E. 907; *A. E. McBee Co. v. Shoemaker* (1916) 174 App. Div. 291, 160 N. Y. Supp. 251, affirmed on other grounds in (1919) 225 N. Y. 621, 121 N. E. 852.

In *Fairbanks v. Nichols* (1909) 135 App. Div. 298, 119 N. Y. Supp. 752, the court said: "At the close of the evidence both parties moved for a direction of a verdict, and thereby all questions of fact were submitted to the court for determination. It must be presumed, therefore, in support of the judgment, that the court found all controverted questions in favor of the defendants."

It has been said that the question on appeal is whether the testimony, viewed in the light most favorable to the appellee, is legally sufficient to support the finding made in his favor. *Gibson v. Allen-West Commission Co.* (1919) 138 Ark. 172, 211 S. W. 142.

On appeal from a directed verdict, both parties having made requests to that effect, the evidence is to be given "its highest probative value in support of appellee's theory of the case." *Home F. Ins. Co. v. Wilson* (1913) 109 Ark. 324, 159 S. W. 1113; *Bankers' Surety Co. v. William Miller & Sons Co.* (1912) 105 Ark. 697, 150 S. W. 570.

In *Bennett v. Thompson* (1916) 126 Ark. 61, L.R.A.1917B, 919, 189 S. W. 363, it was said: "The court gave the appellee's requested instruction, so the question presented to us on this appeal is whether or not the testimony, viewing it in its strongest light in appellee's favor, is sufficient to sustain the verdict."

The facts having been determined, the duty devolves on the court to apply the law to the facts as found. A court of errors may reverse the verdict of the trial court on the ground that the law was not correctly ap-

plied and a wrong conclusion was reached. *Beuttell v. Magone* (1895) 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; *Podmore v. Dime Sav. Bank* (1900) 55 App. Div. 624, 66 N. Y. Supp. 1071; *Schram v. Werner* (1894) 81 Hun, 561, 31 N. Y. Supp. 47; *Anderson v. First Nat. Bank* (1894) 4 N. D. 182, 59 N. W. 1029; *Brady v. Kreuger* (1896) 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083.

In *New England Mortg. Secur. Co. v. Great Western Elevator Co.* (1897) 6 N. D. 407, 71 N. W. 130, the court said that the question for the reviewing court was whether the trial court "erred in its conclusions of law in directing a verdict. In other words, Did the court, in directing a verdict, put a proper legal construction upon the undisputed facts?"

II. Minority rule.

a. Rule stated.

The majority rule, that requests for a directed verdict from both parties effect a waiver of submission of the case to the jury, has been expressly disapproved in several jurisdictions.

Illinois.—*Wolf v. Chicago Sign Printing Co.* (1908) 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369.

Iowa.—*German Sav. Bank v. Bates Addition Improv. Co.* (1900) 111 Iowa, 432, 82 N. W. 1005; *M. M. Walker Co. v. Dubuque Fruit & Produce Co.* (1901) 113 Iowa, 428, 53 L.R.A. 775, 85 N. W. 614; *Teeple v. Hawkeye Gold Dredging Co.* (1908) 137 Iowa, 206, 114 N. W. 906; *Hammill v. Joseph Schlitz Brewing Co.* (1913) 165 Iowa, 266, 143 N. W. 110, 145 N. W. 511; *New England Equitable Ins. Co. v. Boldrick* (1921) — Iowa, —, 185 N. W. 468. And see *MANSKA v. SAN BENITO LAND Co.* (reported herewith) ante, 1430.

Minnesota.—*Stauff v. Bingenheimer* (1905) 94 Minn. 309, 102 N. W. 694. See also *Poppitz v. German Ins. Co.* (1901) 85 Minn. 118, 88 N. W. 438.

New Jersey.—*Hayes v. Kluge* (1914) 86 N. J. L. 657, 92 Atl. 358; *Second Nat. Bank v. Smith* (1918) 91 N. J. L. 531, 1 A.L.R. 470, 103 Atl. 862.

Oklahoma.—*Farmers' Nat. Bank v. McCall* (1910) 25 Okla. 600, 26 L.R.A. (N.S.) 217, 106 Pac. 866; *Taylor v. Wooden* (1911) 30 Okla. 6, 36 L.R.A. (N.S.) 1018, 118 Pac. 372; *Midland Valley R. Co. v. Lynn* (1913) 38 Okla. 695, 135 Pac. 370; *Hogan v. Milburn* (1915) 44 Okla. 641, 146 Pac. 5.

Tennessee.—*King v. Cox* (1912) 126 Tenn. 553, 151 S. W. 58; *Virginia-Tennessee Hardware Co. v. Hodges* (1912) 126 Tenn. 370, 149 S. W. 1056. See also *Brackin v. McGannon* (1916) 137 Tenn. 207, 192 S. W. 922. Compare *Southern R. Co. v. Crutcher* (1910) 1 Tenn. C. C. A. 231; *Aizenstatt v. Jackson* (1911) 1 Tenn. C. C. A. 805.

Vermont.—*Fitzsimmons v. Richardson* (1912) 86 Vt. 229, 84 Atl. 811; *Seaver v. Lang* (1918) 92 Vt. 501, 104 Atl. 877; *MASON v. SAULT* (reported herewith) ante, 1426.

In *German Sav. Bank v. Bates Addition Improv. Co.* (Iowa) supra, it was pointed out that although both parties had requested directed verdicts, neither was really willing, as against the motion of the other, to waive a jury, but each was impliedly asking as against the other that the point in conflict should be submitted to the jury.

In *MANSKA v. SAN BENITO LAND CO.* (reported herewith) ante, 1430, the court discusses the present state of the law in Iowa, reviewing the authorities, and flatly repudiating the rule adopted in the majority of jurisdictions. Regarding the mutual requests for a directed verdict it is said: "Such motions do not indicate any agreement or mutual concession by the parties, but rather an irreconcilable difference. Neither is willing, as against the motion of the other, to waive a jury; and there is no implication of such waiver from the mere fact that each thinks he has ground for asking a peremptory instruction."

In *Wolf v. Chicago Sign Printing Co.* (Ill.) supra, it was said: "When one party asks the court to direct a verdict in his favor, the fact that the other party makes a similar motion cannot in any way affect the rights of the first party. If that were true,

no party could make a motion for a directed verdict without waiving his right to trial by jury if his opponent chose to make the same motion. The decisions relied upon to establish the doctrine that if both parties ask the court to decide a question of law they each waive the right to trial by jury of controverted questions of fact are inapplicable to the practice in this state, and the fact that each party in this case asked the court to direct a verdict did not amount to a submission of controverted questions of fact to the court."

In *Hayes v. Kluge* (1914) 86 N. J. L. 657, 92 Atl. 358, wherein it appeared that the court sent the case to the jury although each side had moved for a directed verdict, the court said: "The fact that both parties moved for a directed verdict did not require the trial court to direct a verdict, the motions not amounting to a consent that the case be taken from the jury." See also *Second Nat. Bank v. Smith* (1918) 91 N. J. L. 531, 1 A.L.R. 470, 103 Atl. 862, following *Hayes v. Kluge* (N. J.) supra.

In Oklahoma it has been held that where both parties verbally move for peremptory instructions, such fact does not constitute a waiver of the right to a jury trial. *Farmers' Nat. Bank v. McCall* (1910) 25 Okla. 600, 26 L.R.A. (N.S.) 217, 106 Pac. 866. In that case the court in discussing the point said: "Counsel for defendant in error in his brief insists that, each party having asked for a peremptory instruction, it had the effect of taking the case out of the hands of the jury and leaving it to the court, and in that event, if it became necessary for the court to weigh conflicting evidence, that then the giving of the peremptory instruction in favor of the defendant in error was without error, and, in any event, the evidence was conflicting, and that this court will not disturb the finding of the court where there is conflict in the evidence. There are some authorities that support this contention, but we decline to follow the same. Further, § 20 of article 7 of the Constitution of Oklahoma provides that 'in all is-

sues of fact joined in any court, all parties may waive the right to have the same determined by jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by jury.' In order to agree with the contention of the defendant in error, it would be necessary to conclude that the verbal moving by each side for a peremptory instruction was tantamount to a waiving of the right by a jury. Section 20, supra, is identical with § 13 of article 4 of the Constitution of North Carolina. . . . The supreme court of North Carolina has never held, under such provisions of the Constitution and the enforcing statutes thereto, that a jury might be waived dehors the record. In the case of *Johnston v. Haynes* (1873). 68 N. C. 509, where neither the written consent was filed nor any oral consent entered of record, it was held that it was too late to object in the supreme court that such consent had not been made, or did not appear of record. In numerous North Carolina cases it has been held that, where any paper or order of record reasonably showed consent either express or implied to waive a jury, the jury would be considered as waived. In this case there appears nothing of the kind. Section 5808, Okla. Comp. Laws 1909, provides that 'the trial by jury may be waived by the parties, in actions arising on contract, and with the assent of the court in other actions, in the following manner: By the consent of the party appearing when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal.' The moving for peremptory instruction by each side in this case cannot be fairly inferred to come within such rule. There is nothing of record in any way to show that it was the intention of the parties thereby to waive a jury." The *McCall Case* was followed in *Taylor v. Wooden* (1911) 30 Okla. 6, 36 L.R.A.(N.S.) 1018, 118 Pac. 372. In *Midland Valley R. Co. v. Lynn* (1913) 88 Okla. 695, 18 A.L.R.—92.

185 Pac. 370, the court, discussing the contention of the defendant that the case was not in point because the motions for peremptory instructions therein were oral, said: "It is true that in the opinion the motions were referred to throughout as verbal, meaning thereby that they were made orally; but we do not understand that the conclusion was based upon so limited a reason."

In Tennessee a distinction is drawn between a motion for peremptory instructions and a demurrer to the evidence, and it has been held that concurring motions for peremptory instructions made by both parties do not have the effect of an agreement by the parties that the whole controversy shall be determined by the trial judge. *Virginia-Tennessee Hardware Co. v. Hodges* (1912) 126 Tenn. 370, 149 S. W. 1056. In that case the supreme court considered the case as one of first impression in Tennessee, and after an extended argument disapproved the view adopted in the majority of jurisdictions, stating its conclusion on the subject as follows: "We are of the opinion that, under the true practice, the motion of each party should be treated for what it is, a matter wholly distinct from and adverse to that of his adversary; that neither is put in a worse position, so far as concerns his ultimate right of review, by his adversary's making a similar motion; that such motion should stand as if made and remaining alone, and should be disposed of on its own merits; that the only question submitted to the trial judge is the question of law above indicated; that, as a necessary preliminary to responding to this question, he must determine whether there is any substantial conflict in the evidence; that if he finds such conflict, or undisputed evidence from which conflicting inferences may reasonably be drawn, on material points, he should submit the case to the jury; that if he is of opinion there is no such conflict, he should sustain the motion of one party or of the other, according to his view of the facts and the law; that the party

whose motion has been overruled may have the action of the trial judge reviewed on appeal, without the necessity of asking the submission of any special question or questions to the jury; that on such appeal he may attack the action of the trial judge, in overruling his motion and in sustaining that of his adversary, and may put forward his contention of the facts and assail that of his adversary; and the appellate court will for itself ascertain the facts, and will determine whether the trial judge should have sustained the one motion or the other, or should have submitted the case to the jury." The view adopted in the Hodges Case, *supra*, was approved in *King v. Cox* (1912) 126 Tenn. 553, 151 S. W. 58, wherein the court explained in detail the difference between a motion for peremptory instructions and a demurrer to the evidence. The court held that "a party, by making a motion for peremptory instructions, does not waive any exceptions he may have reserved against the action of the trial judge in his rulings against him on questions of evidence; and that he, on his motion for new trial, may assign such errors, along with the action of the trial judge in granting to his adversary or in refusing to himself a motion for peremptory instructions."

In Vermont it has been held that the mere fact that each party moves for a directed verdict does not amount to a consent that the case shall be taken from the jury. *Fitzsimmons v. Richardson* (1912) 86 Vt. 229, 84 Atl. 811, wherein the court said: "At the close of the evidence, each party claimed that a verdict should be directed in his favor, and filed a motion to that end. The court made a pro forma order directing a verdict for the defendants, and, such verdict being returned, entered a pro forma judgment thereon. To the direction of the verdict and to the judgment thereon the plaintiff accepted. The exception raises the question of whether there was evidence fairly and reasonably tending to sustain the plaintiff's claim." The court then continued: "The defendants' claim

that, because of the two motions, it was the duty of the court to direct a verdict one way or the other. But this claim is unsound. Where it affirmatively appears that neither party wishes to go to the jury, it is for the court to direct such a verdict as in its judgment the evidence requires. . . . There is nothing novel about this practice, for the parties in civil cases can always by agreement substitute the court for the jury. But the mere fact that each party to a cause moves for a verdict in his favor does not amount to a consent that the case shall be taken from the jury. One who claims that the evidence is all his way does not waive the right to claim that, at least, some of it is his way, and that right is not affected by the fact that the other party moves that a verdict be directed in his favor." See also *Woodsville Guaranty Sav. Bank v. Rogers* (1909) 82 Vt. 468, 74 Atl. 85. But where there was no conflict in the evidence or facts, and so nothing to go to the jury, the defendant having offered no evidence, it was held that a verdict was properly directed by the court following a request therefor by both parties. *MASON v. SAULT* (reported herewith) ante, 1426.

b. Exception to rule.

However, even in jurisdictions repudiating the majority rule it has been held that requests for directed verdicts from both parties, together with an express or implied consent to allow the court to dispose of the case, will effect a waiver of submission of the case to the jury. *Wells v. Western U. Teleg. Co.* (1909) 144 Iowa, 605, 24 L.R.A. (N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371; *Murray v. Brotherhood of American Yeomen* (1917) 180 Iowa, 626, 163 N. W. 421; *Conkling v. Knights & Ladies of Security* (1918) 183 Iowa, 665, 166 N. W. 384; *Clay County v. Olson* (1913) 123 Minn. 437, 143 N. W. 970; *Philadelphia Brewing Co. v. McOwen* (1909) 76 N. J. L. 636, 131 Am. St. Rep. 664, 73 Atl. 518, 16 Ann. Cas. 648; *Lowe v. Vermont Sav. Bank* (1916) 90 Vt. 532, 98 Atl. 1023;

Brightlook Hospital Asso. v. Garfield (1918) 92 Vt. 353, 104 Atl. 99; **Buckley v. Jennings** (1921) — Vt. —, 114 Atl. 40.

In **Wells v. Western U. Teleg. Co.** (Iowa) *supra*, the court justified a verdict directed for the plaintiff, following requests for a directed verdict by both parties, on the ground that, in addition thereto, counsel for the defendant had expressly agreed with the court that there were no disputed facts in the case and nothing for the jury to determine.

So, in **Murray v. Brotherhood of American Yeomen** (1917) 180 Iowa, 626, 163 N. W. 421, the court seemed to think that the Iowa rule on the question was contrary to the majority rule set out above, with exceptions, however, of which the instant case was one, where both sides consented to the disposition of the case by the court.

In **Conkling v. Knights & Ladies of Security** (1918) 183 Iowa, 665, 166 N. W. 384, both parties having requested the direction of a verdict, the trial court remarked that the jury was waived thereby. No objection was made by either party, no exception was taken, and, the case having been argued in the absence of a jury, it was held that the effect thereof was to waive the determination of any fact by a jury, and to submit all questions for the court's determination.

The court in **Clay County v. Olson** (1913) 123 Minn. 437, 143 N. W. 970, said: "There was no conflict in the evidence, and each party requested a directed verdict. It was practically conceded that there was no question for a jury. Under these circumstances, not having asked to have this question submitted to the jury, defendants cannot now complain because it was not submitted."

Both parties having conceded that the evidence presented no question for the jury, it was held in **Lowe v. Vermont Sav. Bank** (1916) 90 Vt. 532, 98 Atl. 1023, that the court properly directed a verdict, following requests by both parties to that effect.

In **Buckley v. Jennings** (1921) — Vt. —, 114 Atl. 40, following requests

from both parties for a directed verdict, the court addressed the jury as follows: "Matters have arisen . . . which are going to relieve you of some of your trouble. There has been a motion for a verdict on each side, and the matter shaped itself so that it has become the duty of the court, on the evidence . . . to rule as a matter of law, it being conceded by both sides that the uncontradicted testimony in the case is determinative of the outcome, and in that case it is the burden for the court, and not for the jury, there being no conflict." A verdict was then directed for the plaintiff, and the defendant took an exception to the directing of a verdict and the refusal of the defendant's motion, but none was taken to the statement of the court. The court on appeal said: "That statement to the jury showed what the court understood the position of the parties to be, and if defendant understood or claimed it to be otherwise, fairness to the court required him to make it known then and there, so that the court might correct itself if in error. This was not done, and the court acted according to the statement it so made. It would be unjust to that court to permit the defendant now to take a different position, thereby putting the court in error."

However, where a motion of one of the parties for a directed verdict is sustained, both parties having moved to that effect, the consent of the other party to the formal act of calling a juror from the box to sign the verdict should be waived has been held not to constitute a consent to the act of the court in refusing to submit the case to the jury. **Hammill v. Joseph Schlitz Brewing Co.** (1913) 165 Iowa, 266, 143 N. W. 110, 145 N. W. 511, *supra*.

And submission to a jury is not waived by counsel's assenting that there was no question for a jury, where such assent was conditional; as, e. g., where, when asked what question there was for the jury, the defendant's counsel said: "I don't think there is any, if the court takes the view of the law as we do,"—

which was followed by a fuller statement of his position. *Seaver v. Lang* (1918) 92 Vt. 501, 104 Atl. 877.

III. Rule in Georgia.

The state of the law in Georgia, on the point under discussion, does not apparently lend itself to formulation, as the cases do not seem to be in entire agreement.

In *Mims v. Johnson* (1911) 8 Ga. App. 850, 70 S. E. 139, the holding of the court is well stated in the first paragraph of the syllabus as follows: "Where both parties to a cause consent that the court direct a verdict though each moves that it be directed in his own favor, neither party can complain that the court erred in directing a verdict, though the losing party may except upon the ground that the verdict directed is erroneous."

The syllabus just quoted was made the holding of the court in *Sovereign Camp, W. W. v. Beard* (1921) 26 Ga. App. 130, 105 S. E. 629. See to the same effect *Lydia Pinkham Medicine Co. v. Gibbs* (1899) 108 Ga. 138, 33 S. E. 945. And another syllabus paragraph in *Sovereign Camp, W. W. v. Beard*, supra, pointed out that the verdict would not be disturbed, since there was sufficient evidence to support the finding.

In *Broadhurst v. Hill* (1912) 137 Ga. 833, 74 S. E. 422, it was argued that, both parties having requested the direction of a verdict, the question whether the case should be submitted to a jury had been waived thereby; and that, on overruling the motion of one of the parties, a verdict might be granted in favor of the other. It was held that the result of requests from both parties for a directed verdict was
to waive submission

jury, and to authorize the direction of a verdict for one of the parties where the evidence considered most favorable as to him did not demand such a verdict.

And in *Elder v. Woodruff Hardware & Mfg. Co.* (1915) 16 Ga. App. 255, 85 S. E. 268, the court said: "It appears to be settled in Georgia that, where both parties move the direction of a verdict, the party against whom the verdict is directed is not estopped, because of his motion, from excepting to the direction of the verdict against him." The case of *Mims v. Johnson*, supra, was distinguished on the ground that it was agreed by counsel on both sides therein that it was a proper case for the direction of a verdict.

IV. Rule in Kansas.

The two Kansas cases in point do not seem to be exactly in accord in principle, although the same result was attained in each instance. In *Dannefer v. Aurand* (1920) 106 Kan. 605, 189 Pac. 371, it was held that the plaintiff should have been allowed to go to the jury although both parties had asked for directed verdicts, the court apparently basing its decision on the fact that the plaintiff's right to a jury trial was saved by asking for the submission to the jury of certain questions and by the existence of conflicting testimony. The court otherwise seemed to approve the majority rule as heretofore stated.

But in *Smith v. Hutchinson Box Board & Paper Co.* (1917) 101 Kan. 274, 166 Pac. 484, the court said: "Neither party, by requesting a peremptory instruction in its favor, consented that the court might withdraw the case from the jury or give a

UNITED STATES, Appt.,
v.
STANLEY FIELD, Exr., etc., of Kate Field, Deceased.

United States Supreme Court—February 23, 1921.

(255 U. S. 257, 65 L. ed. 617, 41 Sup. Ct. Rep. 256.)

Internal revenue — estate tax — power of appointment — testamentary execution.

1. Property passing under a testamentary execution of a general power of appointment was not subject to the estate tax imposed by the Revenue Act of September 8, 1916, title II., by the provisions of § 202 that the value of the taxable estate of a decedent shall include the interest of the decedent at the time of his death, which, after his death, is subject to the payment of the charges against his estate and the expenses of his administration, and is subject to distribution as part of his estate, and any interest of which the decedent has at any time made a transfer, or with respect to which he has created a trust in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration.

[See note on this question beginning on page 1470.]

Statutes — construction — levying of tax.

2. The provisions of statutes levying taxes are not to be extended by implication.

[See 25 R. C. L. 1092, 1093; note in 17 A.L.R. 1029.]

Internal revenue — estate tax — conditions.

3. The conditions expressed conjunctively in the Revenue Act of September 8, 1916, title II. § 202 (a), levying an estate tax, cannot be read as if prescribed disjunctively; and unless the interest sought to be taxed fulfils all the conditions, it is not taxable.

Powers — estate of donee.

4. The existence of a power of appointment does not, in itself, vest any estate in the donee.

[See 21 R. C. L. 773.]

— appointed property as assets of donee's estate.

5. Where the donee of a power of appointment dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal, assets of his estate, and, in the absence of statute, if it passes to the executor at all, it does so, not by virtue of his office, but

as a matter of convenience, and because he represents the rights of creditors.

— rights of creditors of donee.

6. Creditors of the donee of a power of appointment can lay claim to the appointed estate, where the power is executed, only to the extent that the donee's own estate is insufficient to satisfy their demands.

[See 21 R. C. L. 785, 786.]

— effect of failure to execute power.

7. In the absence of statute, creditors of the donee of a power of appointment have no redress in case of a failure to execute the power.

— distribution of property as part of donee's estate.

8. Whether a power of appointment be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. If there be no appointment, it goes according to the disposition of the donor. If there be an appointment to volunteers, then, subject to whatever charge creditors may have against it, it goes not to the next of kin or the legatees of the donee, but to his appointees under the power.

APPEAL by the United States from a judgment of the Court of Claims (Hay, J.) sustaining a claim for refund of an estate tax. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Frank Davis, Jr., Assistant Attorney General, William L. Frierson, Solicitor General, and Thomas K. Schmuck, Special Assistant to the Attorney General, for the United States:

Contemporaneous construction of the law by the executive department called upon to carry it into effect is, of itself, entitled to great respect.

United States v. Pugh, 99 U. S. 265, 269, 25 L. ed. 322, 323; United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446.

The testamentary execution by a donee of a general power of appointment effects a transfer of the appointed estate within the meaning of § 202, ¶ (b), of the act.

Chanler v. Kelsey, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; Luques's Appeal, 114 Me. 235, 95 Atl. 1021; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

An appointed estate is subject to the payment of debts of a deceased appointor.

2 Sugden, Powers, chap. 8, ¶ 7, p. 29; Brandies v. Cochrane, 112 U. S. 344-352, 28 L. ed. 760-763, 5 Sup. Ct. Rep. 194; Knowles v. Dodge, 1 Mackey, 66; Duncanson v. Manson, 3 App. D. C. 260; Clapp v. Ingraham, 126 Mass. 200; Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694; Tallmadge v. Sill, 21 Barb. 34; Rogers v. Hinton, 62 N. C. (Phill. Eq.) 101; 4 Kent, Com. §§ 339, 340; 22 Am. & Eng. Enc. Law, 2d ed. 1147.

A general power of appointment is one which the donee of the power can exercise in favor of such person or persons as he pleases.

Farwell, Powers, 2d ed. 7.

For purposes of taxation, appointment of property under the power is a distribution of such property as part of the appointor's estate.

Chanler v. Kesley, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; 26 Am. & Eng. Enc. Laws, 605; Minot v. Treasurer (Minot v. Stevens) 207 Mass. 588, 33 L.R.A. (N.S.) 236, 93 N. E. 973; Brandies v. Cochrane, 112 U. S. 344, 352, 28 L. ed. 760, 763, 5 Sup. Ct. Rep. 194; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; 4 Kent. Com. 339; Tallmadge v. Sill, 21 Barb. 34; Duncanson v. Manson, 3 App. D. C. 260; Olney v. Balch, 154 Mass. 318, 28 N. E. 258; Scrafton v. Quincey, 2 Ves. Sr. 413, 28 Eng. Reprint, 264; 2 Sugden, Powers, 3d ed. § 19; Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694;

Atty. Gen. v. Upton, L. R. 1 Exch. 224, 4 Hurlst. & C. 336, 35 L. J. Exch. N. S. 138, 12 Jur. N. S. 489, 14 L. T. N. S. 334, 14 Week. Rep. 732.

Messrs. John P. Wilson, William B. Hale, and Walter Bruce Howe, for appellee:

Unless the tax collected in this case is imposed by clear and express words in the statute, it cannot be sustained.

Gould v. Gould, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; Thompson v. United States, 246 U. S. 547-551, 62 L. ed. 876-879, 38 Sup. Ct. Rep. 349; Caminetti v. United States, 242 U. S. 470, 490, 61 L. ed. 442, 455, L.R.A.1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168; Re Harbeck, 161 N. Y. 211, 55 N. E. 850; United States v. Bashaw, 1 C. C. A. 653, 4 U. S. App. 360, 50 Fed. 749.

The Revenue Act of 1916, as construed by the government, does not tax appointed property in all of the states, and therefore cannot be held to tax such property in any of the states, as excise taxes are required by art. 1, § 8, of the Constitution to be uniform throughout the United States.

Lederer v. Pearce, 266 Fed. 497; Knowlton v. Moore, 178 U. S. 41, 86, 44 L. ed. 969, 987, 20 Sup. Ct. Rep. 747.

The Revenue Act of 1916 does not contain clear and express words imposing an estate tax upon an interest in property never owned by appellee, but over which she had only a power of appointment.

McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Keays v. Blinn, 234 Ill. 121, 84 N. E. 628, 14 Ann. Cas. 37; Walker v. Treasurer, 221 Mass. 600, 109 N. E. 647; Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889; Sifford v. Cutler, 244 Ill. 234, 135 Am. St. Rep. 326, 91 N. E. 428, 18 Ann. Cas. 36; Hallbeck v. Stewart, 69 Ill. App. 225; Hill v. Treasurer, 229 Mass. 474, L.R.A.1918D, 337, 118 N. E. 891; O'Grady v. Wilmot [1916] 2 A. C. 231, 85 L. J. Ch. N. S. 386, 114 L. T. N. S. 1097, 32 Times L. R. 456, 60 Sol. Jo. 456.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a judgment

of the court of claims, sustaining a claim for refund of an estate tax exacted under title II. of the Revenue Act of September 8, 1916, as amended by Act of March 3, 1917 (chap. 463, 39 Stat. at L. 756, 777, chap. 159, 39 Stat. at L. 1000, 1002, Comp. Stat. § 6336½b, Fed. Stat. Anno. Supp. 1918, p. 305). It presents the question whether the act taxed a certain interest that passed under testamentary execution of a general power of appointment created prior, but executed subsequent, to its passage.

The facts are as follows: Joseph N. Field, a citizen and resident of Illinois, died April 29, 1914, leaving a will which was duly admitted to probate in that state, and by which he gave the residue of his estate, after payment of certain legacies, to trustees, with provision that one third of it should be set apart and held as a separate trust fund for the benefit of his wife, Kate Field, the net income to be paid to her during life, and from and after her death the net income of one half of said share of the trust estate to be paid to such persons and in such shares as she should appoint by last will and testament. The trust was to continue until the death of the last surviving grandchild of the testator, who was living at the time of his death, and, at its termination, the undistributed estate was to be divided among named beneficiaries or their issue, per stirpes, in proportions specified. Kate Field died April 29, 1917, a resident of Illinois, leaving a will which was duly probated in that state, by which she executed the power of appointment, directing that the income to which the power related should be paid in equal shares to her children surviving the date of the respective payments, the issue of any deceased child to stand in the place of such deceased child. The collector of internal revenue, assuming to act under the Revenue Act of 1916, as amended, and regulations issued by the Commissioner of Internal Revenue included as a part of the gross estate of Kate Field the estate passing under her

of the power; and proceeded to assess and collect an estate tax based upon the net value thereof, and amounting to \$121,059.60. Her executor, having paid the tax under protest, and having made a claim for refund which was considered and rejected by the Commissioner of Internal Revenue, brought this suit and recovered judgment, from which the United States appeals.

The Revenue Act of 1916, in § 201 (39 Stat. at L. 777, chap. 463), imposes a tax equal to specified percentages of the value of the net estate "upon the transfer of the net estate of every decedent dying after the passage of this act." By § 203 (p. 778) the value of the net estate is to be determined by subtracting from the value of the gross estate certain specified deductions. The gross estate is to be valued as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . ."

the gross estate passing under her appointment executed

The amendment of March 3, 1917 (39 Stat. at L. 1002, chap. 159, Comp. Stat. § 6336½b, Fed. Stat. Anno. Supp. 1918, p. 305), pertains merely to the rates, and need not be further considered.¹

The provision quoted from § 202 was construed by the Treasury Department, in U. S. Internal Revenue Regulations No. 37, relating to estate taxes, revised May, 1917, art. XI., as follows: "Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointer."

No question being suggested as to the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before, but executed after, the passage of the taxing act (see *Chanler v. Kelsey*, 205 U. S. 466, 473, 478, 479, 51 L. ed. 882, 886, 888, 889, 27 Sup. Ct. Rep. 550; *Knowlton v. Moore*, 178 U. S. 41, 56-61, 44 L. ed. 969, 975-977, 20 Sup. Ct. Rep. 747), the case involves merely a question of the construction of the act. Applying the accepted canon that the provisions of such acts are not to be

**Statutes—
construction—
levying of tax.**

extended by implication (Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53), we are constrained to the view—notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment.

The government seeks to sustain the tax under both clauses above quoted from § 202.

¹ The act was further amended October 3, 1917 (chap. 63, 40 Stat. at L. 300, 324, Comp. Stat. § 6336aa, Fed. Stat. Anno. Supp. 1918, p. 336); superseded and repealed by Act of February 24, 1919 (chap. 18, 40 Stat. at L. 1057, 1096, 1149).

The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which, after his death, is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate.

These conditions are —estate tax— conditions. expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

The chief reliance of the government is upon the rule, well established in England and followed generally, but not universally, in this country, that where one has a general power of appointment, either by deed or by will, and executes the power, equity will regard the property appointed as part of his assets for the payment of his creditors, in preference to the claims of his voluntary appointees. See *Brandies v. Cochrane*, 112 U. S. 344, 352, 28 L. ed. 760, 763, 5 Sup. Ct. Rep. 194.

The English cases are fully reviewed by the House of Lords in *O'Grady v. Wilmot* [1916] 2 A. C. 231, 246, et seq., 85 L. J. Ch. N. S. 386, 114 L. T. N. S. 1097, 32 Times L. R. 456, 60 Sol. Jo. 456. Illustrative cases in the American courts are *Johnson v. Cushing*, 15 N. H. 298, 307, 41 Am. Dec. 694; *Rogers v. Hinton*, 62 N. C. (Phill. Eq.) 101, 105; *Clapp v. Ingraham*, 126 Mass. 200, 202; *Knowles v. Dodge*, 1 Mackey, 66, 72; *Freeman v. Butters*, 94 Va. 406, 411, 26 S. E. 845; *Tallmadge v. Sill*, 21 Barb. 34, 51, et seq.; contra, per Gibson, Ch. J., in *Com. v. Duffield*, 12 Pa. 277, 279-281; *Pearce v. Lederer*, 262 Fed. 993, affirmed in *Lederer v. Pearce*, 266 Fed. 497.

It is tacitly admitted that the rule obtains in Illinois, and we shall so assume.

But the existence of the power

does not of itself vest any estate in the donee. Collins v. Wickwire, 162 Mass. 143, 144, 38 N. E. 365; Keays v. Blinn, 234 Ill. 121, 124, 84 N. E. 628, 14 Ann. Cas. 37; Walker v. Treasurer, 221 Mass. 600, 602, 603, 109 N. E. 647; Shattuck v. Burrage, 229 Mass. 448, 451, 118 N. E. 889. See Carver v. Jackson, 4 Pet. 1, 93, 7 L. ed. 761, 793.

Where the donee dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal, assets of his estate (Clapp v. Ingraham, 126 Mass. 200, 208; Patterson v. Lawrence, 83 Ga. 703, 707, 7 L.R.A. 143, 10 S. E. 355); and (in the absence of statute), if it passes to the executor at all, it does so not by virtue of his office, but as a matter of convenience, and because he represents the rights of creditors (O'Grady v. Wilmot [1916] 2 A. C. 231, 248-257, 85 L. J. Ch. N. S. 386, 114 L. T. N. S. 1097, 32 Times L. R. 456, 60 Sol. Jo. 456; Smith v. Garvey, 22 N. C. (2 Dev. & B. Eq.) 42, 49; Olney v. Balch, 154 Mass. 318, 322, 28 N. E. 258; Emmons v. Shaw, 171 Mass. 410, 411, 50 N. E. 1033; Hill v. Treasurer, 229 Mass. 474, 477, L.R.A.1918D, 337, 118 N. E. 891).

Where the power is executed, creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands. Patterson v. Lawrence, 83 Ga. 703, 708, 7 L.R.A. 143, 10 S. E. 355; Walker v. Treasurer, 221 Mass. 600, 602, 603, 109 N. E. 647; Shattuck v. Burrage, 229 Mass. 448, 452, 118 N. E. 889.

It is settled that (in the absence of statute) creditors have no redress in case of a failure to execute the power. Holmes v. Coghill, 7 Ves. Jr. 499, 507, 32 Eng. Reprint, 201, 6 Revised Rep. 166, affirmed in 12 Ves. Jr. 206, 214,

215, 33 Eng. Reprint, 79, 8 Revised Rep. 323, 21 Eng. Rul. Cas. 577; Gilman v. Bell, 99 Ill. 144, 150; Duncanson v. Manson, 3 App. D. C. 260, 273.

And, whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. If there be no appointment, it goes according to the disposition of the donor. If there be an appointment to volunteers, then, subject to whatever charge creditors may have against it, it goes not to the next of kin or the legatees of the donee, but to his appointees under the power.

It follows that the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a).

We deem it equally clear that it was not within clause (b). That clause is the complement of (a), and is aptly descriptive of a transfer of an interest in decedent's own property in his lifetime, intended to take effect at or after his death. It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over property not his own.

It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (§ 402 (e), 40 Stat. at L. 1097, chap. 18, Comp. Stat. § 6336½ c): "To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed

Powers—estate
of donee.

—appointed
property as
assets of donee's
estate.

—distribution
of property as
part of donee's
estate.

—rights of
creditors of
donee.

—effect of
failure to
execute power.

executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except," etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment. See *Re Miller*, 110 N. Y. 216, 222, 18 N. E. 139; *Re Harbeck*, 161 N. Y. 211, 217, 218, 55 N. E. 850; *United States v. Bashaw*, 1 C. C. A. 653, 4 U. S. App. 360, 50 Fed. 749, 754. The government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong. 2d Sess.). It is evident, however, that this statement was based upon the interpretation of the Act of 1916, adopted by the Treasury Department; the same report proceeded to declare (p. 102) that "the absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax;" and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance.

The tax in question being unsupported by the taxing act, the Court of Claims was right in awarding reimbursement.

Judgment affirmed.

NOTE

The decision in the reported case (*UNITED STATES v. FIELD*) ante, 1461, settles the construction of the statute there involved. Before the decision had been rendered, however, the statute had been amended by the Act of February 24, 1919 (chap. 18, § 402), which provides that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . . (e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth." 40 Stat. at L. 1097, Comp. Stat. § 6336½c.

The general question of succession tax on property passing under power of appointment is discussed in note, post, 1470.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania, Plff. in Err.,

v.

JOHN W. PEARCE, Exr., etc., of Alfred Pearce, Deceased.

United States Circuit Court of Appeals, Third Circuit — June 14, 1920.

(266 Fed. 497.)

Tax — estate — property passing under power of appointment.

Property passing under the exercise of a power of appointment by one having a life use of it, with power of appointment, is not subject to the Federal estate tax which is imposed upon the transfer of property in which decedent has an interest which is subject to distribution as part of his estate, where, by the law of the state of his domicil, the donee of a power is vested with no interest in its subject-matter, and therefore con-

veys none by its exercise, and it is immaterial that the donee attempts to blend the property covered by the power with his own and make it answerable for his debts if it is not necessary for that purpose.

[See note on this question beginning on page 1470.]

ERROR to the District Court of the United States for the Eastern District of Pennsylvania (Dickinson, Dist. J.) to review a judgment in favor of plaintiff in a suit brought to recover an amount alleged to have been unlawfully exacted as an inheritance tax on the estate of plaintiff's testator. *Affirmed.*

The facts are stated in the opinion of the court.

Argued before Buffington, Woolley, and Haight, Circuit Judges.

Messrs. Robert J. Sterrett and Charles D. McAvoy, for plaintiff in error:

The estate over which the testator had a general power of appointment under his mother's will is so blended by the terms of the testator's will that it becomes subject to the estate tax imposed by the Act of September 8, 1916, chap. 463; 2 Sugden, Powers, 6th ed. chap. 8, § 3, ¶ 6, p. 29; Powell, Powers, 2d ed. 1799, p. 366; Stokes's Estate, 3 Pa. Co. Ct. 194; Horner's Estate, 4 Pa. Co. Ct. 189; Fell's Estate, 14 Pa. Dist. R. 327; Huey's Estate, 17 Pa. Dist. R. 1030; Huddy's Estate, 236 Pa. 276, 84 Atl. 909.

Mr. A. U. Bannard, for defendant in error:

The property in question was not subject to the estate tax.

Com. v. Duffield, 12 Pa. 277; Com. v. Williams, 13 Pa. 29; Pennsylvania Co. v. McClain, 105 Fed. 367, 47 C. C. A. 529, 108 Fed. 618; Fidelity Trust Co. v. McClain, 118 Fed. 152, 57 C. C. A. 679, 122 Fed. 1020; Olney v. Balch, 154 Mass. 318, 28 N. E. 258; Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033; Re Stewart, 131 N. Y. 274, 14 L.R.A. 836, 30 N. E. 184.

Messrs. E. Bartram Richards and Thomas Raeburn White amici curiæ.

Woolley, Circuit Judge, delivered the opinion of the court:

This is a suit brought against a collector of internal revenue to recover taxes assessed and collected on the theory that property passing under a general power of appointment, exercised by a testator, constituted a part of his estate and was, as such, liable for an estate tax under the Act of September 8, 1916, chap. 463, 39 Stat. at L. 777, as amended by the Act of March 3, 1917, chap. 159, 39

Stat. at L. 1002, and the Act of October 3, 1917, chap. 63, 40 Stat. at L. 324, Comp. Stat. §§ 6336½b, 6336½bbb, Fed. Stat. Anno. Supp. 1918, pp. 305, 311.

Elizabeth Pearce, dying before the passage of the act, bequeathed certain of her property to trustees, with direction that they divide it into equal parts and pay the income therefrom, under spendthrift trusts, to her several children for the terms of their respective lives; and, in the event of the decease of any one of her children, she (further disposing of her property by the same will) gave, devised, and bequeathed the principal of that part of her estate to the income of which the child so dying had been entitled while living, "unto such person or persons for such uses and purposes . . . as may be set forth and declared in any last will and testament" that such child might make.

Alfred Pearce, a son of Elizabeth Pearce, dying after the passage of the act, seised of an estate of his own and possessed of the recited power of appointment, left a will whereby he provided for the payment of his debts and also for the payment of sundry legacies in excess of his own estate, and exercised the power of appointment by including "in the dispositions" of his will the share of the principal of the mother's estate to which the power related.

From John W. Pearce, executor of the will of Alfred Pearce, the collector of internal revenue demanded payment of an estate tax assessed on property which included that which was the testator's own and that with

reference to which he had as donee of the power made appointments. John W. Pearce, being also trustee under the will of Elizabeth Pearce, the donor of the power, resisted payment of part of the taxes on the contention that the property which passed under the power to the appointees of Alfred Pearce, the donee, was the property of Elizabeth Pearce, the donor; that it passed not under his will, but under hers; and that, not being "subject to distribution as part of his estate," his estate was not liable for the tax. Failing to impress the collector with this position, the executor of Alfred Pearce paid the tax under protest, and, after the usual formalities, brought this action to recover the same. Judgment was rendered for the executor, and the collector sued out this writ of error. 262 Fed. 993.

There is but one question in this case, and this question, when considered with reference to the facts out of which it arises, is fraught with little difficulty. It is: Whose property passed under the power, property of the donor or of the donee? Upon the answer to this question the law acts with no uncertainty.

By § 201 of the applicable act (39 Stat. at L. 777), a tax, equal to given percentages of the value of the net estate, is "imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

In order to obtain a net estate of a decedent as a basis for taxation, § 202 directs how his gross estate shall first be determined, by providing that it shall include the value of all property, "(a) to the extent of the interest therein of the decedent at the time of his death which, after his death, is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate."

The gross estate of a decedent being thus ascertained, § 203 provides, by allowing sundry deductions therefrom, how the net or taxable

estate shall be determined. *Lederer v. Northern Trust Co.* 262 Fed. 52 (C. C. A. 3d).

As the tax is imposed upon the transfer of property in which a decedent dying after the passage of the act has an interest which is subject to distribution as part of his estate, it is clear that if the property which passed under the exercise of the power of appointment in this case was the property of Elizabeth Pearce, the donor of the power, and as such was subject to distribution as part of her estate, her estate is not liable for the tax, because she died before the passage of the act; and, although Alfred Pearce died

*Tax—estate—
property passing
under power of
appointment.*

after the passage of the act, neither, in such event, is his estate liable, because "at the time of his death" he had no "interest" in the property "which, after his death," was "subject to the payment of the charges against his estate and the expenses of its administration and [was] subject to distribution as part of his estate," unless he made it such, within the Pennsylvania law, when, upon exercising the power of appointment, he included the property of the power in his testamentary dispositions.

From the form of the Federal Estate Tax Act, it is evident the Congress intended that the act should operate not in opposition to, but in harmony with, the many different state acts with which, because of its very terms, it would come into contact. *Lederer v. Northern Trust Co.* supra. Therefore, in creating an estate tax, the Congress very wisely leveled the tax at that property of decedents which is subject to distribution as part of their estates according to the laws of different states (§ 202), after deducting therefrom such expenses, claims, and charges against estates as are allowed by the laws of the states under which they are administered (§ 203). Thus it appears that the Federal estate tax may reach property in one state when it would fail to reach like property in

another, according as the laws of distribution and administration vary in different states. The law of the state being the test of the valid assessment of the tax against given property, our inquiry is, therefore, directed to the law of Pennsylvania to determine whose property passed on the exercise of the power of appointment in this case, and under whose estate was the property distributed.

The rule in England is that a donee of a power takes a beneficial interest in the property of the power, and, upon the exercise of the power, the property becomes a part of his estate, subject to his debts like his other property, in preference to the claims of legatees or appointees. 2 Sugden, Powers, 6th ed. chap. 8, § 3, ¶¶ 6 & 7; Powell, Powers, 2d ed. 366; Lassells v. Cornwallis, 2 Vern. 465, 23 Eng. Reprint, 393; Thompson v. Town, 2 Vern. 319, 23 Eng. Reprint, 806; Hinton v. Toye, 1 Atk. 465, 26 Eng. Reprint, 296; Shirley v. Ferrers, cited in 2 Atk. 172, 26 Eng. Reprint, 508; Townshend v. Windham, 2 Ves. Sr. 2, 28 Eng. Reprint, 2; Holmes v. Coghill, 7 Ves. Jr. 503, 32 Eng. Reprint, 203; Jenney v. Andrews, 6 Madd. Ch. 264, 56 Eng. Reprint, 1091. The English doctrine is rejected in Pennsylvania by the supreme court in *Com. v. Duffield*, 12 Pa. 277, and, upon an opinion by Chief Justice Gibson, a new rule was established to the effect that a donee of the power is vested with no interest in its subject-matter, and therefore conveys none by the exercise of the power; that on the exercise of a power by the donee property passes by the will of the donor as part of his estate, not as part of the estate of the donee; and that the appointees of the donee of the power derive title immediately from the donor.

The plaintiff does not challenge his rule. Indeed, he admits that by his rule, if applicable, the property in question passed under the will of Elizabeth Pearce, the donor of the power, and was not liable for the

Federal estate tax. But he contends that because, in this particular case, the donee in exercising the power included the property of the power in his will and made it liable for the payment of his debts, he thereby "blended" the property of the power with property of his own and made it "part of his estate," and, accordingly, made it liable for the Federal estate tax.

The doctrine of "blending," upon which alone the plaintiff relies in this case, has not, so far as we have been informed, been directly passed upon by the supreme court of Pennsylvania, but it has been considered (though diversely regarded) by the orphans' courts of different counties in that commonwealth. The learned trial judge has discussed this doctrine at length (262 Fed. 993) giving to the Pennsylvania cases, so far as they have arisen, an analysis in which we discern no weakness. He held in effect that the Pennsylvania rule as announced by Chief Justice Gibson prevails even against the doctrine of blending, where the donee of a power, in its exercise, makes provision for the payment of his debts out of the property of the power, on the principle that under such an exercise of a power by a testator the appointment is to creditors, not to the estate, and that creditors take not *qua* creditors, but *qua* appointees; and that the property passes to creditor appointees, not from the donee through his estate, but from the donor through his estate; just as under the general rule it passes to appointees designated by name, though described here by class.

We have been much impressed by the reasoning of the learned trial judge upon the application of this rule of Pennsylvania law to the facts of this case; yet, as it involves an interpretation of a rule of state law, we hesitate, as a Federal court (in the absence of pronouncement by the state supreme court), to express an opinion either approving or disapproving the opposite views of county courts,—the only state courts that have expressed themselves,—

when there is in the case one fact which, standing apart and alone, determines the case.

The orphans' court of Philadelphia follows a rule—with which, apparently, the doctrine of blending had its rise—that the mere direction by a testamentary donee of a power to pay his debts with the property of the power is sufficient to blend the estates and cause property under a general power of appointment to become part of and to pass through the estate of the donee (*Stokes's Estate*, 3 Pa. Co. Ct. 193; *Horner's Estate*, 4 Pa. Co. Ct. 189), though in the absence of such direction the property of the power would not so pass. Regarding this rule as applicable to this case, the orphans' court first awarded the property of the power here in question to John W. Pearce, executor of the will of Alfred Pearce, the donee, for administration under his estate. By later and final adjudication, the orphans' court, on being presented by the executor of Alfred Pearce with an account which did not include any portion of the property of the power, and on being shown that Alfred Pearce's own estate was more than sufficient to pay his debts, amended the previous adjudication and awarded the property of the power not to the executor of the will

of Alfred Pearce for distribution, but directly to his appointees.

As to facts, this was a holding that the property which passed under the exercise of the power was not property in which the donee testator had an "interest," and was therefore not property "subject to distribution as part of his estate," but was the property of the donor of the power and as such was subject to distribution as part of her estate. As to the law, it was a holding (upon an interpretation of its own doctrine of blending) that the doctrine did not apply in a case where, like this one, the donee's own estate is sufficient to pay his debts. As this decision of the orphans' court—a court of competent jurisdiction whose judgment we regard as binding upon us—put out of the case the doctrine of blended estates, the general rule of law as pronounced by the supreme court of Pennsylvania through Chief Justice Gibson returns to control our decision. We think the collector was entirely correct in admitting that under this rule, if applicable, the property in question was not liable to an estate tax. We find the rule applicable.

The judgment below is affirmed.

Petition for rehearing denied June 23, 1920.

ANNOTATION.

Inheritance or succession tax on property covered by power of appointment.

I. Taxability under donee's will:

a. Under statutes not expressly covering powers:

1. Where power is not exercised, 1470.

2. Where power is exercised:

(a) Generally, 1471.

(b) Statute enacted after creation of power, 1472.

(c) In cases of nonresidents, 1474.

b. Under statutes expressly covering powers:

I. Taxability under donee's will.

a. Under statutes not expressly covering powers.

1. Where power is not exercised.

The New York court has held that

L b.—continued.

1. Powers not exercised, 1475.

2. Powers exercised:

(a) Generally, 1475.

(b) Statute enacted after creation of power, 1479.

(c) In case of nonresidents, 1487.

II. Present taxability under donor's will, 1489.

III. Power of appointment reserved by grantor, 1491.

IV. Miscellaneous cases, 1491.

the transfer effected by an instrument in which the grantor conveyed property in trust, to pay the income to himself during his life and upon his death to give the remainder to his

daughter, if she should be living, or, if she should be dead, then to such persons as she should by will appoint, or, in default of appointment, then to such persons as would be entitled to the same if she had died intestate and in possession of the property,—is, the power not having been exercised, embraced within the meaning of the Act of 1892, enacted before the execution of the instrument by the grantor, and providing that a tax shall be imposed when the transfer is of property by deed, grant, bargain, sale, or gift made in contemplation of death of the grantor, or intended to take effect in possession or enjoyment at or after such death. *Re Cruger* (1900) 54 App. Div. 405, 66 N. Y. Supp. 636, affirmed without opinion in (1901) 166 N. Y. 602, 59 N. E. 1121. The court pointed out that the donee took a vested remainder subject to be defeated by her death before that of the grantor, and that her next of kin took a contingent remainder dependent upon her death within the lifetime of the donor, unmarried, without issue, and without having exercised the power of appointment. The court also said that, although the remainders must be held to have vested, subject to be defeated by certain contingencies, yet the remaindermen could not have had actual possession and enjoyment or right of possession until the death of the grantor.

But a widow who, by her husband's will, is given property during her natural life, "to be retained or disposed of as she may think proper," takes an absolute estate under the New York Real Property Statute, providing that where a power of disposition is given and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee; and therefore the failure of the widow to exercise the power of appointment does not cause her property to descend to the testator's heirs at law, so as to warrant the assessment of a transfer tax against them. *Re Lynn* (1901) 34 Misc. 681, 70 N. Y. Supp. 730.

Those who take, upon failure of a donee of a power of appointment to exercise the power, were held to take

under the instrument creating the power, in *Re Murphy* (1920) 182 Cal. 740, 190 Pac. 46, a holding which in this case rendered the transfer subject to the tax.

See also *Re Langdon* (N. Y.) *infra*, I. a, 2 (b).

2. Where power is exercised.

(a) Generally.

It is a theory of some courts that those who take through the exercise of a power of appointment take from the donor of the power, and not by virtue of its exercise, hence the transfer is not subject to the inheritance or succession tax as a transfer from the donee. *Com. v. Williams* (1850) 13 Pa. 29; *Com. v. Sharpless* (1884) 2 Chester Co. Rep. (Pa.) 246. The application of this rule in *Com. v. Williams* (Pa.) *supra*, led to the result that where a testator gave his daughter a life estate in property, and provided that upon her death it should pass to such persons as she should by will appoint, and she exercised the power by appointing her brothers and sisters, the lineal descendants of the original testator, the interest of such descendants was not taxable under a statute imposing a collateral inheritance tax upon estates passing by will to any person except lineal descendants, for the reason that such persons took lineally under the will of the original testator, and not collaterally under the will of the donee of the power. So, where a power of appointment created by a testator in favor of his daughter was exercised by her in favor of her brother and stepmother, the son and wife of the testator, it was held that their estate was derived from the testator's will, and was not subject to the collateral inheritance tax. *Com. v. Sharpless* (Pa.) *supra*.

In *Lisle's Estate* (1903) 22 Pa. Super. Ct. 262, it appeared that a testatrix devised property to her four children in fee, share and share alike, but requested them in making their wills to give the property so received, "unless the strongest reasons should urge them to the contrary," to the direct heirs of the testatrix and her husband; that three of the children

died, and their shares became vested in the fourth, under wills complying with the request of the testatrix; and that upon the death of the survivor, after having made a will disposing of all of the property so transferred by the testatrix, to the survivor's nephews and nieces, a collateral inheritance tax was sought to be imposed upon the interest passing to the latter. Applying the doctrine that an absolute estate given by will is reduced to a life estate with remainder in trust, by succeeding words of desire, expectation, or confidence, the court held that the children took life estates with remainder to the "direct heirs," subject to the power of appointment, and that therefore the nieces and nephews took to the extent of the three portions which the donee acquired under the wills of her sisters, by virtue of her absolute ownership, subject to the payment of the collateral inheritance tax, but that the other portion, passing under her power of appointment to them as lineal descendants of the original testatrix, was not liable to such tax. Of course, so far as the interest which vested absolutely in the donee is concerned, no question of power of appointment was involved, and the case throws little light upon the question here considered. See also *Re Lynn* (N. Y.) *supra*, I. a, 1.

So, in *Com. v. Sharpless* (Pa.) *supra*, the share of a granddaughter which, under the grandfather's will, was subject to her father's power to appoint such uses in respect thereof for the benefit of herself and "issue" as he should see fit, and which she willed to her brother, was held subject to a collateral inheritance tax as part of her estate, notwithstanding the father's attempt to declare a trust for her life with absolute testamentary power of disposal in her. The decision was upon the ground that the father's power did not extend to conferring an absolute power of disposal upon her; and therefore she took an absolute estate, subject only to the trust declared by the father for her lifetime.

And a somewhat analogous case is *Com. v. Stoll* (1909) 132 Ky. 237, 114

S. W. 279, 116 S. W. 687, holding that where a testator devised property to his wife in fee, with absolute power to dispose of the same by will or otherwise, but attempted to dispose of any remainder that should not be disposed of by the wife, the devise over was void, and therefore persons entitled to the property upon the death of the wife intestate took it from her by descent, and not under the will of the testator, and the property was therefore subject to an inheritance tax, under a statute enacted subsequently to the death of the testator.

In *Re Murphy* (1920) 182 Cal. 740, 190 Pac. 46, it was held that, where those who would take in default of the exercise of a power of appointment took the same estate under its exercise as they would have taken upon default, they held under the original instrument creating the power, although in this case the effect of the holding was to render the transfer subject to a tax.

By the decision in *LEDERER v. PEARCE* (reported herewith) *ante*, 1466, and that of the United States Supreme Court in *UNITED STATES v. FIELD* (reported herewith) *ante*, 1461, it is now settled that property passing by virtue of the exercise of a power of appointment is not subject to a tax under the Federal statute involved in those cases. *Ebersole v. McGrath* (1920) 271 Fed. 995, appeal dismissed in (1921) 272 Fed. 1022, is to the same effect.

(b) *Statute enacted after creation of power.*

The theory that the appointee takes by virtue of the original grant precludes the exaction of a tax under a statute enacted after the death of the donor of the power; and so it has been held. *Fidelity Trust Co. v. McClain* (1902) 113 Fed. 152, affirmed in (1903) 57 C. C. A. 679, 122 Fed. 1020; *State v. United States Trust Co.* (1917) 99 Kan. 841, L.R.A.1917C, 975, 163 Pac. 156; *Emmons v. Shaw* (1898) 171 Mass. 410, 50 N. E. 1033; *Re Harbeck* (1899) 161 N. Y. 211, 55 N. E. 850; *Atty. Gen. v. Parker* (1898) 31 N. S. 202.

Various statements and applications to this rule appear. Corporate stock belonging to a testator and directed in his last will and testament to be given for life to his wife, and the remainder thereof to such persons as she shall appoint, is held in *State v. United States Trust Co.* (1917) 99 Kan. 841, L.R.A.1917C, 975, 163 Pac. 156, to belong to the estate of the testator, and therefore not to be within the operation of an inheritance tax law which excepted therefrom estates of persons deceased prior to the taking effect thereof. And this is true although the widow exercised the power of appointment given her in the will after the enactment of the statute. Since an estate created by the execution of a power of appointment takes effect in the same manner as if it had been created by the instrument which raised the power, the estate is not taxable where the power is created by will before the enactment of the statute imposing the tax, even though the power is exercised afterwards. *Re Harbeck* (1899) 161 N. Y. 211, 55 N. E. 850. So, it has been held that, under an act imposing a tax in respect of property or any interest therein or income therefrom passing by will, no tax is enforceable when property passes to a person by virtue of the exercise, even after the passage of the act, of a power of appointment created before the passage of the act, for the appointee does not take from the donee of the power, but takes in the same manner as if his name had been inserted in the power, or as if the power and the instrument executing it had been expressed in that creating it. *Atty. Gen. v. Parker* (1898) 31 N. S. 202. And it was held in *Emmons v. Shaw* (1898) 171 Mass. 410, 50 N. E. 1033, that the donor, and not the donee, of an absolute power of disposition, was the "decendent," within the meaning of an act imposing a tax upon the property of a decedent which should pass by will or other instrument intended to take effect on his death, to persons who did not sustain to him the relation described in the act, and therefore that a remainder which went to the appointee after the

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death of the donee was not subject to the tax, where the statute was enacted subsequently to the death of the donor. The court pointed out that the statute did not provide for a tax on all property transmitted by will, but only on the property passing by will to persons who did not sustain to the decedent the relation described in the act, and that therefore any argument that the tax was in the nature of a duty or excise on the privilege of transmitting property by will was of no assistance in determining whether the donor or the donee was to be regarded as the decedent. So, where the testator gives the donee a life estate, and the remainder to certain named persons, and the power of appointment in the donee is confined to prescribing the manner and proportion in which the remaindermen shall take, the latter take under the will of the testator, and not under the will of the donee, and are, therefore, not subject to United States Revenue Act of 1898, which was enacted before the power of appointment was exercised, but after the death of the donor, and which purports to subject to the tax any person having in charge or trust as administrators, executors, or trustees, any legacies or distributive shares passing after the passage of the act from any person possessed of such property, either by will or by the intestate laws. The court said that the donee was not "the person possessed," within the meaning of the statute, for the reason that the appointees took nothing from the donee, but simply took after her, and that although the corpus of the estate was passed on to them from her after she was through with it, it passed in continuation of its original passage from the testator, who was clearly the person possessed, within the meaning of the statute. The precise ground of this decision, it seems, is that the persons who occupy the position of appointees in this case were really named by the testator himself, the donee of the power being authorized only to specify the proportion which they should take. *Fidelity Trust Co. v. McClain* (1902) 113 Fed. 152, af-

firmed without additional opinion in (1903) 57 C. C. A. 679, 122 Fed. 1020.

A fortiori, no tax is enforceable under a statute enacted subsequently to the testator's death, upon property covered by his will, by which he gave another a life estate with power of disposition, and provided that, if any residue should remain undisposed of, it should pass to two named persons, where the donee of the life estate and power provided in his will that his executors should distribute the property according to the provisions of the former will, for in such circumstances the property is deemed to have passed directly to the remainderman under the first will. *Re Langdon* (1897) 153 N. Y. 6, 46 N. E. 1034. In this case the court regarded the provision in the donee's will as a failure to exercise, rather than an exercise of, the power. And where one devises land to another by a will giving the latter a privilege to use therefrom during her life, and simultaneously makes a contract with her that she will always keep on hand a will devising a half of the property to a third person, the latter takes under the will of the original testator, and is, therefore, not subject to an inheritance tax under a statute passed subsequently to the death of the first testator, but before that of the second. *Winn v. Schenck* (1908) 33 Ky. L. Rep. 615, 110 S. W. 827.

But the New York Transfer Tax Law of 1892, providing that such a tax shall be imposed when any person becomes beneficially entitled, in possession of expectancy, to any property or the income thereof by any transfer, whether made before or after the passage of the act, was held to embrace and render taxable the interest of an appointee who had no previous existence as beneficiary until the exercise, after the enactment of the statute, of a power of appointment created by a will which became effective before the passage of the statute, such appointee being a person who has become beneficially entitled in possession to property after the passage of the act, by a transfer previously made. *Re Brooks* (1894) 65 N. Y. S. R. 255, 32 N. Y. Supp. 176.

In *Re Luques* (1915) 114 Me. 235, 95 Atl. 1021, holding that the widow of testator took an absolute estate under testator's will and that therefore a transfer to a legatee under the widow's will was a taxable transfer, although the testator's will had been probated prior to the enactment of the Collateral Inheritance Tax Law, no transfer under a power of appointment was involved; but in answer to argument the court seemingly approves of the theory that it is a transfer by virtue of the exercise of a power of appointment that is taxable, hence the time of the creation of the power is unimportant. The provisions of the taxing statute with reference to powers of appointment are not set out.

(c) In cases of nonresidents.

Upon the theory that an appointee deprives title immediately from the donor of the power, it was held in *Com. v. Duffield* (1849) 12 Pa. 277, that no collateral inheritance tax was enforceable against either the appointee or the executrix of the donee, where the power related to a certain amount of money, and was created by the foreign will of a nonresident, although the donee's will was probated in Pennsylvania.

So, the doctrine that the title derived from the exercise of the power relates back to the instrument creating it has been applied so as to vest the title in a nonresident appointee prior to her death, and thus subject the property to an inheritance tax as a part of her estate, under the Laws of 1887 as amended by the Laws of 1891, providing that all property which shall pass by the will of a nonresident shall, if located in New York, be subject to a tax, notwithstanding the property was removed from the state before the appointee's will was administered, and although, if the property were to be regarded as passing under the residuary clause of the donee's will, it would not have been subject to the tax under the appointee's will for the reason that she died before the former will was probated. *Re Lord* (1906) 111 App. Div. 152, 97 N.

Y. Supp. 553, affirmed without opinion in (1906) 186 N. Y. 549, 79 N. E. 1110. See *Bullen v. Wisconsin* (U. S.) *infra*, III.

b. Under statutes expressly covering powers.

1. Powers not exercised.

The Massachusetts Statute of 1909, chap. 527, § 8, providing that whenever any person possessing a power of appointment derived from any disposition of property made prior to September 1, 1907, shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chap. 563 of the Act of 1907, and all acts and amendments thereto and in addition thereto, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporation thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure, is held to impose a succession tax upon persons taking upon the omission of the donee of the power to exercise the same, although the power was a limited one, merely conferring upon the donee power to appoint a trust estate among certain members of a class. *Burnham v. Treasurer* (1912) 212 Mass. 165, 98 N. E. 603. It is stated that until the death of the donee, and his exercise or failure to exercise the power of appointment, it could not be known in what proportion the members of the class would take; until that event happened the estate in the members of the class did not become complete, and the succession was not fully determined. It cannot be said, therefore, that the estate had so vested in the members of the class as to render the imposition of a tax under the statute above referred to unconstitutional.

Similarly it was held in *Minot v. Treasurer* (*Minot v. Stevens*) (1911) 207 Mass. 588, 33 L.R.A.(N.S.) 236, 93 N. E. 973, that the interest of those

who will take under a will or deed, upon failure of a donee of a power of appointment therein to exercise it, is not so far vested that the imposition of a succession tax upon the passing to them of the estate in case of such failure can be considered as a taking of property without due process of law.

A provision that a transfer resulting from the failure of the donee of the power to appoint shall be deemed to constitute a taxable transfer is also held valid in *Montague v. State* (1916) 163 Wis. 58, 157 N. W. 508, the court stating that until such failure to act is complete the succession is not fully determined. In this case, also, the power of appointment was limited to the members of a class.

The interest which a child takes after the failure by his mother to exercise a power of appointment created in a deed conveying property to trustees to pay the income to the mother during her life, and remainder to such of her children as she should by will appoint, and in case of her failure to make appointment, to her lawful issue, is taxable under the provision of the New York Amendatory Act of 1897, providing that when any person possessing a power of appointment derived from any disposition of property made before the passage of the act shall omit or fail to exercise the same within the time provided, a taxable transfer shall be deemed to take place to the extent of such omission or failure, in the same manner as though the person thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure. *Re Bartow* (1899) 30 Misc. 27, 62 N. Y. Supp. 1000.

See *Re Duff* (1921) 114 Misc. 309, 186 N. Y. Supp. 259, affirmed on opinion below in (1921) 196 App. Div. 969, 188 N. Y. Supp. 918.

2. Powers exercised.

(a) Generally.

In the English Case of *Platt v.*

print, 100, 19 L. J. Ch. N. S. 181, the testator gave his residuary personal estate upon trust to pay the interest thereon to his daughter for life, and after her death upon trust for such persons, excepting the members of three families, and in such manner, as she should by will appoint, and the testator further provided that if his daughter should intermarry with a certain member of one of the families or his relations, or should reside with or receive visits from him or them, the bequest in her favor with power of appointment given to her should be absolutely void. The daughter exercised the power of appointing the residuary estate among various persons. Three questions were presented in the case: First, whether the daughter or her estate was liable to pay any legacy duty beyond that which was payable on the life interest given to her for her own benefit; second, whether any probate duty was payable on the probate of her will in respect of her father's residuary estate thereby appointed; and third, what, if any, legacy duty was payable upon the sum appointed by her will. The first and third questions were held to be dependent upon whether the power of appointment given to the daughter was general and absolute, and the court having held that, notwithstanding the exception of the members of three families in the grant of a power of appointment otherwise general, and notwithstanding that the daughter was forbidden to intermarry or to have social intercourse with any of the members of one of the families, the power of appointment was general and absolute, and that therefore a legacy duty was payable on the residue under the first will, by virtue of the provision of § 18 of the Statute of 36 Geo. III. chap. 52, providing that where any property should be given for a limited interest, and a general and absolute power of appointment should also be given to any person, to

if the same property had been immediately given to the person having and executing the power, after allowing any duty before paid in respect thereof. It was also held with respect to the third question that, since the power of appointment was general and absolute, a legacy duty was payable on the same residue as appointed under the will of the daughter, by virtue of the 7th section of the same act, defining legacies which are subject to duty to be any gift by will or testamentary instrument which shall, by virtue of such instrument, have effect or be satisfied out of the personal estate of the person dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit. In reaching this conclusion, the court stopped to point out that its opinion was not founded upon the notion that the residue of the original testator's estate had become the property of the daughter, but upon the notion that the property, in the circumstances of this case, was specifically charged by the act. But the court expressly held that the residue over which the daughter had the power of appointment was not her property, and could not be recovered by her executors by virtue of the probate; and that the second question should be answered in the negative; for in such circumstances the property was not "the estate and effects of the deceased, for or in respect of which the probate" should be granted, within the meaning of the Statute of 55 Geo. III. chap. 184, imposing probate duties. This decision was affirmed in (1843) 10 Clark & F. 257, 8 Eng. Reprint, 739. In *Re Lovelace* (1859) 4 DeG. & J. 340, 45 Eng. Reprint, 131, 28 L. J. Ch. N. S. 489, 5 Jur. N. S. 694, 7 Week. Rep. 575, a duty was sought to be imposed upon appointees in respect of the execution in their favor of a power of appointment by the will of one who died subsequently to the passage of the Succession Duty Act of 16 and 17

hand, that the appointees were subject to the duty by virtue of the provision of § 2 of this statute, declaring that every past or future disposition of property by reason whereof any person had or should become beneficially entitled to any property upon the death of any person dying after the time appointed for the commencement of the act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substituted limitation, should be deemed to have conferred, or to confer, a succession on the person entitled by reason of such disposition. It was contended, on the other hand, in effect at least, that § 4 of the act relating to powers of appointment must be deemed to constitute an exclusive legislative declaration in respect of the taxation of powers of appointment, and since such section, which provided that where any person should have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of the act, over property, he should, in the event of his making any appointment, be deemed to be entitled, at the time of exercising such power, to the property or interest thereby appointed, as a succession derived from the donor of the power, and that where any person should have a limited power of appointment under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power should be deemed to take the same as a succession derived from the person creating the power as predecessor,—since such section did not embrace the situation in controversy, which involved a general power of appointment; in which case, under § 4, the donee should be deemed the successor of the donor, no duty was enforceable. The court, however, held that the appointees were subject to the tax under § 2, which expressly embraced the situation, and that the mere fact that a power of appointment was involved, not included within § 4, did not operate to exclude it from the provisions

of § 2. It was further held in this case that § 2 was applicable notwithstanding the appointee and the donee of the power were domiciled outside of the British Empire, and in this respect the case was followed in *Re Wallop* (1864) 1 DeG. J. & S; 656, 46 Eng. Reprint, 259, 5 New Reports, 679, 33 L. J. Ch. N. S. 351, 10 Jur. N. S. 328, 10 L. T. N. S. 174, 12 Week. Rep. 587, which involved a general power of appointment, and in which the court on another point followed *Platt v. Routh*, as affirmed in *Drake v. Atty. Gen.* and regarded such case as having settled the rule of § 18 of the Act of 36 Geo. III. chap. 52, so far as it related to general powers of appointment, applied to the duties payable by the donees of the powers, and not to the duties payable by the appointees, leaving the latter to depend upon the 7th section. In construing the latter section, the court alluded to the fact that it is held not to apply to legacies given by wills of persons domiciled outside of Great Britain, and to be paid out of their personal estates, and stated that usually such construction is based upon the doctrine that the personal estate follows the person, but held that this doctrine could have no application to the present case, where the legacies were given by the exercise of a power; there being no property in the donee of the power. The court observed, however, that the real question was as to what the legislature intended by the language of § 7, in terms applying to legacies given by wills of persons to be satisfied out of their personal estate, or out of any personal estate of which they might have had power to dispose, and held that it must have been intended that the same rule should apply to different members of the same class,—that is, that since no duties were payable by legatees under the wills of persons domiciled outside of Great Britain, none should be chargeable against appointees under the wills of nonresident donees, and that therefore no legacy duty was payable in the case.

It was admitted in *O'Grady v. Wilmot* [1916; H. L.] 2 A. C. (Eng.) 231,

85 L. J. Ch. N. S. 386, 114 L. T. N. S. 1097, 32 Times L. R. 456, 60 Sol. Jo. 456, that property passing by virtue of a power of appointment was subject to the estate tax, the question there being whether the property should bear the tax or whether it should be paid out of the general assets of the estate.

Considerable litigation has arisen in New York under the Amendatory Act of 1897, providing that whenever any person shall exercise a power of appointment, such appointment, when made, shall be deemed a transfer, taxable in the same manner as though the property to which the appointment related belonged absolutely to the donee of such power, and had been bequeathed or devised by him by will. As will be seen, the constitutionality of this act is upheld in cases cited *infra*, I. b, 2 (b).

In *Re Walworth* (1901) 66 App. Div. 171, 72 N. Y. Supp. 984, the court held that the Amendatory Act of 1897 was intended to change the rule that the appointees under the power take by virtue of the will creating the power, and not by virtue of the will by which the power is exercised, with the result that the tax should be fixed "as though the property to which such appointment related belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will," and held that where a testator gave his son a life estate with power of appointment limited so that the same should be exercised only in favor of descendants of the testator, and the donee exercised the power in favor of his own nephews, who were lineal descendants of the testator, the tax was assessable at the general rate, and not at the rate provided for lineal descendants. The court said that since the enactment of the Amendatory Statute of 1897, the word "decendent" in the Act of 1892 must be held to refer to the deceased person who should exercise the power, and not the deceased person who should create it. Under the Amendatory Act of 1897, the value of the estate of appointees, who were named by one who was given a life estate in

property, with power to dispose of the remainder, was held to be the value of the property passing under the power of appointment, and not merely the value of the remainder upon the death of the donor of the power. *Re Tucker* (1899) 27 Misc. 616, 59 N. Y. Supp. 699. In *Re Bucki* (1916) 172 App. Div. 455, 158 N. Y. Supp. 657, the value of a remainder estate devised by virtue of the power of appointment was fixed at its value as of the time it came into the beneficial enjoyment or possession of the appointee; and an order of the surrogate court at the time the estate went into the possession of the donee of the power, when the only question before the court was as to the value of the estate of the donee, was held not conclusive so as to prevent a subsequent estimate of the value.

And by virtue of the Act of 1897, it has been held that property passing under a power of appointment, the donee and appointee both being residents, comes within the principle that the inheritance tax is a tax on the right or privilege of disposing of property by will, so that the tax is payable in respect of the property, whether it is located within the state or not. *Re Hull* (1906) 111 App. Div. 322, 97 N. Y. Supp. 701, affirmed without opinion in (1906) 186 N. Y. 586, 79 N. E. 1107.

It was held in *Re Rogers* (1902) 71 App. Div. 461, 75 N. Y. Supp. 835, affirmed without opinion in (1902) 172 N. Y. 617, 64 N. E. 1125, that property passing by virtue of the exercise of a power of appointment is taxable under the Amendatory Act of 1897, notwithstanding the appointee is a creditor of the donee, in satisfaction of whose debt the appointment is made. The court said that the creditor was not obliged to accept such provision in the instrument exercising the power, apparently upon the theory that he could refuse the provision and prove his debt against the estate, but that if he did accept it, he was subject to the tax.

The fact that property subject to a power of appointment is taxed as part of the estate of the donor does not

prevent its taxation as part of the estate of the donee of the power, under a statute providing that whenever a person shall exercise a power of appointment such appointment shall be deemed a transfer taxable in the same manner as though the property belonged absolutely to the donee of the power. *Re Tillinghast* (1916) 94 Misc. 50, 157 N. Y. Supp. 382, affirmed without opinion in (1918) 184 App. Div. 886, 170 N. Y. Supp. 1116. The remedy in such a case has been held to be by application to the surrogate court to modify the original order taxing the property covered by the power of appointment as part of the estate of the donor. *Re Tillinghast* (1916) 94 Misc. 76, 157 N. Y. Supp. 379, affirmed without opinion in (1918) 184 App. Div. 886, 170 N. Y. Supp. 1116. In such a case, where the donee of the power has a life estate in the property, the value of that life estate is taxable under the donor's will; only the value of the remainder estate can be relieved from taxation. *Re Tillinghast* (1916) 94 Misc. 76, 157 N. Y. Supp. 379, affirmed without opinion in (1918) 184 App. Div. 886, 170 N. Y. Supp. 1116.

It was held in *Hill v. Treasurer* (1918) 229 Mass. 474, L.R.A.1918D, 337, 118 N. E. 891, that the tax upon property passing under a power of appointment should be assessed on the basis of relationship of the appointee to the donor of the power, not to the donees.

It was also held in this case that in assessing the succession tax on property appointed by will under a power of appointment, the sum appropriated by equity to satisfy the debts of the donee of the power should be deducted.

(b) Statute enacted after creation of power.

Real property subject to a power of appointment, which before the exercise of the power has been converted by the trustees into personalty, will be subject to the transfer tax provided for the exercise of such power upon personalty, although, at the time of the execution of the will creating the

power, the tax was not applicable to the transfer of real property. *Re Dows* (1901) 167 N. Y. 227, 52 L.R.A. 433, 88 Am. St. Rep. 509, 60 N. E. 439, affirmed in (1901) 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213. In this case it was sought, under the New York Statute of 1897, which is set out in the preceding subdivision, to enforce a transfer tax upon the exercise of a power of appointment by one in favor of his children, created by the will of his father, giving to the son a life estate in the property, and providing that, upon the latter's death, the property should vest in such of his surviving children as he should by his last will appoint, and that if he should die intestate, then the property should vest absolutely and at once in his surviving children, share and share alike. The court of appeals, applying the doctrine that the right to take property by devise is not an inherent or natural right, but a privilege accorded by the state, which it may tax or charge for, and that therefore the right of a testator to make a will or testamentary instrument is equally a privilege, and equally subject to the taxing power of the state, held that when the original testator devised his property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose upon the privilege accorded to the son of making a will; and that the title of the appointees must be considered as derived from the exercise of the power, and not from the original will. In the United States Supreme Court it was insisted, among other things, that upon the death of the original testator, who at that time had a legal right to transfer by will his property or any interest therein to his grandchildren, without any diminution or impairment then imposed by the law of the state upon the exercise of that right, the grandchildren acquired a vested right in the property transferred, and that the subsequent law operated to diminish and impair such vested right. But the Supreme Court adopted the construction placed upon the statute by the New York court of appeals, and

violated none of the provisions of the 14th Amendment of the United States Constitution. In *Montague v. State* (1916) 163 Wis. 58, 157 N. W. 508, it is held that an inheritance tax, being a tax upon the transfer or devolution of property, or the right of succession thereto, and not a tax upon the property itself, may be properly levied upon transfer which becomes effective by appointment after the passage of the law, under a power previously created, for the reason that the transfer does not become complete until the appointment is made, and at that time the law is in effect. This principle is held to apply where the appointment must be made from a class as well as to a case where the power is a general one.

A transfer by a deed given by the donee and effective in his lifetime, in pursuance of a power of appointment created by a testator prior to the enactment of the Transfer Tax Statute, was held a taxable transfer in *Re Wendel* (1918) 223 N. Y. 433, 5 A.L.R. 177, 119 N. E. 879. In this case the testator devised to his son certain lots and authorized him to appoint said real estate to and amongst his lawful issue, or to his sisters or their issue, as he might think fit, by deed or will, and provided that in default of appointment the lots should go to the son's lawful issue and, if he should leave no issue, then to the sisters, their heirs and assigns. The transfer was made to the sisters. See note to this case in 5 A.L.R. 183, on "Succession tax on property appointed by deed under power of appointment."

See also *Re Lovelace* (Eng.) *supra*, I. b, 2 (a), and *Re Luques* (Me.) *supra*, I. a, 2 (b).

Where a power of appointment is created in a will or other instrument effective before the enactment of an inheritance tax statute, it is apparent that any rights that have become vested thereunder are not subject to

who would have taken under the original instrument had the power of appointment not been exercised.

In *Re Vanderbilt* (1900) 50 App. Div. 246, 63 N. Y. Supp. 1079, affirmed without opinion in (1900) 163 N. Y. 597, 57 N. E. 1127, a testator who died after the enactment of the Inheritance Tax Law of 1885, but before the amendment of 1897, bequeathed property in trust to pay the income thereof to his son for life, and upon his death, to his issue in such shares or proportions as he might by his last will appoint, and in default of such appointment, the gift was made directly to the issue. It does not appear from the case whether, in the latter alternative provision, any particular proportion in which the donee's children should take was specified. The donee, who died subsequently to the enactment of the amendment of 1897, had exercised the power by a will giving one of his children a specified portion of the property, and the balance to his other children equally. It was contended in this case, for the purpose of defeating the tax, that the amendment, if held applicable in this case, would be an unconstitutional deprivation of property without due process of law, as interfering with vested rights, as well as an impairment of the obligation of a contract of the state. The court held that there was no complete vesting of the estate in the children of the donee or life tenant until the power was exercised, and that while appointees take by relation back, so as to derive their title under the donor, they must take their specific shares from the time of the execution of the power, and that the authority of the state to impose the tax on the right of succession continued until the time at which the extent of that right was finally fixed by the exercise of the power of appointment. On the point relating to obligation of contracts, it was insisted that

the donor, that if he should die while such statute was in full operation and unchanged, his estate might be disposed of without the imposition of any further tax, which contract was unconstitutionally impaired by the amendment of 1897, making the appointment a taxable transfer; but the court held that by passing the Act of 1885, the state had not disposed of its power to tax the right of succession to property, and that such right was properly exercised by the enactment of the amendment. Substantially the same question was presented in *Re Delano* (1903) 176 N. Y. 486, 64 L.R.A. 279, 68 N. E. 871, petition for rehearing denied in (1903) 177 N. Y. 540, 69 N. E. 1122, which involved a conveyance by deed, before the Act of 1897 was passed, of property to the grantor's daughter for life, with remainder to her brothers and sisters, or their issue per stirpes, the deed further providing that the daughter might by will appoint the property among the persons named, in such shares as she chose. She died without issue after the passage of the Act of 1897, and after having appointed her nephew beneficiary. The court said that it did not regard the question as open since the decision in the *Vanderbilt* and *Dows* Cases, but went on to say that it was quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made, and the power was created, for the reason that it is the practical transfer through the exercise of the power by will that is taxed, and nothing else, and that the right of the legislature to impose a tax on the privilege of exercising a power by will is not affected by the fact that no such tax was imposed when the power was created. It was also pointed out that while the lower court gave no consideration to the *Dows* Case, it attempted to distinguish the *Vanderbilt* Case upon the ground that there the power of appointment was created by will, whereas in the then-present (*Delano*) case, the power was created by a deed, and also upon the ground that the will by which the power was

created in the *Vanderbilt* Case was made after the enactment of the inheritance tax law. The latter distinction was disposed of by the remarks of the court to which reference has just been made, and the former distinction was repudiated with the statement that the effective agency of the power of appointment to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it, and that the power, however or whenever created, authorized the donee by her will to divest certain defeasible estates, and to vest them absolutely in one person, and that therefore the statute applied to all powers alike, without distinction on account of the method of creation, since it provided that the exercise of the power should be deemed a taxable transfer of the property, the same as if it had belonged absolutely to the donee of the power, and had been bequeathed or devised by such donee. This case also went to the United States Supreme Court, and is reported in *Chanler v. Kelsey* (1907) 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550, where it was held that the statute as so construed did not take property without due process of law, and that the fact of the reduction of the estate resulting from the imposition of the tax did not render the statute repugnant to the United States Constitution as impairing contract obligation. From the decision of the majority of the latter court, Justice Holmes dissented upon the ground that in this case there was no succession. His idea seemed to be that the means of executing the power depended in the first place upon the deed creating it, and that if the creative instrument had permitted the execution of the power by deed rather than by will, then there would have been no question but that the inheritance tax law had no application; and that since the required method of executing the power could be ascertained only by an inspection of the deed creating the power itself, it was the latter instrument that determined ultimately to whom and how the property should pass, and, such

tamentary character, no question of succession could arise. From this, the conclusion was that, since in such circumstances there is no succession, a statute purporting to impose a tax only upon successions, but construed or expressly declared to be applicable in this case, was void.

In *Re Lansing* (1905) 182 N. Y. 238, 74 N. E. 882, the testator devised property in trust to pay the income to his daughter for life, and after her death to pay the remainder to her heirs at law, subject, however, to a power given to the daughter to dispose by will of the remainder in fee after the termination of the trust estate by her death, "among her heirs at law and her collateral relatives in such proportion and manner and with such limitations as she may desire." The daughter exercised the power by devising and bequeathing the property to her only daughter in fee simple, and the question before the court was whether the appointee took by virtue of the power of appointment, in which case the property was subject to an inheritance tax, or whether she took under the will of the donor, who died before the enactment of the statute, in which case no tax could be enforced. The appointee insisted that since the exercise of the appointment gave her nothing to which she would not have been entitled under the will in case the power had not been exercised, the property passed to her directly from the donor, it appearing that she rejected the title from the appointment, and elected to take under the former instrument. The court adopted this view, holding that, since the exercise of the power was made in such a manner as not to alter the destination of the property, such attempted exercise was a mere formality, and of no effect, and that, upon the death

be noted that while it has just been said that the court held that she took a vested remainder, this statement may perhaps be regarded as more of a recital, than as a decision, for, at another point in the opinion, the court said that it was not at all necessary to determine whether the remainder was vested or contingent, for the reason that if it was merely contingent, it was acquired under the donor's will at the instant of his death, and that while it was true that her estate was subject to be defeated by her death before that of the donee, or by diminution if the donee should leave other children, her right to the estate was indefeasible if she survived the donee. The court distinguishes the *Delano Case* upon the ground that there the appointee could have taken an undivided fourth through the deed of the donor, and could have thus escaped the transfer tax, but that he was entitled to the entire estate under the exercise of the power of appointment by the donee, and that when he claimed the entire property, he necessarily elected to take under the power of appointment. In the *Lansing Case*, the court also distinguished *Re Cooksey* (1905) 182 N. Y. 92, 74 N. E. 880, where, notwithstanding the death of the donor before the enactment of the Inheritance Tax Law of 1896, and its amendment of 1897, it was held that the property was taxable as it passed under the exercise of the power which was effected subsequently to the enactment of the statute, where the donor devised and bequeathed his residuary estate to trustees to pay his daughter the income during her life, and upon her death to such of her children as she should by will designate and appoint, and in such manner and upon such terms as she might impose, and provided that in case she

five, a further sum not to exceed a certain amount; and as each should attain the age of thirty years, the remainder. The donee exercised the power by appointing her children to receive the estate share and share alike, but she provided in her will that as each should attain the age prescribed in the donor's will, he or she should be paid precisely the maximum amount specified in the donor's will. The court held that the property was taxable under the statute for the reason that it vested under the exercise of the power, and this was put upon the ground that, although the share received by each appointee would have been the same whether it vested under the power of appointment or under the will of the donor, the latter instrument left it within the discretion of the trustees as to whether the maximum amount be paid, whereas, by the exercise of the power, the donee fixed definitely such maximum amount as the sum to be paid to the children, and without qualification, leaving no discretion in the trustees, and that therefore the exercise of the power could not be treated as a nullity. The variation effected by the exercise of the power in this case should be compared with that in the Ripley Case following, where an apparently greater change in the destination of the property was regarded as insufficient to make the property pass under the exercise of the power. Whereas in the Lansing Case some importance was attached to the fact that the will of the donor provided that the remainder should pass to the children, and that it was only in case of the exercise of the power in favor of other persons that the operation of the original will would be defeated, the court in *Re Lowndes* (1908) 60 Misc. 506, 113 N. Y. Supp. 1114, relies upon such circumstance absolutely, for the purpose of distinguishing the Lansing Case and following the Cooksey Case. In the Lowndes Case, it appeared that the donor provided that her property should vest in trustees, and that the income should be paid to her daughter during life, and that upon the death of the daughter the property should pass according

to the will of the daughter, and in default of a will, to the issue of the daughter, and the daughter exercised the power by giving her husband a life estate, and providing that upon his death the property should pass to the children.

The settled rule under the Act of 1897 seems to be that, where the persons named as appointees take under the exercise of the power just exactly what they would have taken under the original will if the power of appointment had not been exercised, their interest vests upon the death of the original testator, subject, of course, to be defeated by their death before that of the donee, and by the exercise of the power adversely to their interest; and their interests are not taxable, where the original testator died before the enactment of any inheritance or transfer tax law. *Re Chapman* (1909) 133 App. Div. 337, 117 N. Y. Supp. 679, appeal dismissed without opinion in (1909) 196 N. Y. 561, 90 N. E. 1157. The Lansing Case was expressly followed in *Re Spencer* (1907) 119 App. Div. 883, 107 N. Y. Supp. 543, appeal dismissed (1907) 190 N. Y. 517, 83 N. E. 1132, where about the only allusion to the state of facts is the remark of the court that the conditions were substantially the same as in the Lansing Case; and the court lays great stress upon the fact that the will of the donee of the power neither added to nor took from any of the final beneficiaries the benefits which the will of the donor of the power expressly conferred upon them. So, following the Lansing Case, it was held in *Re Haggerty* (1908) 128 App. Div. 479, 112 N. Y. Supp. 1017, affirmed without opinion in (1909) 194 N. Y. 550, 87 N. E. 1120, that where the donee of the power exercised it by naming the person who was entitled to take under the will of the donor in case the donee failed to exercise the power, the interest of such donee or beneficiary was not taxable, the will of the original testator having become effective in 1875. In *Re Lewis* (1908) 129 App. Div. 905, 113 N. Y. Supp. 1136, affirmed without opinion in (1909) 194 N. Y. 550, 88 N. E. 1124, the court, upon the

authority of the *Lansing and Haggerty Cases*, reversed without opinion the decision of the surrogate (1908) 60 Misc. 643, 113 N. Y. Supp. 1112, holding the transfer taxable where it appeared that the donee exercised the power in favor of her children, who by the will of the donor were made the beneficiaries in case the donee should fail to exercise the power. So, without any discussion whatever, but citing *Re Lansing* as authority, the New York court in *Re Backhouse* (1906) 110 App. Div. 787, 96 N. Y. Supp. 466, affirmed without opinion in (1906) 185 N. Y. 544, 77 N. E. 1181, held that where a testator gave his son a life estate with remainder to his heirs, or to such person or persons as the son should appoint by will, and the son in his will appointed his children, the latter took under the will of the first testator, and were vested with the estate when such will became effective, and that therefore the transfer was not subject to tax, for the reason that the Transfer Tax Law was not enacted until after the will of the first testator became effective. And where the testator gives a life estate to his daughter with remainder to such persons as she should by will appoint, and in case of her failure to exercise the power, to her lawful issue in the same manner as if she should die intestate, and she appoints her lawful issue, the latter's interests vest under the will of the original testator, and are therefore not taxable under the Act of 1897, where the original testator died before the enactment of an inheritance or transfer tax law. *Re Chapman* (1917) 117 N. Y. Sup. 561, 90 N. E. 164, 164 A. Supp. 1022, affirmed (1915) 215 N. Y. 544, 77 N. E. 1181, where the power of appointment was exercised as those designating the power in default of appointment took the same as they would have taken if the power had been exercised, the

held not taxable. The same was held with reference to an estate taken by virtue of a deed of trust under which the cestui que trust had power of appointment.

The principle of the foregoing cases has been extended in other cases so as to free from the tax, transfers to appointees who would have taken in default of appointment although not precisely what they did take under the appointment. Quoting the *Lansing Case*, the New York court held in *Re Ripley* (1907) 122 App. Div. 419, 106 N. Y. Supp. 844, affirmed in (1908) 192 N. Y. 536, 84 N. E. 574, that where the will gave a life estate, and provided that upon the death of the life tenant the property should, "unless otherwise disposed of" by the life tenant, pass to the issue of the life tenant, share and share alike, and the life tenant by his will provided that the property should be divided equally between his wife and children,—the children took under the will of the first testator directly, and that their interest therefore was not subject to taxation, such testator having died before the enactment of the Laws of 1897. The court points out that the first testator did not say that the children should take in case the life tenant failed to exercise any power of disposition or appointment, but that they should take unless the trust fund was otherwise disposed of, and it is this feature of the case which leads the court to the conclusion that the property passed under the will of the first testator, and not under the exercise of the power of appointment. It was regarded as

of the power of appointment. (See, however, the *Cooksey Case* (N. Y.) *supra*.) The affirmance of this case by the court of appeals was *per curiam*, the court merely pointing out that the power of appointment was limited, and could be exercised only in favor of persons who did not take under the will creating it, and that the children took directly under the original will, except as their interest might have been divested or cut down by a valid exercise of the power. In *Re Slosson* (1915) 216 N. Y. 79, 110 N. E. 166, the testator, by a will probated before the enactment of an inheritance or transfer tax statute, created a trust, estate and gave the beneficiary the power to dispose of the trust estate by her will, and provided that in default of such disposition by the last will and testament of the beneficiary the trustees should pay the trust estate to those who would receive it had the beneficiary died intestate and its owner. The beneficiary disposed of about two thirds of the estate in equal shares to her children, who would have taken it under the will of the testator in default of the disposition of it by the will of the beneficiary, and of about one third to persons who would not have so taken. The children elected to take the two thirds under the will of the testator and not under that of the beneficiary, and it was held that they had such right, so as to relieve the transfer of the tax. The valid disposition of a part of the estate by the donee of the power to persons entitled solely through such disposition does not destroy the right of the children to elect to take under the testator's will. In another case in which a testator, who left a widow and two daughters, gave his residuary estate to his widow for life, and expressly authorized and empowered her by last will and testament to give, dispose of, and divide the said estate and property to and among his children and descendants in such proportions and shares as in her judgment might seem best, regard being had to the independent property they might have respectively acquired; he then provided that on the death of his widow, in the event

that she should not exercise this power of disposition, the residue and remainder should go to his children absolutely; and it was further provided that, in the event of the death of all his children and descendants in the lifetime of his wife, all his property should go to his wife, her heirs and assigns forever. One of the daughters of the testator who survived him died before the death of his widow, unmarried and without issue. The testator's widow by her will, executed before the death of this daughter, first gave, bequeathed, and appointed to the daughter who subsequently survived the sum of \$125,000 out of the remainder of the estate of the testator, and then gave, devised and bequeathed, and appointed the rest, residue, and remainder of her own estate and of the estate of the testator to her two daughters, share and share alike, and to their descendants in the event of their death, or of the death of either of them, leaving descendants; and in the event that either daughter should predecease her mother without issue living at the time of the death of the mother, then the surviving daughter was to take all of the remainder. Upon the death of the testatrix the surviving daughter was held to take by virtue of the will of her father, and not by the power of appointment exercised by her mother, and therefore the transfer to her was held not to be subject to the tax. *Laughlin, J., in Re Hoffman* (1914) 161 App. Div. 836, 146 N. Y. Supp. 898, on which opinion this decision was affirmed by the court of appeals in (1914) 212 N. Y. 604, 106 N. E. 1034.

It has been held that where the person to whom the estate is appointed by the donee takes no more under the exercise of the power than under the original instrument creating the power, such person takes under the original instrument, and where that was executed and effective before the enactment of the statute the transfer to him is not taxable; there need be no election to take under the original instrument. *Re Chauncey* (1918) 102 Misc. 878, 168 N. Y. Supp. 1019, affirmed without opinion in (1919) 187

App. Div. 952, 175 N. Y. Supp. 897. But if the person in whose favor the power is exercised by the donee takes more than he would have taken under the instrument creating the power, then the transfer is subject to the tax, if such person takes under the power. *Ibid.*

On the other hand, where the donee, in exercising the power, makes a disposition of the property substantially different from the alternative provision by the donor, to be effective if the donee fails to act, the property is deemed to pass by the exercise of the power, and the Act of 1897 is held applicable. Thus, where the testator gives his daughter a life estate with remainder to her issue, share and share alike, and his will further provides that the daughter shall have power to appoint the remainder by will among the testator's descendants living at her death, in such proportions as she shall think proper, and the daughter dies leaving four daughters and two sons, after having exercised the power by providing that the property shall be divided in equal proportion among her daughters, the latter take under the power of appointment, and not under the will of the testator, and their interest is subject to taxation under the Amending Act of 1897, the daughter having died after the enactment of such statute, although the testator died before its enactment. *Re Potter* (1900) 51 App. Div. 212, 64 N. Y. Supp. 1013. And where the donor, who died in 1879, provided that upon the termination of the life estate of the donee, the property should pass to such persons and in such proportions as the donee should by will appoint, and upon failure to appoint, to the heirs of the donee as if the donee had died seised and possessed thereof, and the donee gave his wife a life estate with remainder to three of his four children, it was held that the children did not take under the original will, but that their rights and estates were created and fixed by the exercise of the power, and that therefore they were required to pay a transfer tax under the Amending Act of 1897, the court pointing

out that the power of appointment was exercised so that instead of an equal and immediate division of the estate among the four children upon the death of the donee, which would have occurred if the latter had not exercised the power, the division was postponed during the life of the donee's wife, and the absolute estate was given to only three of the four children. *Re Warren* (1909) 62 Misc. 444, 116 N. Y. Supp. 1034. And it was held in *Re Seaver* (1901) 63 App. Div. 283, 71 N. Y. Supp. 544, that under the Amending Act of 1897, the interest of an appointee acquired under his mother's will, which became effective after the passage of the act, in property devised to the mother by one who gave her a life estate with absolute power of disposition of the same by will, was subject to taxation. The court took pains to say that it did not mean to intimate that the actual title to the property for other than taxing purposes was derived from the mother; but that its conclusion was based upon the fact that the statute explicitly declared that it is the exercise, and not the creation, of a power of appointment which effects the transfer upon which the tax is enforced. So, where a testator gives a life estate to his widow, and authorizes her to dispose of the remainder by will, and provides that in case of her failure to do so, a life estate shall be given to her brother with remainders over at his death to the widow's heirs at law, next of kin according to the New York law in cases of intestacy, and the widow exercises the power by giving her brother the property absolutely, the property passes by virtue of the exercise of power, and the transfer thereby effected is taxable under the Act of 1897. *Re Rogers* (1902) 71 App. Div. 461, 75 N. Y. Supp. 835, affirmed without opinion in (1902) 172 N. Y. 617, 64 N. E. 1125.

Upon the ground that, under the Amending Act of 1897, the tax is imposed upon the transfer effected by the exercise of the power of appointment, it was held in *Re Buckingham* (1905) 106 App. Div. 13, 94 N. Y. Supp. 130, that where a testator whose

will became effective in 1888 transferred property in trust in favor of his nephew for life with the remainder of the nephew's children, or in default of issue, to such persons as the nephew should appoint, the interest of the person who took as appointee under the exercise of the power by the nephew was subject to taxation under the Amendatory Act of 1897, notwithstanding the transfer to the life tenant and donee had previously been excessively taxed under the inheritance tax law in force at the time of the death of the original testator, by computing the tax upon the basis of the value of the principal fund, rather than upon the value of the life estate in the donee. The court pointed out that it is not the property that is taxed, but it is the interest taken by the respective beneficiaries, and that the fact that the life tenant was excessively taxed did not operate to prevent an enforcement of the Amendatory Act of 1897 as against another person, the appointee, whose claim was based upon the exercise of the power, which was distinctive from the transfer under which the person already taxed claimed.

In order that there may be an election so as to free the transfer from the tax it has been held that it must clearly appear that those parties making the election had a perfect title to the estate from the original testator, without the power of appointment exercised by the donee thereof. In *Re King* (1916) 217 N. Y. 358, 111 N. E. 1060, the testator in a will probated before the enactment of the inheritance tax statute left a trust fund with power of appointment in the beneficiary in favor of her children and their issue, or, in case she had not child or issue, as she might direct; and provided that in default of such appointment the fund was to go to "her children and their issue," or in case she left no "child or issue," or husband, to revert to the estate of Charles King (the testator), "and be divided between and among all my (his) other surviving children, share and share alike in equal proportions." The beneficiary exercised the power of

appointment in a will in favor of her nephews who, at the death of the beneficiary, were the only surviving heirs at law and next of kin of their grandfather, the testator. The court held that they did not so clearly take under the designation "children" in the will of the original testator as not to have received something additional by the power of appointment. The court states: "Their title was perfected to the extent that it was not left to depend upon the correct application of shifting rules of interpretation which sometimes include grandchildren in and sometimes exclude them from the term 'children.' The only 'reason of the thing' which demands that the word 'children' should include 'grandchildren' in this case is that if respondents are so included by a strained application of the law of wills, the transfer to them may escape taxation. The reason is not convincing." The transfer was accordingly held subject to taxation.

(c) *In case of nonresidents.*

Stocks and bonds belonging to a trust estate and situated in a foreign state, but in which a resident is a cestui que trust with power of appointment, have been held to pass under the donee's will on the exercise of the power, and such transfer is taxable under a statute providing that whenever any persons shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will. *State ex rel. Smith v. Probate Ct.* (1914) 124 Minn. 508, 50 L.R.A. (N.S.) 262, 145 N. W. 390, Ann. Cas. 1915B, 861. Similar decisions on similar facts appear in *Re Frazier* (1912) 188 N. Y. Supp. 189, and *Re Seaman* (1913) 187 N. Y. Supp. 254. But see *Re Canda* (N. Y.) *infra*.

On the contrary, under a similar statute, in *Walker v. Treasurer* (1915)

221 Mass. 600, 109 N. E. 647, personal property bequeathed to a nonresident trustee by a nonresident decedent, and always situated in a foreign state, was held not subject to a transfer tax, although the donee of the power of appointment was a resident of the state of Massachusetts, and there exercised the power in a will probated in that state. The court states that "no privilege by which the property passes, whether by exercise of the power or by failure to exercise it, is conferred by the law of this commonwealth. Hence, no commodity exists here on which the tax can be levied. By resort to the courts of Maryland [the state where the trust existed] all questions as to the succession of this trust estate will be determined without invoking the law of Massachusetts. . . . There is nothing in this commonwealth upon which [the Inheritance Tax Act] can operate."

And in *Re Canda* (1921) 197 App. Div. 597, 189 N. Y. Supp. 917, there was held to be no taxable transfer where a resident exercised a power of appointment over property which had always been located in another state, the state of donor's residence, and where the will was there probated, never having been probated in the state of donee's residence.

In *Re Thomas* (1902) 89 Misc. 136, 78 N. Y. Supp. 981, the court held that since, in the *Vanderbilt and Dows Cases*, the constitutionality of the Amendatory Act of 1897 had been upheld upon the ground that the tax is not upon property, but upon transfers of property made by will or descent, where the right to make or receive such transfers is accorded by the laws of the state, and which right the sovereign power of the state lawfully exercises by imposing the tax,—the interest of an appointee was not taxable under such statute where the will creating the power of appointment was executed by a nonresident, and disposed of property having its situs in the foreign state, until paid over in due course, and after the exercise of the power by the donee became effective, the court saying that while it was true that the will exercising the

power was that of a resident, its legal effect depended entirely upon the law of the foreign state, and that if its probate in New York was necessary or useful for any purpose, it was only because the law of the foreign state so declared.

Declaring in favor of the doctrine that, irrespective of the time when the instrument creating the power was executed, it was the actual transfer effected by the exercise of the power which was to be taxed under the amendment of 1897, the New York court in *Re Fearing* (1910) 200 N. Y. 340, 93 N. E. 956, held that where a resident testator who died before the enactment of any transfer tax law devised his property in trust for the life of his daughter, and gave her the power to appoint by will the person to whom the trustee should set over the remainder upon her death, and the daughter, a nonresident, exercised the power of appointment by a will made under and by virtue of the laws of her domicil, no tax was enforceable against the property included within the power, notwithstanding a part of it consisted of bonds secured by mortgages of real estate situated in New York. One apparent ground of this decision is that since, by the amendment of 1897, the tax is upon the transfer affected by the appointment,—that is, is exacted by the state in return for its indulgence in permitting property to be transferred by will,—there is no ground for upholding the tax where the power is exercised by a will the existence and validity of which depend upon the laws of another state.

And where a nonresident donee exercised a power of appointment over property having its situs in a foreign state, in favor of beneficiaries of the class limited by the will creating the power, executed by a resident at such an early date that the transfer, if effected by it, was not subject to an inheritance or transfer tax, and the will exercising the power was executed in the foreign state, and was probated under the laws thereof, it was held that the property was not subject to taxation under the Amendatory Act of 1897, the court invoking the doctrine

that the tax is upon the privilege of transferring property by will, and that, since the privilege of exercising the power was granted by the foreign state, the state of New York could impose no tax upon the transfer so effected. *Re Kissel* (1909) 65 Misc. 448, 121 N. Y. Supp. 1088, affirmed in (1911) 142 App. Div. 984, 127 N. Y. Supp. 1127.

But in *Re Warden* (1916) 94 Misc. 563, 157 N. Y. Supp. 1111, a transfer of property consisting of bonds and mortgages on real estate in New York, by virtue of the exercise of a power of appointment under the will of a non-resident donor by a nonresident donee, was held subject to the transfer tax where the bonds were physically located within the state of New York.

A transfer of shares of stock in a domestic corporation by virtue of a power of appointment exercised by a non-resident donee under the will of a resident testator has been held subject to an inheritance tax, even though the certificates of stock or shares were in the possession of trustees domiciled in a foreign state, and although the shares of stock were held by a corporation which was created by the trustees in a foreign state for the purpose of avoiding double taxation. *Gardiner v. Treasurer* (1916) 225 Mass. 355, 114 N. E. 617.

See also *Re Lovelace and Re Wallop* (Eng.) *supra*, I. b, 2 (a); *Bullen v. Wisconsin* (U. S.) *infra*, III.

II. *Present taxability under donor's will.*

A succession tax cannot be assessed at the death of the testator upon the corpus of the estate, when property is devised in trust for a period of twenty years, during which time annuities shall be paid to certain persons named, among whom the estate shall be distributed at the expiration of that period if they are alive at that time, and if they are not alive, among persons whom they shall appoint, and certain persons named by the testator, under a statute authorizing a tax against a person who "shall become beneficially entitled, in possession or income expectation, to any property or income thereof," where the tax rate differs according to 18 A.L.R.—94.

the relationship of the testator and the person who ultimately becomes entitled to the property. *People v. McCormick* (1904) 208 Ill. 437, 64 L.R.A. 775, 70 N. E. 350.

Money received under a power given by will to a trustee, to appoint the residuary estate to any of certain persons, was held in *Re Stewart* (1892) 131 N. Y. 274, 14 L.R.A. 886, 30 N. E. 184, to pass "by will," within the meaning of the New York Inheritance Tax Law of 1885, imposing a tax upon all property which should pass by will or by the intestate law from any person who might die seised or possessed of the same, to all but certain excepted persons, in trust or otherwise, or by reason whereof any but the excepted persons should become beneficially entitled, in possession or expectancy, to any property or the income thereof. The court applied the doctrine that when the donee of a power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but that his title relates to and is acquired under the instrument creating the power. It was insisted that the legislature had failed to provide any method for valuing or taxing contingent or uncertain interests, not capable of valuation and assessment immediately upon the death of the decedent; but the court held that although the interest was contingent, and therefore not capable of valuation at the testator's death, it could, after it became vested and ascertained by the appointment, be appraised, by virtue of a provision of such inheritance tax law, authorizing the appointment of an appraiser "as often and whenever occasion requires." The decision in this case was adopted in *Hoyt v. Hancock* (1904) 65 N. J. Eq. 688, 55 Atl. 1004, the court remarking that the statute involved in the latter case was substantially identical with the New York statute.

In *Howe v. Howe* (1901) 179 Mass. 546, 55 L.R.A. 626, 61 N. E. 225, it was held that an interest in property passes by will within the meaning of an inheritance tax act, although its destination is by the will made subject to the appointment of a third person,

it being pointed out that the statute specified as subject to the tax any form of interest in property whatsoever. The question before the court was as to the present taxability of property which was subject to the power of appointment.

No present tax is assessable upon the death of a testator who transferred property to trustees to divide it into equal shares for his children, and to pay the income and so much of the principal of any share as the trustee should deem advisable to each child, and upon the death of any child, to give so much of his share as remained in such manner as he should designate in his will, or if he should make no such designation, then to his issue, if any, and if there should be no such issue then to the survivors or survivor of the testator's children, under the Amendatory Statute of 1899, providing that when property is transferred in trust or otherwise, and the rights, interests, or estates of the transferees are dependent upon contingencies or conditions whereby they may be created, defeated, etc., a tax shall be imposed upon the transfer at the highest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of the act, and that the tax so imposed should be due and payable forthwith out of the property transferred. *Re Howell* (1901) 34 Misc. 432, 69 N. Y. Supp. 1016.

Upon the theory that under the provision of the Amendatory Act of 1897, it is the exercise of the power of appointment, and not the creation of that power, which effects the transfer which the statute makes taxable, it was held in *Re Howe* (1903) 86 App. Div. 286, 83 N. Y. Supp. 825, affirmed without opinion in (1903) 176 N. Y. 570, 68 N. E. 1118, that the remainder is not taxable until the time comes for the exercise of the testamentary power of appointment conferred upon the life beneficiary, and by this the court obviously meant until the death of the life beneficiary, after having made, or having failed to make, a will exercising the power. It was insisted in this case that the amendment of 1897,

relating to powers of appointment, was impliedly repealed by an amendment enacted in 1899, providing that when property is transferred in trust or otherwise, and the rights of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, etc., a tax shall be imposed upon said transfer at the highest rate which, on the happening of the said contingencies or conditions, would be possible under the provisions of the act, and such tax so imposed shall be due and payable forthwith out of the property transferred. The court denied this contention, saying, in effect, that there is nothing in the amendment of 1899 making a general provision in respect of the manner of taxation of contingent and conditional estates, which must necessarily be regarded as repealing a former amendment to the same statute, making specific provision for the taxation for such conditional or contingent estates as shall arise from the creation of a power of appointment. And the court further said that while the donee might be regarded as the original transferee of the property devised in trust for his benefit, it could not fairly be said that his right or estate was dependent upon contingencies or conditions whereby they might be wholly or in part created, defeated, etc.

It was held in *Re Field* (1901) 36 Misc. 279, 73 N. Y. Supp. 512, that no present tax could be assessed upon the death of the testator upon so much of the property covered by the will as had been subjected to a power of appointment in a donee, the will transferring the property in trust to pay the income to the testator's wife for life, the remainder to his nephew, and a codicil having been made giving the wife power to appoint a certain specified portion of the value of the estate to any descendants of the testator's father in such proportions as she might see fit.

On the other hand, by a surrogate's decision in *Re Le Brun* (1902) 39 Misc. 516, 80 N. Y. Supp. 486, decided before the *Howe* Case (N. Y.) *supra*, that a present tax was enforceable

upon the death of a testator who transferred his property in trust to pay an income to his daughter for life, with power given to her thereafter to dispose by will of a certain percentage of the estate to and among such persons who might be living at her death, and as she should think proper, and the balance of the remainder to and among any of the testator's descendants, notwithstanding such remainders were not ascertainable until after the death of the life beneficiary, and the persons to take it should be disclosed by her will. The court said that in reaching this conclusion it did not overlook the Laws of 1896 as amended by the Laws of 1897, and that when the donee of the power should have exercised it, the question might then arise whether the payment of the tax presently to be imposed would or would not relieve the remainderman of the payment of any new tax because of the transfer affected by the exercise of the power, but that it was sufficient for the then-present purposes that, within the meaning of the Amendatory Act of 1899, transfers from the estate of the decedent had been made upon which it was the court's duty to impose a tax.

In *Re Dimock* (1918) 168 N. Y. Supp. 584, it is held that where a power of appointment has been exercised by the donee thereof, the property subject to its exercise is no longer, for transfer tax purposes, a part of the estate of the donor of the power, and cannot be the subject of adjudication in a transfer tax proceeding upon his estate.

See *Re Tillinghast* (N. Y.) *supra*, I. b, 2 (a).

III. Power of appointment reserved by grantor.

Of course, where a person reserves to himself a power of appointment in a deed by which he transfers property to a trustee to pay the income to the grantor during his life, and after his death to such persons as he shall by will appoint, or, in default of appointment, to his next of kin, etc., although the legal title passes to the trustee, the property and all interest

therein really remains in the grantor; and where he, by will, appoints the persons to whom the trust company shall convey after his death, the property passing to the appointees is taxable under the Act of 1885 as amended by the Act of 1887, providing that any property which shall be transferred by deed, grant, etc., made or intended to take effect in possession or enjoyment after the death of the grantor, shall be subject to a tax. *Re Ogsbury* (1896) 7 App. Div. 71, 39 N. Y. Supp. 978.

And where one deeds property in trust for the purpose of paying the income to the grantor during her life, and of conveying it after her death to such persons as she shall by will appoint, the property is within the meaning of the Collateral Inheritance Statute imposing a tax upon property passing by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor; and the property is taxable thereunder, and the statute is constitutional, and it is immaterial if the deed of trust was executed before the statute went into effect. *Crocker v. Shaw* (1899) 174 Mass. 266, 54 N. E. 549.

In *Bullen v. Wisconsin* (1916) 240 U. S. 625, 60 L. ed. 830, 36 Sup. Ct. Rep. 473, it was held that a fund represented by stocks, bonds, and notes kept in a state other than that where the decedent resided, which he conveyed upon certain trusts to a trust company of such other state, reserving to himself an absolute power of control which he exercised during his life by a revocation (followed by a second conveyance to the trust company upon the same terms), and by taking the whole income for himself, may be subjected to an inheritance tax in the state of his domicile without violating the 14th Amendment or the contract clause of the Federal Constitution.

IV. Miscellaneous cases.

Dispositions by a testatrix in pursuance of a general power of appointment, by a will in which she also disposed of her personal estate, are legacies, within the meaning of a provision of the will directing her executors "to

and all transfer or inheritance taxes that may be imposed or become due upon any of the legacies hereinbefore made," and are such as are entitled to have the taxes paid out of her residuary estate. *Isham v. New York Asso.* (1904) 177 N. Y. 218, 69 N. E. 867.

The fact that one who had an absolute title under an unrecorded deed, and who was given a life estate therein with power of testamentary disposition, under the will of the grantor of the deed, ignored his absolute title and submitted to a transfer tax upon his life estate, and thereby precluded his administrator, upon his death intestate, from vacating the assessment upon the ground that the unrecorded deed was found among the intestate's effects after his death, does not prevent the intestate's next of kin and heirs at law, who were made residuary legatees and devisees in case the in-

power of disposition, from relying upon the deed of the ancestor, rather than upon his will, and therefore from taking the remainder free from the imposition of a transfer or inheritance tax. *Re Mather* (1904) 90 App. Div. 382, 85 N. Y. Supp. 657, affirmed without opinion in (1904) 179 N. Y. 526, 71 N. E. 1134.

Under a statute imposing a tax upon all estates passing from any person who may die seised and possessed thereof, transferred by deed, will, grant, etc., made or intended to take effect in possession after the death of the grantor, deviser, etc., the value at the death of the donee of the power of appointment, who has exercised the power, and not the value at the time of the death of her husband, by whose will the power was created, is to be taken for the purpose of computing the tax. *Fisher v. State* (1907) 106 Md. 104, 66 Atl. 661. W. A. E.

THEODORE ENDERS

v.

RUTH ENDERS.

Idaho Supreme Court—October 24, 1921.

(— Idaho, —, 201 Pac. 714.)

Divorce — allowance for appeal.

1. Where an action for divorce is brought by the husband, the wife is entitled to be provided with means at the expense of the husband for an efficient preparation of her case on appeal, where it appears that she is without means, and that all the property of the parties was awarded to the husband by the decree of the lower court.

[See note on this question beginning on page 1494.]

Courts — supreme — jurisdiction — attorneys' fees.

2. Under article 5, § 9, of the Constitution of this state, the supreme court has jurisdiction to entertain an original application for attorneys'

Divorce — right of wife to representation.

3. In an action for divorce, considerations of justice and public policy require that the wife be afforded an opportunity to be properly represented

actions is vested in the district court, and such relief is granted by the appellate court only where it is neces-

sary to a complete exercise of its appellate jurisdiction.

[See 1 R. C. L. 917, 918.]

MOTION by defendant for an order directing plaintiff to pay a certain sum of money to her for attorneys' fees in the prosecution of her appeal from a decree of the District Court for Bannock County (Baum, J.) in a divorce action, and for temporary alimony. *Attorneys' fees allowed.*

The facts are stated in the opinion of the court.

Messrs. Peterson & Coffin and H. E. Ray for appellant.

Messrs. D. W. Standrod, C. D. Smith, and C. M. Booth, for respondent.

Budge, J., delivered the opinion of the court:

This is an original application in this court for an order directing respondent to pay a certain sum of money to appellant for attorney fees in the prosecution of her appeal, and for temporary alimony.

An application for the payment of costs, expenses, and attorney fees was made to the trial judge, whereupon an order was made directing that respondent pay the clerk of the court an amount necessary to cover the transcript on appeal, the filing fee in the supreme court, and the sum of \$30 to cover the cost of printing briefs, but denying the application for attorney fees.

A motion has been made by respondent to dismiss appellant's application in this court, upon the ground that no appeal was taken from the order made by the district judge disallowing the attorney fees, and that, therefore, this court is without jurisdiction to entertain appellant's application. With this contention we are not in accord.

Article 5, § 9, of the Constitution, provides that "the supreme court shall . . . have . . . jurisdiction to issue . . . all writs necessary or proper to the complete exercise of its appellate jurisdiction."

See *Roby v. Roby*, 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938; *Day v. Day*, 12 Idaho, 556, 86 Pac. 531, 10 Ann. Cas. 260; *Spofford v. Spofford*, 18 Idaho, 115, 108 Pac. 1054; *Callahan v. Dunn*, 30 Idaho, 225, 164 Pac.

356; *Callahan v. Callahan*, 33 Idaho, 241, 192 Pac. 660; 14 Cyc. 745.

As will be observed from the foregoing authorities, this court has jurisdiction to entertain appellant's application upon a proper showing that the granting of such relief is necessary to a complete exercise of its appellate jurisdiction. *Callahan v. Dunn*, 30 Idaho, 225, at 231, 164 Pac. 356.

From the record on appeal in this case it appears that respondent's complaint was dismissed and a decree of divorce granted to appellant upon her cross complaint, and that all of the property owned or possessed by appellant and respondent was awarded to the latter. Whether this property is the separate property of respondent, or community property, is a question to be determined when the cause is submitted upon the merits.

Appellant's application is supported by the affidavit of one of her attorneys, who upon information and belief alleges that appellant is now, and since the rendition of the decree of divorce has been, compelled to seek aid from friends and relatives for her support; that she is in indigent circumstances and unable to pay counsel to prosecute her appeal; and that she has agreed to pay a reasonable attorney fee; and prays that this court make an order allowing her the sum of \$1,000 for prosecuting her appeal.

Respondent, in resisting appellant's application, filed an affidavit setting out his resources and liabilities, and alleging that he is unable to procure and advance any further sums for attorney fees or alimony.

Courts—
supreme—jurisdiction—attorneys' fees.

Where it appears that all of the property of the husband and wife has been awarded to the husband, and the wife is without means to employ counsel to properly protect her interests on appeal, we do not think a showing of property by the husband should defeat her application, particularly

**Divorce—allow-
ance for appeal.**

where the action for divorce was brought by the husband; since he should not be permitted to maintain an action against his wife for divorce if he cannot furnish sufficient means to the wife to enable her to make her defense. A wife is entitled to be provided with means at the expense of the husband for an efficient preparation of her case on appeal, where it appears that she is without means, and all of the property of the parties was awarded to the husband. Considerations of justice

**—right of wife to
representation.**

and public policy demand an opportunity for the wife to be represented, before her property and other rights are passed upon by the appellate court.

While respondent in his affidavit does not challenge the reasonableness of the amount of attorney fees prayed for by appellant, yet we think that \$250 is a reasonable amount to be allowed appellant for that purpose at this time, reserving the right, however, to determine upon the final submission of the cause whether any additional amount should be allowed for services ren-

dered, or to be rendered, upon the prosecution of her appeal.

In passing, we feel constrained to say that we do not wish to be understood as encouraging original applications to this court for attorney ^{Courts—juris-} fees, alimony, or ^{diction—alimony.} suit money. Application should be made to the trial court. As was said by this court in the case of Callahan v. Dunn, 30 Idaho, at page 231, 164 Pac. 357: "An examination of §§ 2662 and 2673, Rev. Codes, clearly shows that original jurisdiction in the matter of granting alimony and suit money, in connection with divorce actions, is vested in the district courts and the judges thereof at chambers. It is clear that this court does not have original jurisdiction in such matters. Such orders are made by this court only where it is necessary to a complete exercise of its appellate jurisdiction."

This court will review upon appeal an order of the district court allowing or disallowing alimony, suit money, or attorney fees.

In view of the foregoing, it is ordered that respondent be, and he is hereby, directed to pay to the clerk of this court, for the benefit of appellant, the sum of \$250 for the purpose stated, within thirty days after the filing of this opinion. The application for temporary alimony will be denied.

Rice, Ch. J., and McCarthy, Dunn, and Lee, JJ., concur.

ANNOTATION.

Right of wife to allowance of counsel fees to prosecute or defend appeal in matrimonial action.

I. Introductory, 1494.

I
II]

sel fees for the purpose of prosecuting or defending an appeal in a matrimonial action. No discussion of an allowance of alimony pending appeal is intended, but it is to be noted that in many jurisdictions the courts make no distinction between the latter question and the allowance of counsel fees incident to the appeal. Hence, cases are cited wherein it is apparent that an allowance of alimony pending appeal included an allowance of counsel fees to prosecute or defend the appeal.

II. General rule.

It is generally held that the court in a matrimonial action will allow counsel fees to the wife to enable her properly to prepare and present her case in prosecuting or defending an appeal.

California.—*Reilly v. Reilly* (1882) 60 Cal. 624; *Ex parte Winter* (1886) 70 Cal. 291, 11 Pac. 630; *Larkin v. Larkin* (1886) 71 Cal. 330, 12 Pac. 227; *Bohnert v. Bohnert* (1891) 91 Cal. 428, 27 Pac. 732; *Grannis v. Superior Ct.* (1904) 143 Cal. 630, 77 Pac. 647; *Bruce v. Bruce* (1911) 160 Cal. 28, 116 Pac. 66; *Dunphy v. Dunphy* (1911) 161 Cal. 87, 118 Pac. 445; *Coleman v. Coleman* (1913) 23 Cal. App. 423, 138 Pac. 362; *McCahan v. McCahan* (1920) — Cal. App. —, 190 Pac. 458.

Colorado. — See *Pleyte v. Pleyte* (1890) 15 Colo. 125, 25 Pac. 25.

District of Columbia. — *Sparks v. Sparks* (1905) 25 App. D. C. 856; *Morgan v. Morgan* (1905) 25 App. D. C. 389; *Bernsdorff v. Bernsdorff* (1905) 26 App. D. C. 228; *Lane v. Lane* (1905) 26 App. D. C. 235, 6 Ann. Cas. 683.

Florida.—*Prine v. Prine* (1895) 36 Fla. 676, 84 L.R.A. 87, 18 So. 781.

Idaho. — *Roby v. Roby* (1903) 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50; *ENDERS v. ENDERS* (reported herewith) ante, 1492.

Illinois.—*Jenkins v. Jenkins* (1878) 91 Ill. 167; *Earle v. Earle* (1898) 75 Ill. App. 351; *Miles v. Miles* (1902) 102 Ill. App. 130; *Harding v. Harding* (1903) 205 Ill. 105, 68 N. E. 754, affirming 105 Ill. App. 363. See also *Blake v. Blake* (1875) 80 Ill. 523.

Compare Seeger v. Seeger (1910) 154 Ill. App. 38; *Balswic v. Balswic* (1912) 179 Ill. App. 118.

Iowa. — *Vanduzer v. Vanduzer* (1887) 70 Iowa, 614, 31 N. W. 956; *Doolittle v. Doolittle* (1889) 78 Iowa, 695, 6 L.R.A. 187, 43 N. W. 616; *Simpson v. Simpson* (1894) 91 Iowa, 235, 59 N. W. 22; *Parsons v. Parsons* (1911) 152 Iowa, 68, 131 N. W. 17; *Mengel v. Mengel* (1912) 157 Iowa, 630, 138 N. W. 495.

Kansas.—*Kjellander v. Kjellander* (1913) 90 Kan. 112, 45 L.R.A.(N.S.) 943, 132 Pac. 1170, Ann. Cas. 1915B, 1246.

Kentucky.—*Compare Elliott v. Elliott* (1910) 138 Ky. 309, 127 S. W. 478, 1008.

Maryland.—*Rohrback v. Rohrback* (1892) 75 Md. 317, 23 Atl. 610; *Buckner v. Buckner* (1912) 118 Md. 263, 84 Atl. 471; *Mulhall v. Mulhall* (1913) 120 Md. 22, 87 Atl. 490; *Outlaw v. Outlaw* (1914) 122 Md. 695, 91 Atl. 1067; *Crane v. Crane* (1916) 128 Md. 214, 97 Atl. 535. See also *Dicus v. Dicus* (1917) 131 Md. 87, 101 Atl. 697.

Michigan. — *Chaffee v. Chaffee* (1866) 14 Mich. 463; *Nichols v. Nichols* (1910) 163 Mich. 107, 127 N. W. 1042; *Bloss v. Bloss* (1915) 187 Mich. 425, 153 N. W. 666.

Minnesota. — *Eberhart v. Eberhart* (1921) — Minn. —, 183 N. W. 140.

Mississippi. — *Hall v. Hall* (1900) 77 Miss. 741, 27 So. 636; *Franklin v. Franklin* (1915) 109 Miss. 163, 68 So. 74; *Brown v. Brown* (1920) 123 Miss. 125, 85 So. 180.

Missouri.—*Rosenfeld v. Rosenfeld* (1895) 63 Mo. App. 411; *Creasey v. Creasey* (1913) 175 Mo. App. 237, 157 S. W. 862; *Dowling v. Dowling* (1914) 181 Mo. App. 675, 164 S. W. 643; *McCain v. McCain* (1920) — Mo. App. —, 218 S. W. 949.

Montana. — *Bordeaux v. Bordeaux* (1904) 29 Mont. 478, 75 Pac. 359. See also *Bordeaux v. Bordeaux* (1902) 26 Mont. 533, 69 Pac. 103.

Nebraska.—*Willits v. Willits* (1906) 76 Neb. 228, 107 N. W. 379, 5 L.R.A.(N.S.) 767, 14 Ann. Cas. 883; *Wyrick v. Wyrick* (1910) 88 Neb. 12, 128 N. W. 662.

New Jersey. — *Disborough v. Dis-*

Atl. 8.

New Mexico. — Taylor v. Taylor (1914) 19 N. M. 383, L.R.A.1915A, 1044, 142 Pac. 1129.

New York. — McBride v. McBride (1890) 55 Hun, 401, 8 N. Y. Supp. 448, affirmed in (1890) 119 N. Y. 519, 23 N. E. 1065; Halsted v. Halsted (1895) 11 Misc. 592, 32 N. Y. Supp. 1080; Haddock v. Haddock (1902) 75 App. Div. 565, 78 N. Y. Supp. 304; Haddock v. Haddock (1905) 109 App. Div. 502, 96 N. Y. Supp. 522; Greenberg v. Greenberg (1909) 134 App. Div. 419, 119 N. Y. Supp. 227; Miller v. Miller (1913) 158 App. Div. 766, 144 N. Y. Supp. 278.

Nevada.—Lake v. Lake (1882) 16 Nev. 363; Buehler v. Buehler (1915) 38 Nev. 500, 151 Pac. 44.

Oklahoma. — Hunt v. Hunt (1909) 23 Okla. 490, 22 L.R.A. (N.S.) 1202, 100 Pac. 541; Kostachek v. Kostachek (1912) 40 Okla. 744, 124 Pac. 761; Hartshorn v. Hartshorn (1916) — Okla. —, 155 Pac. 508; Spradling v. Spradling (1916) — Okla. —, 158 Pac. 900.

Oregon.—O'Brien v. O'Brien (1899) 36 Or. 92, 57 Pac. 374, 58 Pac. 892.

South Dakota. — Drake v. Drake (1907) 21 S. D. 182, 110 N. W. 270; Tuttle v. Tuttle (1910) 26 S. D. 95, 127 N. W. 637; Wells v. Wells (1910) 26 S. D. 70, 127 N. W. 636; Cameron v. Cameron (1913) 30 S. D. 634, 139 N. W. 329.

Tennessee. — Shy v. Shy (1872) 7 Heisk. 125; Taylor v. Taylor (1921) — Tenn. —, 232 S. W. 445.

Utah. — See Cast v. Cast (1873) 1

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Wash. —, 203 Pac. 2.

West Virginia. — Wass v. Wass (1896) 42 W. Va. 460, 26 S. E. 440.

Wisconsin. — Freeman v. Freeman (1872) 31 Wis. 235. See also Krause v. Krause (1868) 23 Wis. 354; Coad v. Coad (1876) 40 Wis. 392; Friend v. Friend (1886) 65 Wis. 412, 27 N. W. 84.

Wyoming. — Duxstad v. Duxstad (1908) 16 Wyo. 396, 94 Pac. 463, 15 Ann. Cas. 228; Brown v. Brown (1913) 22 Wyo. 92, 135 Pac. 801.

"The husband is regarded as the head of the family and the holder of the purse strings. Before trial temporary alimony . . . is awarded as a matter of course. After an adverse decision against the wife, and an appeal by her, the same considerations would require the making of additional allowances for the purpose of enabling her to present her case to the appellate court, unless it is manifest that her appeal is without merit." Rosenfeld v. Rosenfeld (1895) 63 Mo. App. 411.

So, in the leading case of Lake v. Lake (1882) 17 Nev. 230, 30 Pac. 878, it was said: "The law gives appellant . . . the right to appeal from that part of the judgment disposing of the property, and accords to her every privilege granted to other litigants in this court. Upon her rests the burden of showing error in the court below. Among all the rights to which she is entitled, there is no one more important to her and the court than that of having the aid of counsel learned in

of the court would be disturbed, and it would be deprived of one of the usual, proper, and necessary means of exercising its appellate jurisdiction."

III. *Requisites to allowance.*

a. *Existence of marital relation.*

The view that, where the wife appeals from a decree of absolute divorce, the matrimonial status essential to an allowance of counsel fees on appeal no longer exists, is supported by *Elliott v. Elliott* (1910) 138 Ky. 309, 127 S. W. 1008, wherein the court said: "In the opinion rendered on the appeal, we said that the lower court should render a judgment against appellee for the costs of the action, and for a reasonable attorney's fee in favor of counsel representing appellant 'in that court.' The judgment appealed from granted appellee a divorce from the bonds of matrimony, and appellant was not the wife of appellee when the appeal was pending in this court. Therefore, the statute requiring the husband in suits for alimony and divorce to pay the cost of each party, unless it should be made to appear in the case that the wife is in fault and has ample estate to pay the same, cannot apply. The statute was not intended to embrace the attorney fees of a divorced wife."

A different view was taken in *Tuttle v. Tuttle* (1910) 26 S. D. 95, 127 N. W. 637, wherein the court, apparently including counsel fees in its reference to alimony and suit money, said: "It is the marriage relation that is the basis or foundation of an action for divorce, and alimony and suit money are but necessary incidents to a suit based upon such relation. It is only by virtue of such relation that the wife has any claim upon the husband for support, or payment of the expenses of her suit or defense, and certainly no court would be justified in requiring a man to advance moneys to a person upon the ground that she is his wife, without some showing that she is such. The relief asked for here is not based upon the ground that the appellant is the wife of respondent, but upon the ground that when this action was brought she was the

wife of respondent,—that the marriage relation had existed,—and this fact of marriage stands conceded. It would certainly be an anomalous situation if a wife seeking a divorce and alimony should procure the decree of divorce sought, and with it an unsatisfactory allowance as permanent alimony, and, desiring to have a review of the allowance for alimony, being without means to conduct such appeal, should be compelled either to abandon her appeal, or else, in order to continue the marriage relation and through it hold her husband for the means with which to maintain her appeal, be compelled to appeal from that part of the decree granting the divorce, and then be entitled to alimony only by being reversed upon her appeal from the divorce part of the decree."

But where the husband obtains a judgment of divorce, and dies pending an appeal by the wife, no allowance of counsel fees for services in prosecuting the appeal will be made, as the proceeding is no longer a suit for divorce, but a review for the purpose of ascertaining property rights. *Strickland v. Strickland* (1906) 80 Ark. 451, 97 S. W. 659.

Similarly, in *Seibert v. Seibert* (1912) — N. J. —, 86 Atl. 535, it was held that, an action for divorce having abated by the death of the wife before the hearing of her appeal, the court could not make an order for an allowance of counsel fees for services in preparation of the appeal.

b. *Good faith of wife.*

Where the wife is the appellant it must appear that she is acting in good faith, and has reasonable grounds to believe that the appeal will be successful. *Bohnert v. Bohnert* (1891) 91 Cal. 428, 27 Pac. 732; *Halsted v. Halsted* (1895) 11 Misc. 592, 32 N. Y. Supp. 1080; *Gansz v. Gansz* (1899) 59 N. Y. Supp. 955; *Greenberg v. Greenberg* (1909) 134 App. Div. 419, 119 N. Y. Supp. 227; *Berger v. Berger* (1910) 141 App. Div. 455, 126 N. Y. Supp. 284; *Disborough v. Disborough* (1893) 51 N. J. Eq. 306, 28 Atl. 3;

who is the appellee, has no assets on which to raise money to employ counsel to enable her to conduct her case on appeal, and the appellant husband is a man of ample means, whose property is all without the state, and he himself is also without the jurisdiction, the court may allow as counsel fees a sum sufficient to compensate the wife's attorney for appearing in her behalf on the appeal. *Buehler v. Buehler* (1915) 38 Nev. 500, 151 Pac. 44.

Likewise, where it is shown that the husband has twice removed his property from the state in which the wife was domiciled, in violation of an order of the trial court allowing alimony and support money for minor children, a peculiarly appropriate case is made for the exercise of the court's power to make an allowance to the wife of funds with which to prepare and present her defense on appeal. *Spradling v. Spradling* (1916) — Okla. —, 158 Pac. 900.

In *Buckner v. Buckner* (1912) 118 Md. 263, 84 Atl. 471, it appearing that the wife was without means to employ counsel to present her case to the appellate court, it was held that she had an undoubted right to an allowance of counsel fees.

So, in *Sullivan v. Sullivan* (1908) 49 Wash. 508, 95 Pac. 1095, the court said: "Where the wife prevails in the trial court, and there is belonging to the parties a substantial amount of community property which is in the possession and under the control of the husband, and the disposition thereof made by the trial court is superseded by the husband's stay bond on appeal, and the wife has no means . . . for legal services and charges incidental to properly preparing and presenting her case upon appeal, we think a sufficient showing is made for an allowance for these purposes by this court."

In *Ex parte Winter* (1886) 70 Cal. 291, 11 Pac. 630, the court in applying the rule said: "To us it appears that the learned judge below was by law vested with the power, within the bounds of a proper discretion, to make the order for the payment by the de-

fendant of the sum of \$250 counsel fees, to enable his wife, who was without any means or property otherwise than as obtained from him, to prosecute her action then on appeal."

In the reported case (*ENDERS v. ENDERS*, ante, 1492), it appearing that all of the property of the husband and wife had been awarded to the husband, and that the wife was without means to employ counsel properly to protect her interests on appeal, it is held that a showing of poverty by the husband could not defeat her right to an allowance, particularly where the action for divorce was brought by the husband.

IV. Jurisdiction of trial court.

It has been held, without reference to any statute, that the trial court may exercise jurisdiction to allow counsel fees incident to an appeal in a matrimonial action. *Pleyte v. Pleyte* (1890) 15 Colo. 125, 25 Pac. 25; *Rohrback v. Rohrback* (1892) 75 Md. 318, 23 Atl. 610; *Buckner v. Buckner* (1912) 118 Md. 263, 84 Atl. 471; *Mulhall v. Mulhall* (1913) 120 Md. 22, 87 Atl. 490; *Outlaw v. Outlaw* (1914) 122 Md. 695, 91 Atl. 1067; *Crane v. Crane* (1916) 128 Md. 214, 97 Atl. 535; *Dicus v. Dicus* (1917) 131 Md. 87, 101 Atl. 697; *Craig v. Craig* (1914) 115 Va. 764, 80 S. E. 507; *Griffith v. Griffith* (1912) 71 Wash. 56, 127 Pac. 585, 128 Pac. 636; *Lewis v. Lewis* (1915) 83 Wash. 671, 145 Pac. 980; *State ex rel. Clark v. Superior Ct.* (1916) 90 Wash. 80, 155 Pac. 398. See also *Engleman v. Engleman* (1899) 97 Va. 487, 34 S. E. 50.

In *Rohrback v. Rohrback* (1892) 75 Md. 318, 23 Atl. 610, supra, the power of the trial court, after an appeal had been taken, to allow to the wife counsel fees incident to the appeal, was expressly recognized as follows: "The right of a wife to a reasonable allowance for counsel fees . . . in proceedings of this kind is well settled in this state. This, indeed, was not and could not be disputed. . . . The wife could not, in fact, make application for counsel fees and expenses incident to the appeal, until after the appeal had been taken, because she

the husband intended to appeal from the decree of the court below, dismissing his bill. And although the appeal was taken, the court still had jurisdiction of the parties, and, having jurisdiction, it had the power to determine the question as to the right of the wife to an allowance for counsel fees."

So, in *Dicus v. Dicus* (1917) 131 Md. 87, 101 Atl. 697, the court of appeals said: "Application has been made to this court for an order requiring the appellee to pay the plaintiff a sufficient sum for her . . . counsel fee in the prosecution of the appeal. This was a question over which the court below had jurisdiction after the appeal was entered. . . . The application should have been made to the trial court, and, if it had been presented there, we have no reason to doubt that it would have been given due consideration."

Likewise, in *Crane v. Crane* (1916) 128 Md. 214, 97 Atl. 535, the court, in referring to one of its recent decisions, said: "In *Outlaw v. Outlaw* (1914) (appeal by the wife) 122 Md. 695, 91 Atl. 1067 [syllabus decision], this court said. 'It is well established by the decisions of this court that the trial court had jurisdiction to hear and pass upon the petition of the plaintiff in which she asked for counsel fees . . . incident to her appeal to this court.'"

In *Craig v. Craig* (1914) 115 Va. 764, 80 S. E. 507, the appellate court said that the trial court was in a better position than the appellate court to allow counsel fees pending an appeal.

The California statute provides that "when an action for divorce is pending the court may, in its discretion, require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." It is also provided by statute that an action is deemed to be pending "from the time of its commencement until its final determination upon appeal or until the time for

provisions it has been held that the trial court has power, after an appeal has been taken, and at any time during the pendency of the appeal, to order the husband to pay the wife a reasonable sum as counsel fees for defending or prosecuting the appeal. *Bohnert v. Bohnert* (1891) 91 Cal. 428, 27 Pac. 732; *Grannis v. Superior Ct.* (1904) 143 Cal. 630, 77 Pac. 647; *Bruce v. Bruce* (1911) 160 Cal. 28, 116 Pac. 66; *McCahan v. McCahan* (1920) — Cal. App. —, 190 Pac. 458. In *Grannis v. Superior Ct.* (1904) 143 Cal. 630, 77 Pac. 647, supra, the court said: "The power of the court to compel the husband to pay the wife counsel fees for services of her attorney in an action for divorce, where she is without means to pay them, is not exhausted by the granting of a final judgment." A like result was reached in several earlier cases wherein no reference was made to any statute. *Reilly v. Reilly* (1882) 60 Cal. 624; *Ex parte Winter* (1886) 70 Cal. 291, 11 Pac. 630; *Larkin v. Larkin* (1886) 71 Cal. 330, 12 Pac. 227. The trial court has the same power to allow counsel fees pending an appeal in an action for annulment of marriage. *Dunphy v. Dunphy* (1911) 161 Cal. 87, 118 Pac. 445, wherein the court said: "The same considerations which make such power, pending appeal from the judgment of the trial court, essential to the adequate protection of the wife in an ordinary action for divorce, are present in an action by the husband for annulment of the marriage, and the reasons given by the courts for holding that the power exists in the annulment action, independent of express statutory provision, warrant the exercise of the power, as long as it is essential to enable the wife to make such defense in the annulment action as she may have, including necessarily such rights as are given her by the law to have the action of the trial court reviewed on appeal."

An Idaho statute, providing that, "while an action for divorce is pending the court may, in its discretion

any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action," has been construed to give the trial court jurisdiction to allow counsel fees on appeal. *Roby v. Roby* (1903) 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50, wherein the court said: "We think the 'court' referred to in § 2472, supra, is the district court, in which such actions are originally commenced, and that it is the intention of our statute to give to the trial court the jurisdiction to grant alimony and suit money so long as the action is pending, whether in the trial court or upon appeal. The trial judge is in a better position than this court to know the amount of money necessary for the payment of costs and disbursements in the prosecution of an appeal, and the ability of the husband to meet such requirements. He knows all the facts in the case and the situation and condition of the parties. If we should hold that, so soon as a notice of appeal is filed and served in such cases, application for suit money and attorneys' fees must thereafter be originally made in this court, it would result in turning the supreme court into a trial court in such matters; for the reason the record in such case would not be before the appellate court, and in order to apprise it of the facts in the case, and the condition of the parties, and the ability of the husband to comply with such order as might be made, it would be necessary to have affidavits from both of the respective parties made and filed in this court, and such investigation and determination made here as would be originally made by the trial judge." The court added, however: "We do not want to be understood as denying the jurisdiction of this court to allow either attorneys' fees . . . after the case has been filed in this court upon appeal, when the same is proper or necessary to the complete exercise of its appellate jurisdiction. Under § 9 of article 5 of the Constitution, this court has jurisdiction to review upon appeal any decision of the district courts, and may issue 'all writs necessary or proper to the complete exer-

cise of its appellate jurisdiction.' " So, under the constitutional provision referred to in the case last cited, it is held in the reported case (*ENDERS v. ENDERS*, ante, 1492) that while the supreme court may consider a motion for counsel fees on appeal, where it is shown that the granting of such relief is necessary to a complete exercise of its appellate jurisdiction, the motion should, in the first instance, be made to the trial court, which is vested with original jurisdiction in the matter.

An Illinois statute provides as follows: "In all cases of divorce the court may require the husband to pay to the wife, or pay into court for her use during the pendency of the suit, such sum or sums of money as may enable her to maintain or defend the suit; and, in every suit for a divorce, the wife, when it is just and equitable, shall be entitled to alimony during the pendency of the suit. And in case of appeal or writ of error by the husband, the court in which the decree or order is rendered may grant and enforce the payment of such money for her defense, and such equitable alimony during the pendency of the appeal or writ of error, as to such court shall seem reasonable and proper." In *Jenkins v. Jenkins* (1878) 91 Ill. 167, it was held that this statute gives the trial court power to order an allowance of solicitors' fees for conducting the wife's case in the supreme court, after an appeal from a decree of divorce in her favor in the trial court is perfected by the husband. Similarly, in *Earle v. Earle* (1898) 75 Ill. App. 351, the court, in affirming an order of the trial court allowing counsel fees to the wife with which to defend her case on appeal, said: "We are unable to see how any question can arise as to the power of the court to thus provide the wife with means necessary to prosecute her cause. . . . Rev. Stat. § 15, chap. 40." See also *Blake v. Blake* (1875) 80 Ill. 523. In *Miles v. Miles* (1902) 102 Ill. App. 130, it was held that an allowance by the trial court of counsel fees, under the statute, to enable the wife to make her defense on appeal,

was not premature. The court said: "The chancellor, having heard the case, has a sufficient general knowledge of the issues presented, the situation and ability of the appellant, the expenses and the labor necessary to be performed in a court of review, to enable him to fix a reasonable amount in most cases. In the nature of things, under the statute, no certain basis is attainable for such allowances, and they must, in the main, be made in advance of the expenses incurred and the rendition of services by a solicitor." In *Harding v. Harding* (1903) 205 Ill. 105, 68 N. E. 754, affirming (1903) 105 Ill. App. 363, an allowance of counsel fees by the trial court, pending appeals by the husband from a decree awarding separate maintenance and in a proceeding for contempt arising therefrom, was affirmed without reference to any statute. The statute, however, has been held not to authorize the trial court to make an allowance of counsel fees to enable the wife to prosecute an appeal from a decree of divorce against her for adultery. *Balswic v. Balswic* (1912) 179 Ill. App. 118. And in *Seeger v. Seeger* (1910) 154 Ill. App. 38, it was said: "The court allowed to appellant two sums of \$50 each, at different times, for her solicitors' fees. After the divorce had been granted, she asked for solicitors' fees and money with which to prosecute an appeal. This the court denied, and it is argued that it should have been granted. Where a divorce case is decided in favor of the wife, and the husband takes an appeal, it is highly proper that the wife should be granted the means wherewith to defend the decree; at least, unless she has sufficient means of her own. But where the wife is defeated, we do not recognize the duty of the court to award her further suit money. In this case the wife had property of her own, and the parties had an antenuptial contract, and we think the court properly refused to award her further suit money after the divorce was granted."

In *Missouri* the trial court alone has jurisdiction to grant counsel fees pending an appeal, and the allowance

must be made in connection with the granting of the appeal. The statute relating to alimony and maintenance, among other things, provides as follows: "The court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the same manner provided by law in other cases." In *State ex rel. Kranke v. Calhoun* (1921) 206 Mo. App. 298, 227 S. W. 1080, affirmed on opinion below in (1921) — Mo. —, 232 S. W. 1038, wherein the relief asked was for an allowance of alimony and suit money, to defray, among other things, the expense of employing counsel on appeal, the court construed this statute as follows: "The fundamental object, as we interpret the language of § 2375, Revised Statutes of Missouri 1909, is to provide the wife, at all times while the suit for divorce is pending, a forum in which she may make her application for alimony and suit money, and have the same determined upon hearing upon its merits, thus assuring the wife, where need and the circumstances require, the necessary funds with which to conduct her case, whether she be plaintiff or defendant, appellant or respondent. In other words, the legislature evidently intended that the wife should at all times, so long as a suit for divorce is pending, be assured of an opportunity to prosecute or defend her case until final judgment in the matter is entered. It has long since been definitely settled that the circuit court is the only court which can make an order allowing alimony pending the suit. . . . Can it be said that, when an appeal has been taken from the judgment of the circuit court upon the merits of the controversy involved in a divorce proceeding, the case is no longer pending? We think not. And when we consider the fact that an appeal from a decree in a divorce suit invests the appellate court solely with jurisdiction to hear and determine the cause upon the record as made up in the circuit court, and that such appeal does not carry with it for review the action of the circuit court upon the

allowance or disallowance of a motion for alimony and suit money pending an appeal, it seems plain to us that there remains in the circuit court jurisdiction to entertain a motion for allowance of alimony and suit money pending the appeal, after the appeal has been taken from the judgment on the merits." The foregoing decision was followed in *Welday v. Welday* (1921) — Mo. App. —, 232 S. W. 1045. In several other cases the trial court has been held, without reference to any statute, to have jurisdiction to allow counsel fees pending appeal. *State ex rel. Gercke v. Seddon* (1887) 93 Mo. 520, 6 S. W. 342; *Rosenfeld v. Rosenfeld* (1895) 63 Mo. App. 411; *Lawlor v. Lawlor* (1898) 76 Mo. App. 293; *Libbe v. Libbe* (1911) 157 Mo. App. 701, 138 S. W. 685; *Creasey v. Creasey* (1913) 175 Mo. App. 237, 157 S. W. 863; *Dowling v. Dowling* (1914) 181 Mo. App. 675, 164 S. W. 643; *Arndt v. Arndt* (1914) 177 Mo. App. 420, 163 S. W. 282. In *Dowling v. Dowling* (1914) 181 Mo. App. 675, 164 S. W. 643, the court said: "The matter of the allowance in favor of the wife pending an appeal, the appeal being taken either by her or by her husband, has been before our court and the supreme court a number of times, and it has been decided that the trial court is the only court that can make such allowance, and that it must be made, if made at all, at, or in connection with, granting the appeal in the main case." Likewise, in *Creasey v. Creasey* (1913) 175 Mo. App. 237, 157 S. W. 863, it was said: "It is . . . within the power of the trial court, in and by the final decree, in case of an appeal, to provide for the payment of . . . counsel fees pending and covering the appeal. But this must be done in and by the final decree, or along with the granting of an appeal, if an appeal is taken. That it is within the power of the circuit court, and solely within its power, so to do, is clearly settled by the decisions of our supreme court and of the courts of appeals." See also *State ex rel. Clarkson v. St. Louis Ct. of Appeals* (1885) 88 Mo. 135. The principal reason for the appellate court's refusal to allow

counsel fees is that it cannot exercise both original and appellate jurisdiction over the same subject-matter, in the same suit. As was said in *State ex rel. Clarkson v. St. Louis Ct. of Appeals*, supra: "The only question before this court is whether the St. Louis court of appeals has jurisdiction to make an order on the husband in a divorce suit, pending an appeal in that court, to pay the wife the . . . counsel fees necessary for the prosecution of her appeal, in a case where the husband was awarded a decree of divorce in the court below. The St. Louis court of appeals has original jurisdiction to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other original remedial writs, and to hear and determine the same, and also has a superintending control over all inferior courts of record in the counties embraced within its territorial jurisdiction. Const. § 2, art. 6. Besides the original jurisdiction thus conferred, its jurisdiction is appellate only. It is clear that the power to make such an order as we are asked to prohibit the court from making and enforcing is not included in the exercise of its original jurisdiction, and we think it is equally clear that it is not included in the exercise of its appellate jurisdiction. The appeal from the decree in the divorce suit invested the St. Louis court of appeals with jurisdiction to hear and determine the cause solely upon the record as made up in the circuit court, and to affirm, or modify, or reverse the judgment and remand the cause, or to render such judgment as in its opinion the circuit court ought to have rendered. By § 2179 the circuit court was fully empowered 'to decree alimony pending the suit for divorce . . . and enforce such order in the manner provided by law in other cases;' and we doubt not but that the circuit court, in granting an appeal to defendant in the divorce suit, could, upon a proper showing, have made an order requiring the husband to pay her such reasonable sum as in the judgment of the court would enable her to prosecute her appeal. We have in several

instances, when the circuit court had failed to allow the wife temporary alimony to prosecute her appeal, refused to entertain motions asking us to make such allowance, holding that to do so would be exercising power not possessed by us, either by virtue of our original or appellate jurisdiction." See also *State ex rel. Dawson v. St. Louis Ct. of Appeals* (1889) 99 Mo. 216, 12 S. W. 661; *Lawlor v. Lawlor* (1898) 76 Mo. App. 298, overruling *Clarkson v. Clarkson* (1885) 20 Mo. App. 94. The trial court has jurisdiction to make an allowance of alimony for counsel fees after application for an appeal has been made, and before the application has been granted. *Watkins v. Watkins* (1896) 66 Mo. App. 468. See also *State ex rel. Gercke v. Seddon* (1887) 93 Mo. 520, 6 S. W. 342.

Under a New York statute providing that the court may, during the pendency of an action for divorce, "from time to time, make and modify an order or orders requiring the husband to pay any sum or sums necessary to enable the wife to carry on or defend the action," it has been held that the trial court, at special term, may decree an allowance of counsel fees pending appeal. *McBride v. McBride* (1890) 55 Hun, 401, 8 N. Y. Supp. 448, affirmed in (1890) 119 N. Y. 519, 23 N. E. 1065; *Halsted v. Halsted* (1895) 11 Misc. 592, 32 N. Y. Supp. 1080; *Greenberg v. Greenberg* (1909) 134 App. Div. 419, 119 N. Y. Supp. 227; *Berger v. Berger* (1910) 141 App. Div. 455, 126 N. Y. Supp. 284; *Miller v. Miller* (1913) 158 App. Div. 766, 144 N. Y. Supp. 278. In *Halsted v. Halsted* (1895) 11 Misc. 592, 32 N. Y. Supp. 1080, *supra*, the court said: "It is the settled law of this state that the power of the court to grant . . . counsel fees in matrimonial actions during their pendency is not limited to applications made before the entry of the final judgment, but may be exercised during the pendency of an appeal, and until the final determination of the action, and that although judgment finally, for the purposes of an appeal, is entered, the action is still pending; in other words, an action, within the

purview of § 1769 of the Code, is pending as long as the appeal is undetermined." Similarly, in *McBride v. McBride* (1890) 55 Hun, 401, 8 N. Y. Supp. 448, it was said: "An action is pending as long as an appeal is undetermined; and the right given by § 1769 to make these allowances during the pendency of the action clearly contemplated the fact that, as long as the litigation continued so that the wife could not reap the results of a judgment in her favor, the court should have the right to protect her interests." The motion for counsel fees, however, should be made on a case, and the court at special term should not attempt to determine the merits of the appeal on affidavits. *Gansz v. Gansz* (1899) 59 N. Y. Supp. 955; *Greenberg v. Greenberg* (1909) 134 App. Div. 419, 119 N. Y. Supp. 227. In at least one case the right of the court to make an allowance of counsel fees, pending appeal, was denied. In *Winton v. Winton* (1883) 31 Hun, 290, it was held that, after a decree of divorce in favor of the wife, the court had no authority to order the husband to pay counsel fees for services which the wife's counsel had previously rendered, or might subsequently render in the action, although the husband had appealed to the court of appeals from an order of the general term affirming the decree of the court below. The court said: "By no provision in the law has the power been conferred upon the court to impose any additional conditions or restrictions upon the party appealing. The right, on the contrary, is absolutely given to either party to appeal, upon giving notice and the security which has been prescribed. And on complying with the law in these particulars, a positive and unqualified right of review has been provided for the defeated party. If the authority to direct allowances of this nature should be held to continue during the pendency of an appeal from the judgment, it might be exercised in such a manner as altogether to defeat that right, and the law has, in no form, committed its exercise to the

court. It has, on the other hand, as plainly as that could be done, declared what shall be required from the party to entitle him to appeal and to have his appeal heard. And the payment of an allowance of this nature has, in no form, been by any possibility required for that purpose." See, however, *McCarthy v. McCarthy* (1893) 137 N. Y. 500, 33 N. E. 550, wherein the court said: "If . . . the judgment of divorce should be appealed from, then, upon an application wherefrom that fact should appear, and it should also appear that in order to maintain and defend her rights an allowance ought to be made, the court would be justified in granting one."

Under the West Virginia statute allowing the court in term, or the judge in vacation, during the pendency of a suit for divorce, to make any proper order to compel the husband to pay any sum necessary for the maintenance of the wife, and to enable her to carry on her suit, the trial court has power to allow counsel fees on appeal. *Wass v. Wass* (1896) 42 W. Va. 460, 26 S. E. 440, wherein the court said: "Nothing is said about the appellate court in said statute, and we must regard it as a matter submitted to the sound discretion of the circuit court under all of the circumstances, including the condition of the parties. The discretion has been exercised in this case by allowing \$120 for counsel fees, in addition to what had already been allowed at different times; and we think the legislature intended that this discretion should be exercised by the circuit court, being nearer to and more in touch with the parties and their circumstances and surroundings."

V. Jurisdiction of appellate court.

a. View that court has jurisdiction.

The rule that an appellate court has implied or inherent jurisdiction to allow counsel fees on an appeal before it in a matrimonial case, as an incident of its appellate jurisdiction, is sustained in several jurisdictions.

District of Columbia. — *Lane v.*
18 A.L.R.—95.

Lane (1905) 26 App. D. C. 235, 6 Ann. Cas. 683.

Florida. — *Prime v. Prime* (1895) 36 Fla. 676, 34 L.R.A. 88, 18 So. 78.

Kansas. — *Kjellander v. Kjellander* (1913) 90 Kan. 112, 45 L.R.A.(N.S.) 943, 132 Pac. 1170, Ann. Cas. 1915B, 1246.

Michigan. — *Nichols v. Nichols* (1910) 163 Mich. 107, 127 N. W. 1042. See also *Bloss v. Bloss* (1915) 187 Mich. 425, 153 N. W. 566.

Mississippi. — *Hall v. Hall* (1900) 77 Miss. 741, 27 So. 636; *Franklin v. Franklin* (1915) 109 Miss. 163, 68 So. 74.

Missouri. — *McCoin v. McCoin* (1920) — Mo. App. —, 218 S. W. 949.

Nevada. — *Lake v. Lake* (1882) 16 Nev. 363, affirmed in (1882) 17 Nev. 230, 30 Pac. 878; *Buehler v. Buehler* (1915) 38 Nev. 500, 151 Pac. 44.

New Mexico. — *Taylor v. Taylor* (1914) 19 N. M. 383, L.R.A.1915A, 1044, 142 Pac. 1129.

Oklahoma. — *Kostachek v. Kostachek* (1912) 40 Okla. 744, 124 Pac. 761; *Hartshorn v. Hartshorn* (1916) — Okla. —, 155 Pac. 508; *Spradling v. Spradling* (1916) — Okla. —, 158 Pac. 900. See also *Hunt v. Hunt* (1909) 23 Okla. 490, 22 L.R.A.(N.S.) 1202, 100 Pac. 541.

In *Taylor v. Taylor* (N. M.) supra, the court said: "It is to be conceded that this court is without statutory authority to make the allowance prayed for, and unless the power so to do is an inherent one this court must reject the application. We believe that the weight of authority supports the view that appellate courts possess inherent power to allow . . . attorney fees pending an appeal, and may make such allowance as the circumstances warrant. . . . The opposing view as to the power of appellate courts in this respect is, generally speaking, based upon the ground that the exercise of such power is the assumption of original jurisdiction usually withheld by constitutional and statutory provisions. Our view of the matter being that the power is inherent in the appellate court, and necessary, by reason of the nature of the case,

might otherwise find it impossible to be represented before this court, we cannot agree with the minority rule."

Similarly, in *Kjellander v. Kjellander* (Kan.) *supra*, the court expressed a like view, saying: "The power to require the payment of counsel fees, or suit money and temporary alimony, pending an appeal, has not been expressly given, and the question is whether there is implied power to make such allowances in the exercise of our appellate jurisdiction. The appellate jurisdiction conferred carries with it, by implication, the power to protect that jurisdiction, and to make the decisions of the court thereunder effective."

"The exercise of such authority by an appellate court is based on the theory that the jurisdiction to review decrees in divorce cases carries with it, by implication, the incidental power to make such allowances; such authority being indispensable to the proper exercise of proper appellate jurisdiction. The object of the law is to afford a wife without means the funds necessary, . . . pending the final determination of a divorce proceeding, . . . to prosecute or defend such action. This object would be defeated if, after a decree in such action, courts withheld from her . . . the means necessary for a reasonable review, in case of an adverse decree by the chancellor. She is entitled to a proper allowance so long as the cause is pending, and until it is finally determined." *Kostachek v. Kostachek* (Okla.) *supra*.

And in *Lane v. Lane* (1905) 26 App. D. C. 235, 6 Ann. Cas. 683, the appellate court of the District of Columbia was held to have jurisdiction, the court saying: "We have, in former cases, intimated that this court has the power to entertain a motion of this kind, pending an appeal in a divorce proceeding, though it was not then necessary to actually decide the question. . . . Now

this court. . . . This power is one, however, that will not be exercised unless the application for the order is supported by proofs tending to show that the applicant is in a destitute or needy condition, and that there exists a good reason why the relief could not be obtained in the trial court." See also *Morgan v. Morgan* (1905) 25 App. D. C. 389. Compare *Sparks v. Sparks* (1905) 25 App. D. C. 356; *Bernsdorff v. Bernsdorff* (1905) 26 App. D. C. 228.

The appellate court has the power, even though the appeal was granted by the lower court with supersedeas. *Brown v. Brown* (1920) 123 Miss. 125, 85 So. 180.

In Iowa, the appellate court has exclusive jurisdiction to allow counsel fees pending an appeal. *Mengel v. Mengel* (1912) 157 Iowa, 630, 138 N. W. 495, wherein the court said: "According to our more recent holdings, the appellate tribunal is the only one to make such an allowance." See to the same effect, *Parsons v. Parsons* (1911) 152 Iowa, 68, 131 N. W. 17; *Simpson v. Simpson* (1894) 91 Iowa, 235, 59 N. W. 22; *Doolittle v. Doolittle* (1889) 78 Iowa, 695, 6 L.R.A. 187, 43 N. W. 616.

In Idaho, the Constitution (art. 5, § 9) provides that "the supreme court shall . . . have . . . jurisdiction to issue . . . all writs necessary or proper to the complete exercise of its appellate jurisdiction." Under that provision it has been held that the supreme court may entertain an application for counsel fees on appeal, when the granting of such relief is necessary to a complete exercise of its appellate jurisdiction. See the reported case (*ENDERS v. ENDERS*, ante, 1492). See also *Roby v. Roby* (1903) 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50.

In Nebraska, it has been held that where the trial court fails to provide a sufficient amount to cover the costs of the wife's action, and she appeals for that reason, the supreme

also been held in that state, without regard to a failure on the part of the trial court to allow attorneys' fees, that the appellate court may award a reasonable sum for such purpose. *Willits v. Willits* (1906) 76 Neb. 228, 5 L.R.A.(N.S.) 767, 107 N. W. 379, 14 Ann. Cas. 883.

In New York the appellate court has jurisdiction to allow counsel fees on appeal, in the event of a wrongful refusal by the court at special term to make the order. *Haddock v. Haddock* (1902) 75 App. Div. 565, 78 N. Y. Supp. 304. See also *Haddock v. Haddock* (1905) 109 App. Div. 502, 96 N. Y. Supp. 522.

In South Dakota the appellate court has been held to have original jurisdiction to grant counsel fees on appeal, although the trial court, under the Code, has concurrent jurisdiction over the same matter. *Wells v. Wells* (1910) 26 S. D. 70, 127 N. W. 636. See also *Drake v. Drake* (1907) 21 S. D. 182, 110 N. W. 270; *Tuttle v. Tuttle* (1910) 26 S. D. 95, 127 N. W. 637; *Cameron v. Cameron* (1913) 30 S. D. 634, 139 N. W. 329.

In Tennessee the appellate court may either allow counsel fees on appeal, or remand the case for the purpose of having such fees determined by the trial court. *Shy v. Shy* (1872) 7 Heisk. 125; *Taylor v. Taylor* (1921) — Tenn. —, 232 S. W. 445.

In Wyoming the right of the supreme court to allow counsel fees pending appeal is held to be given by the Constitution (art. 5, § 2), providing that such court shall have general superintending control over inferior courts, and (§ 3 of the same article) that the court shall have power to issue writs of review, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. *Duxstad v. Duxstad* (1908) 16 Wyo. 396, 94 Pac. 463, 15 Ann. Cas. 228; *Brown v. Brown* (1913) 22 Wyo. 92, 135 Pac. 801. In the latter case the court said: "It was held by this court in an action for divorce, upon an original application of the wife for an allowance to enable her to further prosecute the proceedings in error

(*Duxstad v. Duxstad*, supra), that, 'by the great weight of authority, this court, in the exercise of its appellate jurisdiction, may consider the motion and make such order in the premises as may be deemed advisable.' . . . The only difference between the *Duxstad* Case and the one here is that the former was an action for divorce, and the latter is for separate maintenance."

b. View that court has not jurisdiction.

The appellate courts of some jurisdictions refuse to allow counsel fees pending an appeal, on the ground that they are without jurisdiction. *State ex rel. Clarkson v. St. Louis Ct. of Appeals* (1885) 88 Mo. 135; *Bordeaux v. Bordeaux* (1902) 26 Mont. 533, 69 Pac. 103; *Tonn v. Tonn* (1907) 16 N. D. 17, 111 N. W. 609; *O'Brien v. O'Brien* (1899) 36 Or. 92, 57 Pac. 374, 58 Pac. 892; *Griffith v. Griffith* (1912) 71 Wash. 59, 127 Pac. 585, 128 Pac. 636; *Lewis v. Lewis* (1915) 83 Wash. 671, 145 Pac. 980; *State ex rel. Clarkson Superior Ct.* (1916) 90 Wash. 80, 155 Pac. 398.

In *Bordeaux v. Bordeaux* (1902) 26 Mont. 533, 69 Pac. 1035, the appellate court held that it had neither constitutional nor inherent power to allow counsel fees in a matrimonial action, saying: "In Montana an action of divorce is a suit in equity. According to the equity practice, an appeal removed the whole case—all questions of law and of fact—to the higher court, where it was tried anew upon the depositions presented to the chancellor a quo, or upon such depositions and further evidence reduced to writing, and a decree entered upon the merits. During the pendency of the appeal the suit so transferred was in the higher court, and hence it might, in general, make such orders as the court or chancellor of first instance could have made. Such, as we understand, is the procedure still in vogue in certain of the states. In Montana, however, the contrary practice prevails. The action—the entire case—is not transferred by appeal. Questions of law only are presented on appeal, even

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are filed here in support of the application. In order to allow applications of this character we must determine facts which, in most cases, will be disputed by original evidence. In other words, this court must exercise original jurisdiction. . . . No jurisdiction is conferred by the Constitution, and even if the legislature has authority to confer it upon this court, which is subject to much doubt, it has not done so or attempted to do so." In *Lewis v. Lewis* (1915) 83 Wash. 671, 145 Pac. 980, following

the Griffith Case, the court said: "Our attention has not been called to the decision of any court holding that the trial court does not have jurisdiction, after the appeal has been perfected in a divorce action, to make an allowance for . . . attorneys' fees . . . pending the appeal, where the reviewing court is without jurisdiction, as in this state, to determine such matters." See to the same effect, *State ex rel. Clark v. Superior Ct.* (1916) 90 Wash. 80, 155 Pac. 398. L. F. C.

MRS. F. D. POOLE, Plff. in Err.,

v.

MARVIN PERKINS.

Virginia Supreme Court of Appeals—November 20, 1919.

(126 Va. 331, 101 S. E. 240.)

Conflict of laws — note executed in one state payable in another — what law governs.

1. A note executed by a married woman at her domicile in a state where she is under disability of coverture is valid if made payable in another state where such disability does not exist.

[See note on this question beginning on page 1516.]

—law of coverture — effect in other states.

2. The disability of coverture arising from the laws of a married woman's domicile does not follow her into other states.

[See 5 R. C. L. 950.]

—presumption as to intention of parties.

3. When parties make contracts which upon their face are to be discharged in a state other than that in which they are executed, they are pre-

sumed, in the absence of anything to the contrary, to have intended the law of the state of performance, the *lex loci solutionis*, to control.

[See 5 R. C. L. 940.]

—effect of intention of parties.

4. The capacity of parties to contract depends upon their intention as to place of performance, contracts being valid if authorized by the law of the place where they intended the contract to be performed.

[See 5 R. C. L. 950; 1 R. C. L. Supp. 1560.]

ERROR to the Circuit Court for Wythe County (Campbell, J.) to review a judgment in favor of plaintiff in a proceeding by notice of motion brought to recover judgment on a certain promissory note. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. W. B. Kegley, for plaintiff in error:

The trial court erred in overruling petitioner's defense of coverture, and in rendering judgment on the note sued upon against petitioner.

Burr v. Beckler, 264 Ill. 230, L.R.A. 1916A, 1049, 103 N. E. 206, Ann. Cas. 1915D, 1132; *Story*, Conf. L. § 10; *Minor*, Conf. L. § 72; *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 417; *Union Nat. Bank v. Chapman*, 169

N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672; *Mayer v. Roche*, 77 N. J. L. 681, 26 L.R.A.(N.S.) 764, 75 Atl. 235; *Young v. Hart*, 101 Va. 480, 44 S. E. 703.

Messrs. S. B. Campbell and Robert Sayers, for defendant in error.

The note expressly provides that it shall be payable in Virginia.

National Mut. Bldg. & L. Asso. v. Ashworth, 91 Va. 712, 22 S. E. 521; *Nickels v. People's Bldg. Loan & Sav. Asso.* 93 Va. 387, 25 S. E. 8; *Ware v. Bankers' Loan & Invest. Co.* 95 Va. 685, 64 Am. St. Rep. 826, 29 S. E. 744; *People's Bldg. Loan & Sav. Asso. v. Tinsley*, 96 Va. 325, 31 S. E. 508; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L.R.A. 271, 64 Am. St. Rep. 715, 26 S. E. 421; *Middle States Loan Bldg. & Constr. Co. v. Miller*, 104 Va. 464, 51 S. E. 846; *R. S. Oglesby Co. v. Bank of New York*, 114 Va. 668, 77 S. E. 468; *Freeman's Bank v. Ruckman*, 16 Gratt. 126; 1 *Minor's Inst.* 3d ed. p. 148; *Story*, *Conf. L.* § 301a; 1 *Rob. Pr.* pp. 77, 78; *Kent. Com.* 2d ed. p. 459; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; 2 *Parsons, Contr.* p. 324; 1 *Dan. Neg. Inst.* p. 658, § 865.

The parties to a contract may adopt the law of the place of performance to govern all matters connected with a merely personal contract.

Story, *Conf. L.* § 280; 5 *R. C. L.* § 27, p. 940; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587; *Mayer v. Roche*, 77 N. J. L. 681, 26 L.R.A.(N.S.) 763, 75 Atl. 235; *Thompson v. Taylor*, 66 N. J. L. 253, 55 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544; *Nickels v. People's Bldg. Loan & Sav. Asso.* 93 Va. 387, 25 S. E. 8.

The law of Virginia should be held to apply from the standpoint of public policy.

Bell v. Packard, 69 Me. 105, 31 Am. Rep. 252; *Locke v. McPherson*, 163 Mo. 493, 52 L.R.A. 420, 85 Am. St. Rep. 567, 63 S. W. 726.

Virginia is the "locus contractus," as regards the note in question.

McGarry v. Nicklin, 110 Ala. 559, 55 Am. St. Rep. 48, 17 So. 726; *International Harvester Co. v. McAdam*, 142 Wis. 114, 26 L.R.A.(N.S.) 776, 124 N. W. 1042, 20 Ann. Cas. 614.

to the order of Marvin Perkins, Poole and wife and Perkins at that time resided and were domiciled in the city of Bristol, Tennessee. More than a year after the execution of the note, but prior to the institution of this suit, all of the parties, makers and payee, became and have since remained residents of and domiciled in Virginia. The note was dated, signed, and delivered in Tennessee, but upon its face was payable at a bank in the city of Bristol, Virginia.

According to the laws of the state of Tennessee, in force at the time of the execution and delivery of the note and for some time thereafter, the contracts of a married woman were voidable, and could not be enforced against her where there was a plea of coverture; but at the time of the institution of this suit the disability of coverture had been removed by statute in Tennessee, so far as concerns the contracts of married women subsequent to the passage of the statute.

This is a proceeding by notice of motion brought by Perkins against Mrs. F. D. Poole in the circuit court of Wythe county, to recover judgment on the note. All matters of law and fact having been submitted to the court without the intervention of a jury, a judgment was rendered against her, and she thereupon obtained this writ of error.

There were other issues in the lower court, but the sole question before us is whether Mrs. Poole's common-law disability of coverture at the time of the execution of the note can be successfully relied upon by her as a defense.

If the note had been made payable in Tennessee, it is clear that her plea of coverture would have been good. The reason and authority for this proposition are perfectly familiar, and require no elaboration.

capacity to make the contract? If so, it is conceded that she was liable, and that the judgment complained of is right.

It would be idle to say that the question is free from difficulty. There are substantial reasons for a difference of legal opinion, and the authorities upon the subject are by no means in harmony. The exact question has never been decided in this state. It would be impossible in an opinion of reasonable length to review all of the authorities bearing upon the subject, and it would perhaps be unprofitable to do so, if such a thing were feasible.

In the case of *Freeman's Bank v. Ruckman*, 16 Gratt. 126, Judge Moncure announced the following general rule, upon which there is practically no conflict of opinion: "It is a general rule that every contract, as to its validity, nature, interpretation, and effect, or, as they may be called, the right, in contradistinction to the remedy, is governed by the law of the place where it is made, unless it is to be performed in another place; and then it is governed by the law of the place where it is to be performed."

This familiar and well-settled rule, however, cannot be said to be conclusive of the instant case, because, as the same was applied by Judge Moncure, and as most commonly illustrated by decided cases, it does not relate specifically to the capacity of the parties to make a contract, but to the validity and effect of a contract made by concededly competent parties.

Professor Raleigh C. Minor, in his excellent "Conflict of Laws," says at page 410: "The only law that can operate to create a contract is the law of the place where the contract is entered into (*lex celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If by the law of that state no contract has been made, there is no contract. Hence, if by the *lex celebrationis* the parties are

incapable of making a binding contract, there is no contract upon which the law of any other state can operate. It is void *ab initio*."

And the author, in support of the text, quotes from the opinion in *Campbell v. Crampton*, 18 Blatchf. 150, 2 Fed. 423, as follows: "Upon principle no reason can be alleged why a contract, void for want of capacity of the party at the place where it is made, should be held good because it provides that it shall be performed elsewhere, and nothing can be found in any adjudication or textbook to support such a conclusion. It is a solecism to speak of that transaction as a contract, which cannot be a contract because of the inability of the persons to make it such."

Strong support for the opinion thus advanced is also found in the case of *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672, in the Illinois case of *Burr v. Beckler*, 264 Ill. 230, L.R.A. 1916A, 1049, 106 N. E. 206, Ann. Cas. 1915D, 1132, and in some of the comments and citations contained in the annotations to these cases, as well as in the note to *Mayer v. Roche*, 26 L.R.A. (N.S.) 763, hereinafter mentioned.

In opposition to the above view is the following pronouncement by one of the most eminent of Virginia law writers, Professor John B. Minor: "The law which is to govern in relation to the capacity of parties to enter into a contract is much disputed by the continental jurists of Europe. In general, however, they hold that the law of the party's domicile ought to govern. Story, *Conf. Laws*, §§ 51 et seq. But the doctrine of the common law is well established, both in England and America, that the capacity of parties to contract is, with some few exceptions, determined by the *lex loci contractus*; that is, the law of the place with reference to which the contract is made, which is usually the place where it is made, unless it is to be performed in another

place or country, and then the law of that country." 3 Minor, Inst. p. 143.

We are disposed to accept the latter as the rule applicable to the instant case, for reasons which we shall now point out.

Conflict of laws—note executed in one state payable in another—what law governs.

It is to be observed, in the outset, that with practical unanimity the authorities, even those relied upon

—law of coverage—effect in other states.

by the plaintiff in error, hold that the disability of coverage arising from the law of the married woman's domicil does not follow her into other states, and that if she goes into another state than that of her domicil, and makes a contract valid by and to be performed in accordance with the laws of such other state, she will be bound thereby, even though she would not have been competent to make the contract according to the laws of her own state. In such a case the law of the place where the contract is made will be enforced wherever the suit is brought, even in the state of her domicil, subject only to the exception that, if the suit is brought in a jurisdiction whose law imposes upon married women a total incapacity to bind themselves by any contract whatever, then, perhaps, for reasons of public policy, the contract will not be enforced. Minor, Conf. L. § 72; Young v. Hart, 101 Va. 480, 484, 44 S. E. 703; Armstrong v. Best, 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Bell v. Packard, 69 Me. 105, 31 Am. Rep. 251; Robinson v. Queen, 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38; 57 L.R.A. 513, note; L.R.A.1916A, 1055, note. It follows, therefore, beyond question, that if Mrs. Poole had merely stepped across the state line between Bristol, Tennessee, and Bristol, Virginia, and signed the note in the latter state, she would be held liable thereon in a suit brought in any state where a married wom-

an can contract, including now the state of Tennessee.

It will be found, too, from an examination of the authorities last above cited, to which many others of like tenor and effect might be added, that most of them concede that the actual bodily presence of the contracting party is not necessary to make the contract valid according to the laws of some other state than that of the domicil. If, for example, in the instant case, Mrs. Poole had delivered the note to Perkins by mailing or sending it to him in Virginia, then by the clear weight of authority she would have bound herself in accordance with the laws of the state of Virginia as fully as if she had actually crossed the state line, and signed and delivered the note in that jurisdiction. This is unmistakably implied, even in the New York case of Union Nat. Bank v. Chapman, supra, so strongly relied upon by the plaintiff in error.

We are brought, therefore, to this question: If Mrs. Poole had actually come into Virginia and signed the note, or had sent it here for delivery and acceptance, would there have been any substantial legal difference between the case as thus supposed, and the case as it actually exists? We think not. It may be stated as settled

—presumption as to intention of parties.

law that, when parties make contracts which upon their face are to be discharged in a state other than that in which they are executed, they are presumed, in the absence of anything to the contrary, to have intended the law of the state of performance, the *lex loci solutionis*, to control, and thus, if intention can do so, to have voluntarily constituted the law of that state the law of the contract; or, as often otherwise expressed, the proper law or the governing law. So unanimous are the authorities on this proposition that those advocating the actual situs of the parties as the test of contractual capacity concede that, if the intent in such cases is effec-

tive, then they are in error, and the *lex loci solutionis* must be regarded as the governing law.

The adoption of the intention of the parties to the contract as the true criterion is consistent with the reason which Professor Minor assigns for his opinion that the proper law is the law of the place where the contract is actually signed. He says: "It may be regarded as certain that if the party enters into a contract in the state of his domicil, though the contract is to be performed elsewhere, the proper law governing his capacity to enter into the contract is the *lex domicilii*, no matter where the suit may be brought. But if the contract is entered into in a state other than the party's domicil, he has not the same right to claim the protection of his domiciliary law. He has voluntarily entered into another state, and has there made an agreement with persons who are relying upon the law under which he is acting. To that law he has submitted himself when he makes the contract there, and a just comity will ordinarily demand that the sovereignty of that state over all acts done there should be respected in other states." *Conf. L.* p. 145.

If the parties, by the mere act of signing in a state other than their domicil, can give validity to a contract which would not be valid in their own state, and if the reason for this is that they are presumed to contract with reference to the law of such other state, it would seem to follow that the actual situs of the parties is only important as a factor in determining the law with reference to which they intended to contract. In this view, all that is needed to divest a married woman of her domiciliary incapacity is an intention, sufficiently evidenced or expressed, to contract with reference to the laws of a state in which the contract is valid, and, as we have just seen, where the contract, like the one involved in the instant case, provides upon its face for performance in a state whose laws will

uphold it, such provision is, alone, sufficient to evidence an intention to bring the contract within the influence of the laws of the latter state. *National Mut. Bldg. & L. Asso. v. Ashworth*, 91 Va. 706, 712, 22 S. E. 521; *Nickels v. People's Bldg. & L. Asso.* 93 Va. 387, 25 S. E. 8; *Ware v. Bankers Loan & Invest. Co.* 95 Va. 680, 684, 64 Am. St. Rep. 826, 29 S. E. 744. These cases did not involve the question of contractual capacity; but, granting that the intention of the parties determines the proper law, the decisions here cited are conclusive of the proposition that the note in litigation, by providing for payment in Virginia, sufficiently expressed such intention. Citations to the same effect might be multiplied indefinitely.

In the elaborate note, cited *supra* from L.R.A.1916A, 1055, the learned author shows that, if the true criterion as to the proper or governing law is to be found in the intention of the parties, then the law of the place of performance controls, and accordingly determines the question of the capacity to make a contract.

The case to which —effect of intention of parties.
that note is appended (*Burr v. Beckler*, 264 Ill. 230, L.R.A.1916A, 1049, 106 N. E. 206, Ann. Cas. 1915D, 1132), and some decisions cited therein and in the note, as well as the discussion by the author, vigorously challenge the correctness of this test. In our opinion, however, it furnishes the most satisfactory and consistent solution of the question. It affords a simple and uniform rule, fair to both parties, and applicable alike to all contracts, regardless of whether the parties reside in the same or different states; and it gives due recognition to the sovereignty of the state whose laws are thus invoked. As to precedent and authority for the adoption of this test, it would require some boldness, in the face of the multitude of apparently conflicting decisions and textbook discussions bearing more or less directly on the question, to undertake

to affirm that the decided weight of authority is either for or against it. We content ourselves with the statement that it appears to us as being supported by the better reason and by entirely sufficient authority.

In 3 Minor, Inst. 145, cited *supra*, Professor John B. Minor employs the phrase "*lex loci contractus*" to indicate the law of the place with reference to which the contract is made, and says that such place is usually the place where it is made, unless it is to be performed in another place or country. In other words, according to his view, the place of the contract, in legal contemplation, depends upon the presumed intention of the parties. This definition or understanding of the *lex loci contractus*, or law of the place of the contract, is not by any means universally approved, but it has been very extensively employed by high authority. The fact that it is not universally approved, of course, accounts for the conflict of authority upon the question at issue in this case. The authorities which are at variance with the conclusion we have reached are so because of the intrinsic effect accorded by them to the local situs of the contracting parties in determining what is legally the place of the contract. The following authorities, in addition to those already cited, support Professor Minor's view: "It will be presumed that the contract is to be performed at the place where it is made, and is to be governed by its laws, if there is nothing in the terms of the contract or in the explanatory circumstances of its execution inconsistent with that intention. But, if by the terms of the contract it is to be performed in a place other than the place of execution, the place of performance will ordinarily be deemed the place of contract; . . . at least, unless the parties otherwise intended." 22 Am. & Eng. Enc. Law, 2d ed. 1325.

In Robinson v. Queen, 87 Tenn. 445, 446, 3 L.R.A. 214, 215, 10 Am. St. Rep. 690, 691, 11 S. W. 38, the

supreme court of Tennessee said: "Though some authorities may be found to the contrary, it may now be said to be well-settled law that the validity of a contract, the obligation thereof, and capacity of the parties thereto, are to be determined by the *lex loci contractus* (in the sense of the place of performance), unless there be something in the contract which is deemed hurtful to the good morals, or injurious to the rights, of its own citizens, by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country."

In that case the court was dealing with a contract made in Kentucky, to be performed in Kentucky, by a married woman domiciled in Kentucky; but the language quoted shows that the Tennessee court intended the phrase "*lex loci contractus*," in the sense of the place of performance, to refer to the legal seat or place of the contract.

Mr. Freeman, in a note to McGarry v. Nicklin, 55 Am. St. Rep. 48, says: "Where the parties to a contract reside in different states or countries, unless they take the trouble to both go to the same place, one of them must manifest his assent in one state or country, and the other in another. We think it absurd, for the purpose of determining the place of the contract, and by what laws it shall be construed and its validity adjudged, to inquire which of the parties happened to manifest his assent last, or what was the mode or place of delivery. From the contract, or from it and other competent evidence, the place where it was intended to be executed or enforced can be made evident. The performance of the contract is the essential thing, and, in our judgment, should control, and the place where that performance is to take place should be deemed, for all substantial purposes, the place of the contract."

In Story on Conflict of Laws, § 301a, it is said: "But several, and indeed most of them [judicial deci-

sions under discussion by the author], do expressly and directly recognize the rule that, where the contract is made in one place and is to be performed in another, not only may the law of the latter be properly called the 'locus contractus,' but that it ought in all respects, except as to the formalities and solemnities and modes of execution, to be deemed the rule to govern such cases."

See also *Pritchard v. Norton*, 106 U. S. 124, 134, 27 L. ed. 104, 108, 1 Sup. Ct. Rep. 102; *Minor*, Conf. L. pp. 362, 363, and numerous cases cited in note 3 thereto; *Freeman's* note in 55 Am. St. Rep. 778.

The definition of the "lex loci contractus" as above expressed or implied, has been the subject of criticism from eminently respectable writers; but it must be conceded that, however plausible the objection to this use of the phrase may be, the authorities thus using it are themselves of very high rank, and are more numerous than those holding the opposite view.

It may be remarked, in passing, that no question arises in this case as to the formalities attending the execution of the note sued on.

We will conclude this discussion by a reference to a few cases dealing concretely with the question at issue, and in which the law of the place of performance, instead of the place of execution and delivery, has been held to be the proper law in determining the capacity of married women to make a contract.

The case of *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620, involved the validity of a bond and mortgage executed by a married woman in Pennsylvania, in consummation of a purchase by her of real estate in Delaware. According to the laws of Pennsylvania, a married woman could not bind herself personally by such a bond, but she could do so by the laws of Delaware. The question was whether her rights and obligations under the bond were to be determined by the laws of Delaware or by those of

Pennsylvania. The suit was brought in Pennsylvania, and she was held liable on the ground that the contract was a Delaware contract, and therefore controlled as to its validity by the laws of that state. It is true that the court found that the contract, though actually signed in Pennsylvania, was delivered and became binding in Delaware, and seems to have finally rested the decision on that ground; but the case nevertheless distinctly holds that the capacity of a married woman to contract is an element to be determined by the place of performance. The opinion says: "If it be conceded that the bond and mortgage were executed in this state [Pennsylvania], yet it appears upon their face that they were to be performed in the state of Delaware, and the general rule is that in such cases the instrument is governed as to its validity, nature, obligation, and interpretation by the laws of the place where it is to be performed"—citing *Story*, Conf. L. § 280; 2 *Kent*, Com. 449.

Mayer v. Roche, 77 N. J. L. 681, 26 L.R.A. (N.S.) 763, 75 Atl. 235, is a strong case and is much in point. The action there was on a promissory note, in which a married woman appeared as a joint maker. It appeared that the note was signed by Mrs. Roche in New Jersey, where she resided, but was dated and payable in New York. By the New Jersey law it was void, but by the New York law it was valid. The court in New Jersey, in *Thompson v. Taylor*, 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544, had previously held that the law of the place of contract was decisive on the question of the competency of a married woman to make a contract. The question in the *Roche* Case, therefore, was, as stated in the opinion, whether "the place of contract was New York or New Jersey." The court, adopting the intention of the parties as the true criterion, said: "What, then, must be presumed to have been the

intention of the parties to the note in suit as to the law by which their contract was to be governed? We think the fact that it was dated in New York indicates that the parties meant to be bound by New York law. It has been so held in our supreme court in *Hoppins v. Miller*, 17 N. J. L. 185. In addition, the fact that the note was payable in New York is sufficient, of itself, to justify the conclusion that New York law was the law contemplated. It has been so held in this state in cases involving the question of usury. *Ball v. Consolidated Frank-linite Co.* 32 N. J. L. 102; *Freese v. Brownell*, 35 N. J. L. 285, 10 Am. Rep. 239. Authority in other jurisdictions is ample. *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *London Assur. Co. v. Companhia de Moagens*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753. This view of the presumed intention of the

parties, based upon the well-settled rules as to the effect of the place where the contract is made and the place where it is to be performed, is in accord, also, with the general principle, which would lead us to hold that the parties meant to make a binding contract, and that neither meant to mislead the other."

See also *Basilea v. Spagnuolo*, 80 N. J. L. 88, 77 Atl. 531; *Fiske Rubber Co. v. Muller*, 42 App. D. C. 49; *Hammerstein v. Sylvia*, 66 Misc. 550, 124 N. Y. Supp. 535.

We conclude, therefore, that the note sued on in this case must be construed as having been executed with reference to the laws of the state of Virginia; that it became to all legal intents and purposes, so far as its validity is concerned, as truly a Virginia note as if it had been signed and delivered here; that by the laws of this state Mrs. Poole could have legally executed the same; and that, therefore, the lower court was right in holding her liable.

The judgment is accordingly af-

ANNOTATION.

Conflict of laws as to capacity of married women to contract.

I. In general, 1516.

II. Personal contracts:

- a. As between *lex loci contractus* (or *lex loci solutionis*) and *lex domicilii*, 1518.
- b. As between *lex loci contractus* and *lex loci solutionis*, 1525.
- c. As between *lex loci contractus* (or *lex loci solutionis* or *lex domicilii*) and *lex situs*, 1541.

I. In general.

The governing law as regards capacity to marry, or to enter into ante-nuptial contracts, is beyond the scope of the annotation.

In this annotation, unless otherwise stated, the term "*lex loci contractus*" is used in the sense of the law of the place where the contract is made, and the term "*lex loci solutionis*" in the sense of the law of the place of performance, although the former term is

II.—continued.

- d. As between *lex loci contractus* (or *lex loci solutionis* or *lex domicilii*) and *lex fori*:

1. In general, 1543.
2. Public policy or forum, 1543.
3. Matters relating to remedy, 1550.

III. Contracts relating to real property or immovables, 1555.

sometimes used by the courts in the sense of the law of the place of performance. See *Robinson v. Queen* (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38.

The question under consideration, like most other questions as to conflict of laws, is confused by the common practice of the courts to describe the governing law in terms that import a choice as between the situs of different factors which were in fact coincident,

so that there was no occasion, or intention, perhaps, to choose between them. For example, it frequently happens that a contract of a married woman is made and performable in the same state, and the court is only called upon to decide between the law of that state and the law of the state in which she was domiciled or in which the action is brought. Though the choice of the law of the first state does not call for any expression of preference as between the law of the place where the contract is made, and the law of the place where it is performable, the courts frequently designate it as the law of the place where the contract is made, or *lex loci contractus*,—usually, though not always, employed as the equivalent of the law of the place of making,—or as the law of place where it is performable (*lex loci solutionis*). In subsequent cases, when the contract is made in one state and performable in another, and the laws of the two differ as regards the capacity of a married woman to contract, the court is confronted with precedents which apparently favor one or the other, but which, apart from the cumulative effect of the constant use of a particular phrase or term to describe the governing law, have no value as precedents as between the place where the contract is made and the place where it is performable. If the court, when that question is presented, decides in favor of the law of the place of performance, it sometimes undertakes to reconcile the result with previous declarations that the *lex loci contractus* governs, by a statement to the effect that when the contract is made in one state and performable in another, the law of the latter is *lex loci contractus*; or even that a contract will be deemed to have been made in the state where it is performable, although in fact it had its legal inception in another state. It is therefore unsafe to accept without question general statements to the effect that the *lex loci contractus* governs as authority for the view that the place where the contract was in fact made—i. e., had its legal inception—will prevail over the *lex loci solutionis*, since

there may have been no conflict between the two, or the court may even have employed the term "*lex loci contractus*" to describe the law of the place of performance.

A similar difficulty is experienced in treating individual cases as authority for the *lex loci contractus* as against the *lex domicilii* when, as frequently happens, the contract was made in the state where the married woman was domiciled, and the conflict is between the law of that state and the law of some other state where the action is brought, or perhaps where the contract is performable.

Another source of difficulty is the common failure of the courts to consider the possibility of a distinction as regards the governing law between the different elements or questions concerning a contract, and the tendency to refer the decision to a general principle of undoubted applicability to some questions in relation to contracts, but of doubtful application to the particular question under consideration. This tendency is further discussed in subd. II. b.

In determining the governing law of a married woman's contract it is sometimes necessary to observe a distinction between an original and independent contract and one which rests upon an earlier contract. For example, in *Robison v. Pease* (1902) 28 Ind. App. 610, 63 N. E. 479, a note having been given by a married woman to make good the default of the principal in a bond executed and performable in Ohio, by the law of which she was capable of binding herself as surety, it was held that the note could be enforced against her in Indiana, by the law of which a married woman was incapable of binding herself as surety, although it was made and performable in that state, and she was domiciled there. This was upon the ground that the bond was an Ohio contract, and was governed by the law of that state. It will be observed that the only ground upon which this result could have been avoided would have been to have taken the position that it would be contrary to the public policy of Indiana to enforce the contract

against a married woman domiciled in that state. The result in this case is reducible to terms of the law of Indiana; that is, the decision may be expressed in the form that the note in question is valid by the law of Indiana, since it is in discharge of a liability accruing under a contract of another state which was valid by the law of that state, notwithstanding that, if the original contract had been an Indiana contract, it would have been invalid, and would have created no personal liability upon the part of the married woman, and would, therefore, have furnished no consideration for a new contract.

So, in *Young v. Hart* (1903) 101 Va. 480, 44 S. E. 703, the court observed that, even upon the assumption that the original consideration for a note given by a married woman in Pennsylvania, and payable in Kentucky, was an obligation of the husband, and by the law of either of those states she was incapable of binding herself by such an agreement as an original agreement, nevertheless, as the note was given in renewal of a previous note executed by her in Illinois, by the law of which state she was capable of so binding herself, she was liable on the note in suit, as she could have been sued upon the original note either in Pennsylvania or Kentucky, and a personal judgment recovered against her there, and the renewal of the note in Pennsylvania did not release her or lessen her liability.

These are merely illustrations of a not uncommon class of cases in which the result of the application of the proper law of the contract immediately before the court is affected by the character previously impressed upon one of the elements of that contract by the law of another state or country where it had its origin, and whence it came to the contract in suit. As shown in subd. III., the point is of especial importance in dealing with contracts in relation to real property.

The question as to where, under various circumstances, a contract will be deemed to have been made, depends upon considerations equally applicable to a large class of cases not coming

within the subject of this note, and is therefore not discussed, although the decision on the point is incidentally indicated in connection with some of the cases.

The proper course to be pursued, including the presumptions to be indulged, when it is decided or assumed that the question of the married woman's capacity is governed by the law of a state or country other than that in which the court is sitting, but the content of that law is not proved or conceded, is also beyond the scope of the annotation, and is only referred to incidentally in connection with some of the cases. The point, of course, is not distinctive to the question under consideration.

II. Personal contracts.

a. *As between lex loci contractus (or lex loci solutionis) and lex domicilii.*

The distinction between applying *lex domicilii* as the general criterion of the contractual capacity of a married woman, and refusing upon the ground of public policy of the forum to enforce, against a married woman domiciled at the forum, a contract she was incapable of making according to the law of the forum, although capable by the law of the place where the contract was made, is discussed at the beginning of subd. II. d, 2, *infra*.

As shown *infra*, II. b, there is some difference of opinion as to whether the capacity of a married woman to contract is governed by the law of the place where the contract is made, or by the law of the place where it is performable, in the event of a conflict between the two. With the exception of Louisiana, however, the cases in this country are practically agreed that her capacity to make a personal contract is governed by the *lex loci contractus* (or possibly the *lex loci solutionis*), and not by the *lex domicilii* as such, whether she was capable or incapable by the former law. (As subsequently pointed out, in many cases cited in support of this statement the *lex loci contractus* and *lex domicilii* were the same; but it is apparent that the controlling feature was the place where the contract was

made, or, at least, where it was performable, and not the domicil of the married woman.)

United States.—Bowles v. Field (1897) 78 Fed. 742; First Nat. Bank v. Mitchell (1899) 34 C. C. A. 542, 92 Fed. 565, reversing (1898) 84 Fed. 90.

Alabama.—Union Nat. Bank v. Hartwell (1887) 84 Ala. 379, 4 So. 156.

Connecticut.—Connecticut Mut. L. Ins. Co. v. Westervelt (1884) 52 Conn. 592.

Illinois.—Nixon v. Halley (1875) 78 Ill. 611; Forsyth v. Barnes (1907) 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710.

Indiana.—Robison v. Pease (1902) 28 Ind. App. 610, 63 N. E. 479.

Iowa.—Nichols & S. Co. v. Marshall (1899) 108 Iowa, 518, 79 N. W. 282.

Kentucky.—Young v. Bullen (1897) 19 Ky. L. Rep. 1561, 43 S. W. 687.

Maine.—Bell v. Packard (1879) 69 Me. 105, 31 Am. Rep. 251; Bond v. Cummings (1879) 70 Me. 125.

Maryland.—Union Trust Co. v. Knabe (1914) 122 Md. 584, 89 Atl. 1106, 1116.

Massachusetts.—Milliken v. Pratt (1878) 125 Mass. 374, 28 Am. Rep. 241; Hill v. Chase (1886) 143 Mass. 129, 9 N. E. 30; Walling v. Cushman (1921) — Mass. —, 130 N. E. 175.

Mississippi.—Partee v. Silliman (1870) 44 Miss. 272; Bank of Louisiana v. Williams (1872) 46 Miss. 618, 12 Am. Rep. 319.

Missouri.—Phoenix Mut. L. Ins. Co. v. Simons (1893) 52 Mo. App. 357; F. B. Hauck Clothing Co. v. Sharpe (1900) 83 Mo. App. 385.

New Hampshire.—Hill v. Pine River Bank (1864) 45 N. H. 300; Brigham v. Gilmartin (1878) 58 N. H. 346.

New Jersey.—Thompson v. Taylor (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544; Mayer v. Roche (1909) 77 N. J. L. 681, 26 L.R.A.(N.S.) 763, 75 Atl. 235.

New York.—Graham v. First Nat. Bank (1881) 84 N. Y. 393, 38 Am. Rep. 528; Miller v. Campbell (1893) 140 N. Y. 457, 35 N. E. 651; Union Nat. Bank v. Chapman (1902) 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672.

North Carolina.—Taylor v. Sharp

(1891) 108 N. C. 377, 13 S. E. 138; Armstrong v. Best (1893) 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14 (applying exception).

Ohio.—Smith v. Frame (1889) 3 Ohio C. C. 587.

Pennsylvania.—Evans v. Cleary (1889) 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440.

Tennessee.—Pearl v. Hansborough (1848) 9 Humph. 433; Robinson v. Queen (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38.

West Virginia.—Dulin v. McCaw (1894) 39 W. Va. 721, 20 S. E. 681.

In the following cases the contract was made at the domicil, so that there was no conflict between the *lex loci contractus* and the *lex domicilii*, the only conflict being between the *lex loci contractus* et *domicilii*, on the one side, and the *lex fori*, on the other; but the decisions are expressly put upon the ground that the *lex loci contractus* governs, and, so, may be regarded as some support for the principle that, as between the *lex loci contractus* and *lex domicilii*, the former governs,—at least, when the domicil is not at the forum. Nixon v. Halley (1875) 78 Ill. 611; Bond v. Cummings (1879) 70 Me. 125; Partee v. Silliman (1870) 44 Miss. 272; F. B. Hauck Clothing Co. v. Sharpe (1900) 83 Mo. App. 385; Hill v. Pine River Bank (1864) 45 N. H. 300; Thompson v. Taylor (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544, reversing (1900) 65 N. J. L. 107, 46 Atl. 567; Evans v. Cleary (1889) 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440.

In Dulin v. McCaw (1894) 39 W. Va. 721, 20 S. E. 681, where the place of the contract and of the domicil were the same, it was held that the coincidence was an additional reason for applying the *lex loci contractus*.

In the following cases, in accordance with the principle above stated, the law of the place (other than that of the domicil) where the contract had its legal inception was held to govern, notwithstanding that the contract was signed or assented to by the married woman at the domicil, and there left her hands, being delivered to the other

contracting party through the mails, or by some third person:

United States. — First Nat. Bank v. Mitchell (1899) 34 C. C. A. 542, 92 Fed. 565, reversing (1898) 84 Fed. 90.

Indiana.—Robison v. Pease (1902) 28 Ind. App. 610, 63 N. E. 479.

Kentucky.—Young v. Bullen (1897) 19 Ky. L. Rep. 1561, 43 S. W. 687.

Massachusetts. — Milliken v. Pratt (1878) 125 Mass. 374, 28 Am. Rep. 241.

Maine.—Bell v. Packard (1879) 69 Me. 105, 31 Am. Rep. 251.

Missouri.—Phoenix Mut. L. Ins. Co. v. Simons (1893) 52 Mo. App. 357.

Ohio. — Smith v. Frame (1889) 3 Ohio C. C. 587.

New Hampshire.—Brigham v. Gilmartin (1878) 58 N. H. 346.

In Connecticut Mut. L. Ins. Co. v. Westervelt (1884) 52 Conn. 592, while there was no decision as between the law of the place where the contract had its legal inception by delivery, and the law of the place of performance, it was held that the law of one or the other of those places governed, and not the law of the domicil, although the completed contract was handed by the wife to her husband at the domicil, it being delivered by the husband to the other contracting party in another state.

In Freeman's Appeal (1897) 68 Conn. 533, 37 L.R.A. 452, 57 Am. St. Rep. 112, 37 Atl. 420, however, it was held that the validity of a guaranty of the payment of her husband's debt, performable in Illinois, executed by a married woman in Connecticut, and there delivered to her husband and mailed by him to Illinois to the other party, was governed by the law of Connecticut rather than that of Illinois, and was therefore invalid. The decision is upon the ground that, though whatever delivery there was took place in Illinois when the guaranty was there received, yet the effectiveness of that delivery depended upon the validity of the wife's act in constituting her husband agent for the purposes of the delivery, and that her attempt to confer such authority upon him in Connecticut was invalid. The court said that if the wife had been within the state of Illinois when she signed the guaranty, it might be that

her personal presence would have so far made her a resident of that state as to subject her to its laws in respect to acts done within its jurisdiction. The decision in this case was disapproved by the circuit court of appeals in First Nat. Bank v. Mitchell (1899) 34 C. C. A. 542, 92 Fed. 565, *supra*.

In Union Nat. Bank v. Hartwell (1887) 84 Ala. 379, 4 So. 156, the court said that the general rule as to the capacity of a married woman to make contracts in respect to her separate personal property, when situated in a country other than that of the domicil of her husband, is that the law of the domicil of the husband governs unless the property, from its peculiar nature, necessarily has an implied locality, or *unless the contract is made in the country where the property is situated*. (Italics ours.) It will be observed that this case impliedly supports the *lex loci contractus*, as against the *lex domicilii*, when the two are opposed.

In Taylor v. Sharp (1891) 108 N. C. 377, 13 S. E. 138, in which the presumption was indulged that the married woman was domiciled in the state where the contract was made, the contrary not appearing, the court approved of the position taken in Milliken v. Pratt (1878) 125 Mass. 374, 28 Am. Rep. 241; that a contract which, by the law of the place, is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of the domicil, be deemed capable of making it.

In Armstrong v. Best (1893) 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14, it was also held that the *lex loci contractus*, rather than the *lex domicilii*, in general, furnishes the test of capacity, though, as subsequently shown (*infra*, II. d. 2), the circumstances of the case were held to bring it within an exception to that general principle. In Graham v. First Nat. Bank (1881) 84 N. Y. 393, 38 Am. Rep. 528, the court said, obiter, that the disability of coverture is to be determined by the rule of the place of the contract and performance.

As between the law of the place

where a note and warrant of attorney are executed by a married woman, and the law of her domicile, the former governs as to her capacity to bind herself by such a contract. *Forsyth v. Barnes* (1907) 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710. It was so held in this case, notwithstanding that the result was that the contract was held invalid, it being presumed, in the absence of proof of the law of Ohio, where the contract was made, that the common law, by which all contracts of a married woman are absolutely void, prevailed there. As already stated, the course to be followed or presumption to be indulged when proper foreign law is not proved is beyond the scope of the annotation.

In *Nichols & S. Co. v. Marshall* (1899) 108 Iowa, 518, 79 N. W. 282, the rule that the law of the place of the contract, rather than the law of the domicile, governs with respect to the capacity of a married woman to contract as surety, was applied so as to hold unenforceable in Iowa a contract of suretyship, made and to be performed in Indiana, by a married woman domiciled in Iowa, because she was incapable of contracting by the law of Indiana, notwithstanding that she was capable according to the law of Iowa.

In *Pearl v. Hansborough* (1848) 9 Humph. (Tenn.) 433, the principle was also applied so as to hold invalid a contract which, though valid by the *lex domicilii*, was invalid by the *lex loci contractus*, because of the married woman's lack of capacity. In this case, however, the domicile was not at the forum, as it was in the preceding case.

It is thus apparent that when, by the *lex loci contractus*, the contract would be invalid, the principle applies, and the contract is condemned without reference to whether the domicile is at the forum or not. As subsequently shown (II. d, 2), the fact, in that respect, may be important when it is sought to apply the principle to a contract, valid by the *lex loci contractus*, but invalid by the *lex domicilii*.

The status obtained by a married woman, while domiciled in Alabama, 18 A.L.R.—96.

by a decree of a chancery court in that state, relieving her of the disability of coverture as to her statutory, or other, separate estate, so far as to invest her with the right to buy, sell, hold, convey, and mortgage real and personal property, and to sue and be sued as a feme sole,—cannot be insisted on in Florida, after the removal of her domicile to that state, as to transactions had in Florida. *Walling v. Christian & C. Grocery Co.* (1899) 41 Fla. 479, 47 L.R.A. 608, 27 So. 46.

There are occasional expressions, even in cases not decided in England or Louisiana, that may seem to favor the *lex domicilii* over the *lex loci contractus*, or at least to intimate a doubt as to which is to prevail; but it will generally be found that no decision was made as to the point.

In *Union Trust Co. v. Grosman* (1917) 245 U. S. 412, 62 L. ed. 368, 38 Sup. Ct. Rep. 147, where a contract was made in Illinois by a married woman domiciled in Texas, the opinion by Mr. Justice Holmes suggests the possibility that even a court of Illinois might decide that a married woman could not lay hold of a temporary absence from her domicile to create remedies against her in that domicile that the law did not allow her to create, and therefore hold the contract was void, although it would not have been so if executed in Illinois by a married woman domiciled there. The decision, however, was upon the ground that it would be contrary to the public policy of Texas to enforce the contract, and that that public policy should be recognized by the Federal courts in a case brought in the Federal district court, sitting in Texas.

And in *Hager v. National German-American Bank* (1898) 105 Ga. 116, 31 S. E. 141, holding that a married woman, incapacitated by the law of her domicile from binding herself by a note, cannot be made liable on such a note because, though executed at the place of her residence, it is made payable in another state, by the law of which she is authorized to make such a contract, it will be observed that there was no conflict between the law of the place where the contract was made and that

where the married woman was domiciled.

And the reason for applying the law of Alabama in *Union Nat. Bank v. Chapman* (1902) 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672, was not that the married woman was domiciled there, but that the note was an Alabama contract, it having been signed and delivered there, although payable in Illinois.

In *Waldron v. Ritching* (1870) 3 Daly (N. Y.) 288, the opinion was expressed that the New York statute permitting married women to carry on trade or business did not extend to contracts made in New York by married women domiciled in another state, where, presumptively, the common-law rule was in force. In this case, however, it was held that the contract was not made in New York, so that the question did not actually arise.

In *Voight v. Brown* (1886) 42 Hun (N. Y.) 394, the contract was made and the married woman was domiciled in New York, so that, as the court said, it was not necessary to decide whether the place of domicile or the place of contract should prevail.

In *Wheeler v. Constantine* (1878) 39 Mich. 62, 33 Am. Rep. 355, the decision was that a court of Michigan could not presume, in the absence of evidence to that effect, that there was anything in the law of Indiana, the domicile of a married woman, which would render void notes made by her and which were authorized by the law of Michigan; but the court said that it did not wish to be understood as intimating that the laws of Michigan would not govern the notes of a married woman made in that state, though she were domiciled in another state.

In *Ritch v. Hyatt* (1879) 3 Mac-Arth. (D. C.) 536, it is expressly held that a married woman's capacity to contract is to be determined by the *lex domicilii* rather than by the *lex loci contractus*. In this case the court ap-

plied the law of the District of Columbia (D. C.) 220, an action of replevin by the purchaser, it was held that the validity of a purchase of goods on credit by a married woman domiciled at Washington, from a merchant domiciled at New York, and her title to the goods purchased, depended upon the law of the District of Columbia. The court said that it was immaterial whether the transaction was in New York (where a married woman was enabled by statute to carry on business as a sole trader, and for that purpose to make contracts to a limited amount), or at Washington (where a married woman was incapable of purchasing goods on credit), since the New York statute related only to married women acting as sole traders in that state. There is an apparent inconsistency between the decision in this case, which applies the law of the District of Columbia to determine the capacity of the married woman, and the implication that the New York statute would have been applied if it had, in terms, covered a contract made in New York by a married woman domiciled elsewhere. Even if the New York statute had expressly covered such a case, its application by a court of the District must have proceeded on the principle that the capacity of a married woman is to be determined by the law of the place of the contract, rather than the law of the place of her domicile; and if so, it would seem that the law of New York must govern, whether there was a statute expressly applicable or not. There being no statute of New York applicable, it would seem that resort should have been had to the common-law rule in New York on the subject; and, as a matter of fact, the contract seems to have been held invalid upon common-law principles, though it was apparent that it would have been upheld if the enabling statute of the District had been held to cover such a case.

For reasons stated *infra* 11 2 6

and forum, she would be incapable of making, although she was capable by the law of the place where the contract was made and performable, are not authority for the *lex domicilii* as the general test, as against the *lex loci contractus* or *lex loci solutionis*.

Rule in Louisiana.

In Louisiana, contrary to the rule elsewhere in this country, the *lex domicilii* is held to prevail over the *lex loci contractus* (or *lex loci solutionis*) as regards the capacity of a married woman to contract. *Le Breton v. Nouchet* (1813) 3 Mart. (La.) 60, 5 Am. Dec. 736; *Roberts v. Wilkinson* (1850) 5 La. Ann. 369; *Hyman v. Schlenker* (1892) 44 La. Ann. 108, 10 So. 623; *Baer Bros. v. Terry* (1901) 105 La. 479, 29 So. 886; *Garnier v. Poydras* (1839) 13 La. 177; *Marks v. Germania Sav. Bank* (1903) 110 La. 659, 34 So. 725; *Freret v. Taylor* (1907) 119 La. 307, 121 Am. St. Rep. 522, 44 So. 26; *First Nat. Bank v. Hinton* (1909) 123 La. 1018, 49 So. 692; *National City Bank v. Barringer* (1918) 143 La. 14, 78 So. 134; *Marks v. Loewenburg* (1918) 143 La. 196, 78 So. 444; *Lorio v. Gladney* (1920) 147 La. 930, 86 So. 365.

In *LeBreton v. Nouchet* (1813) 3 Mart. La. 60, 5 Am. Dec. 736, the court said that according to the principles of the law of nations, "personal incapacities communicated by the laws of any particular place, accompany the person wherever he goes. Thus, he who is excused the consequences of contracts for want of age in his country cannot make binding contracts in another." This was said in discussing the question whether the property rights, as affected by the marriage in Mississippi of a minor domiciled in Louisiana, were to be determined by reference to the law of Louisiana or of Mississippi.

In *Roberts v. Wilkinson* (1850) 5 La. Ann. 369, the court seems to have been of the opinion that notes made and payable in Mississippi, by a married woman domiciled in Louisiana, would be held valid against her in Louisiana, notwithstanding that they would be invalid by the law of Mis-

issippi. This position is referable only to the doctrine that the *lex domicilii* furnishes the test of capacity, and cannot be referred to the public policy doctrine, since, as subsequently shown (II. d) that doctrine only operates to invalidate contracts valid by the *lex loci*, but invalid by the *lex fori*; never to validate contracts invalid by the *lex loci*, but valid by the *lex fori*.

And it has been expressly declared that the capacity of a married woman domiciled in Louisiana to bind herself or her property by contract is determined by the law of her domicil. *National City Bank v. Barringer* (1918) 143 La. 14, 78 So. 134; *Marks v. Loewenburg* (1918) 143 La. 196, 78 So. 444; *Lorio v. Gladney* (La.), *supra*.

And the principle that the *lex domicilii* governs has been applied where the domicil was not in Louisiana.

Thus, in *Garnier v. Poydras* (1839) 13 La. 177, it was held that the capacity of a married woman to contract in Louisiana, without the assent of her husband, was to be determined by the law of France, their domicil, rather than the law of Louisiana, the *lex loci contractus*.

The statutes regulating the privileges and disabilities attaching to married women are purely domiciliary in their character, and, unless otherwise expressly declared, do not affect married women domiciled in another state. *Hyman v. Schlenker* (1892) 44 La. Ann. 108, 10 So. 623.

In *Baer Bros. v. Terry* (1901) 105 La. 479, 29 So. 886, the court, referring to the capacity of a married woman, said that the capacity to contract is tested by the law of the domicil. The note in question, in this case, was executed in Missouri by a woman domiciled in that state, but was payable in Louisiana. The court rejected the contention of counsel that, because the note was payable in Louisiana, the capacity of defendant to make it must be tested by the law of Louisiana, holding, as already stated, that the capacity must be tested by the law of Missouri, the domicil at the time the note was given, notwithstanding the fact that she subsequently became

It will be observed that the law of the place where the note was made and the law of the domicile were the same; but the decision is squarely put on the ground that the law of the domicile governs. The court cites, in support of this position, Rorer, *Interstate Law*, p. 263, but that author takes exactly the contrary position, holding that the capacity to contract as to all personal matters depends upon the law of the state or country where the transaction takes place, whether the subject-matter contracted about or involved be within the state or without. The decision, moreover, is obiter, since the action was not on the notes, but was to recover the purchase price of the property for which the notes were given.

In *Marks v. Germania Sav. Bank* (1903) 110 La. 659, 34 So. 725, declaring it to be settled in Louisiana that the laws of that state regarding the privileges and prescribing the disabilities of married women are "personal" statutes, purely domiciliary in character, and do not operate to the benefit of married women domiciled elsewhere than in Louisiana, it does not appear whether the contract in question was made in New York or Mississippi, in one or the other of which states the married woman was domiciled, or in Louisiana.

In *Freret v. Taylor* (1907) 119 La. 307, 121 Am. St. Rep. 522, 44 So. 26, an action against a married woman domiciled in Missouri, upon a lease of real property in New Orleans, it was held that, she having the right, under the law of her domicile, to enter into the contract as if a feme sole, her capacity to do so accompanies her wherever she may go, and her liability on such a contract is not extinguished by the fact that she may have exercised her legal right in another state. The court said: "Laws enacted by certain states for the protection of married women, by requiring the authorization of their husbands to their contracts, are personal statutes, and if, in the state where the parties have their domicile, such protective laws are not deemed necessary, but really more

should be, it is not the duty of the states in which those parties may chance to temporarily sojourn to safeguard their rights or restrict their actions in a manner or to an extent other and different from what is provided for in the state of their domicile."

In *First Nat. Bank v. Hinton* (1909) 123 La. 1018, 49 So. 692, also declaring that the Louisiana statute imposing disabilities upon married women with respect to incurring obligations has no application to a married woman domiciled elsewhere, and entering into a contract to be executed in the state of her domicile, the court said that the contract sued on having been entered into in Mississippi, to be executed there by parties who were subject to the laws of that state, their rights were to be determined and enforced in accordance with the *lex loci contractus*. In this case, however, Mississippi was both the *lex loci contractus* and the *lex domicilii*.

Rule in England.

There is some doubt as to whether the English courts would refer the capacity of a married woman to enter into an ordinary mercantile contract of a personal nature to the *lex domicilii* or *lex loci contractus*. Dicey, in his "*Conflict of Laws*," p. 534, and Halsbury, in "*Laws of England*," vol. 6, p. 233 (under topic, "*Conflict of Laws*," 348), declaring that the general rule in England is that capacity to make a personal contract is governed by the law of the domicile (*lex domicilii*) of the contracting party; but state, though tentatively and doubtfully, and by way of exception, that one's capacity to bind one's self by an ordinary mercantile contract of a personal nature is probably governed by the law of the place where the contract is made (*lex loci contractus*) (Dicey, p. 538; Halsbury, pp. 233, 234), such a contract being distinguished from a contract of marriage or a marriage settlement (Halsbury, p. 238). There is in fact but little specific authority in the English cases as to the capacity of a married woman to bind herself by an ordinary

mercantile contract of a personal nature. The conclusion of the text-writers on the subject is drawn mainly from cases not involving the capacity of a married woman to enter into a mercantile contract. In a footnote at page 534, Dicey observes that the authority of the dicta in favor of the *lex domicilii* had been a good deal shaken, not by the judgment, but by the dicta of the court of appeal in *Ogden v. Ogden*, L. R. [1908; C. A.] Prob. 46, 77 L. J. Prob. N. S. 34, 97 L. T. N. S. 827, 24 Times L. R. 94,—a case involving capacity to marry, and so not within the scope of the present annotation.

In *Guepratte v. Young* (1851) 4 DeG. & S. 217, 64 Eng. Reprint, 804, 5 Eng. Rul. Cas. 848, it was held that while the law of England, where a contract by a married woman was made, determined the form, the law of France, where she was domiciled, determined her capacity, and the contract was upheld in accordance with the law of France, as to capacity, although by the law of England she would be incapable of making such a contract.

b. As between lex loci contractus and lex loci solutionis.

As is shown by the opinion in the reported case (*POOLE v. PERKINS*, ante, 1509), there is a difference of opinion on the question whether the law of the place where the contract is made (*lex loci contractus*), or the law of the place where it is performable (*lex loci solutionis*), governs as to the capacity of a married woman to make a personal contract. The decision in that case that, conformably to the presumed intention of the parties, the question as to the capacity of the married woman was to be referred to the law of the place where the contract was performable (*lex loci solutionis*) rather than to the law of the place where the contract was made (*lex loci contractus*), she being capable by the former but incapable by the latter law, is, as shown in the opinion, supported by the decision in *Mayer v. Roche* (1909) 77 N. J. L. 681, 26 L.R.A. (N.S.) 763, 75 Atl. 235,

upon a very similar state of facts. (The court in *Union Trust Co. v. Knabe* (1914) 122 Md. 584, 89 Atl. 1106, 1116, which is subsequently set out in this subdivision, questions the authority of the *Mayer Case* for this position, because the evidence in that case did not show where the note in question was delivered; but it seems clear that the court meant to apply the law of New York as the law of the place of performance, even upon the assumption that the note was delivered in New Jersey.)

Even if it had affirmatively appeared in *Mayer v. Roche* that the note in question, which was signed by a married woman in New Jersey, where she resided, was delivered in that state, and had its inception there as a binding contract, the law of New York as to the capacity of married women might, perhaps, have been properly applied, upon the ground that, defendant would be estopped to deny that the note was a New York contract, it being dated and payable in New York (see, on this point, *Chemical Nat. Bank v. Kellogg*, 2 L.R.A. (N.S.) 299, *infra*). It may be, however, that the other facts essential to the doctrine of estoppel did not appear. At all events, the decision applying the law of New York (it not appearing whether in fact the note was delivered in New York or New Jersey) was expressly put upon the ground that the intention of the parties as to the governing law controls, and that the presumption in that case was that the parties intended to contract with reference to the law of New York, by which a married woman is capable of making such a contract, rather than the law of New Jersey, by which she would be incapable. The presumption was undoubtedly properly indulged, if it be assumed that the intention of the parties, expressed or presumed, is the criterion of the governing law with respect to the capacity to contract. The correctness of that assumption, however, is open to grave doubt. There are but few cases which have directly involved and adjudicated the specific question.

The position of the reported case

POOLE v. PERKINS, ante, 1509), and Mayer v. Roche (N. J.) supra, is supported by two later decisions in New Jersey,—*Basilea v. Spagnuolo* (1910) 80 N. J. L. 88, 77 Atl. 531, and *Basilea v. Spagnuolo* (1910) 80 N. J. L. 92, 77 Atl. 532,—and by *Fisk Rubber Co. v. Muller* (1914) 42 App. D. C. 49, and *Hammerstein v. Sylva* (1910) 66 Misc. 550, 124 N. Y. Supp. 535, reversed on another point in (1910) 137 App. Div. 580, 122 N. Y. Supp. 276.

The principle which refers the question of the governing law to the presumed intention of the parties was applied in *Basilea v. Spagnuolo* (1910) 80 N. J. L. 88, 77 Atl. 531, by holding that a note dated and made payable in New Jersey, signed by the husband, payable to the order of his wife, a resident of New Jersey, and indorsed by her for his accommodation, and delivered by him to his creditors in New York, was presumably a New Jersey contract and governed by the law of that state, by which a married woman is incapable of becoming surety for her husband, in the absence of any evidence showing that the husband was authorized by the wife expressly or impliedly to pass away the note elsewhere than in New Jersey. In the companion case of *Basilea v. Spagnuolo* (1910) 80 N. J. L. 92, 77 Atl. 532, the law of New Jersey was applied to a note given under the same circumstances, except that it appeared in this case that the husband mailed the note in New Jersey, addressed to the plaintiffs in New York. It will be observed that in these cases the fact that the notes were dated and were payable in New Jersey, where the married woman resided, was deemed more persuasive of an intention to contract with reference to the law of New Jersey, than the fact that, by the law of New Jersey, the note was invalid, whereas, by the law of New York, it was valid, was persuasive of an intention to contract with reference to the law of New York.

Again in *Fisk Rubber Co. v. Muller* (1914) 42 App. D. C. 49, the law of the District of Columbia, by which a married woman is incapable of binding herself as surety, was applied to

the contract in question, upon the ground that, in the circumstances, it was to be presumed that the parties intended to contract with reference to the law of the District where the contract was to be performed. It appeared in this case that one of the papers constituting the contract was signed by the sureties and their principal in the district, and that the other paper was signed by the obligee in Massachusetts. The court, however, did not undertake to decide whether the contract had its legal inception in the District or in Massachusetts, but, as already stated, referred the question of the governing law to the intention of the parties, notwithstanding that the question related to the capacity of the parties. The court invoked "the general principle that a contract is to be governed by the law with a view to which it is made; and this is a question of intention, to be deduced, when not expressly declared, from the place, terms, character, and purposes of the transaction;" and applied it without any consideration, or at least discussion, of the propriety of applying the principle to a matter like that in respect to the capacity of a married woman to contract, that goes to the question whether any contractual relation at all has been created. And it may be observed that none of the cases which it cites in support of the principle (*Pritchard v. Norton* (1882) 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Hall v. Cordell* (1891) 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154; *Coghlan v. South Carolina R. Co.* (1891) 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150; *Croissant v. Empire State Realty Co.* (1907) 29 App. D. C. 538) involved any question as to capacity of parties.

In *Hammerstein v. Sylva* (1910) 66 Misc. 550, 124 N. Y. Supp. 535, reversed on another point in (1910) 137 App. Div. 580, 122 N. Y. Supp. 276, the court was of the opinion that the contract of a married woman domiciled in the United States, to perform as an opera singer in the United States, was not governed by the law of France, where the contract was made, by

which a married woman is incapable of binding herself by a contract without the consent of her husband. The court discussed at some length the question as to the governing law. While the fact that a married woman was domiciled in the United States seems to have had some influence, the court was apparently of the opinion that the law of the place of performance prevails over the law of the place where the contract is made, even in relation to the capacity to contract; especially where the contract is valid by the former law, but would be invalid by the latter law.

In *Shacklett v. Polk* (1875) 51 Miss. 378, a married woman residing in Tennessee, and owning separate estates, real and personal, both in Tennessee and Mississippi, executed in Tennessee a note to one whom she had appointed her agent to take charge of her cotton crop for the year on her plantation in Mississippi, in order to secure him for his services as such agent, and for advances and expenditures he might make in respect of the crop, pursuant to an agreement in that regard. It was held that, notwithstanding that, by the law of Tennessee, she was incapable of binding herself or her property in that state, the payee of the note was entitled to be reimbursed for so much of the amount thereof as was expended under the contract upon the property in Mississippi, and that such property was liable for its payment. The court declared that while the law of the place where the contract is made furnishes the rule for validity or invalidity, the rule is not inflexible, and if performance is to be made in another jurisdiction the parties may justly be presumed as referring to its law as the standard both of validity and construction. So far as appears, the note itself was payable in Tennessee, where it was made,—at least, it does not appear that it was payable in Mississippi; but it was given as a part of an agreement in respect of the property in Mississippi, and the court apparently regarded Mississippi as the place of performance of the contract as a whole.

Upon the other hand, the doctrine

that the *lex loci contractus* prevails over the *lex loci solutionis* as to the capacity of a married woman to enter into a personal contract, or a contract in relation to personal property, irrespective of the intention of the parties, express or presumed, receives strong support from the decision of the Illinois supreme court in *Burr v. Beckler* (1914) 264 Ill. 230, L.R.A. 1916A, 1049, 106 N. E. 206, Ann. Cas. 1915D, 1132, reversing (1913) 182 Ill. App. 231, under title *Burr v. Tobey*. In that case the law of Florida was applied notwithstanding that, by that law, the married woman was incapable of binding herself by the contract, merely because the court deemed that her contract had its legal inception when she mailed the note and deed of trust in that state. Clearly the facts would have presented a very strong case for the application of the law of Illinois if, as in the reported case (*POOLE v. PERKINS*, ante, 1509), and *Mayer v. Roche* (1909) 77 N. J. L. 681, 26 L.R.A.(N.S.) 763, 75 Pac. 235, supra, the presumed intention of the parties had been regarded as the criterion, since the note was dated in that state, purported to be payable there [that the note was by its terms payable in Illinois appears from the report of the case in the appellate court, 182 Ill. App. 231], the parties were domiciled there, and the note was secured by a deed of trust upon real property there, and it was only by somewhat technical reasoning that the conclusion was reached that her contract was made in Florida rather than in Illinois. And again, if the presumed intention of the parties were to be regarded as the criterion of the governing law, the fact that the contract was invalid, tested by the law of Florida (*lex loci contractus*), but valid, tested by the law of Illinois (*lex domicilii* and *lex solutionis*), would be a very strong circumstance indicating an intention to contract with reference to the law of Illinois. At the close of the opinion the court said: "The law of the state of performance will govern in determining the rights of the parties and the effect of the contract, but if a party is not competent to make

a contract, the contract is not valid and will not be enforced anywhere."

Burr v. Becker is, both as to its facts and its decision, very much like the case of *Union Nat. Bank v. Chapman* (1902) 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672, which is subsequently set out in this subdivision. As there suggested, it may be questioned whether, on the facts of the *Chapman* Case, it could not have properly been held that the married woman's contract was made in Illinois, where the note was first delivered, so as to be binding upon her. Possibly there may also be a similar question in the *Burr* Case. But, of course, this possibility merely strengthens the authority of these cases for the position that the law of the place where the contract is made governs, as against the law of the place where it is performable.

It will be observed that the decision in *Chemical Nat. Bank v. Kellogg* (1905) 183 N. Y. 92, 2 L.R.A. (N.S.) 299, 111 Am. St. Rep. 717, 75 N. E. 1103, 5 Ann. Cas. 158, that the law of New York governed an accommodation indorsement by a married woman, although the note left her hands in New Jersey, was not upon the ground that the question depended upon the intention of the parties, or that the *lex loci solutionis* prevails over the *lex loci contractus*, but upon the ground that the note being dated and payable in New York, by the law of which the indorsement was valid, and the note having been negotiated in that state, she was estopped, as against a bona fide purchaser, to show that her contract was made in New Jersey.

The view that the law of the place where the contract is made rather than the law of the place where the contract is performable governs as to the capacity of a married woman is also supported by *Union Trust Co. v. Knabe* (1914) 122 Md. 584, 89 Atl. 1106, where the law of New Jersey, by which a married woman is incapable of binding herself as surety or guarantor, was applied to a guaranty indorsed by a married woman, a resident of Maryland, up-

on the obligation of her husband to a trust company in New Jersey, delivered to her husband in Maryland, and taken by him to New Jersey, and there delivered to the trust company. While the question as to the governing law was thus made to turn upon the place where the contract was completed, notwithstanding that, by the law of that place, it was not binding, whereas it would have been, according to the law of Maryland, the court does not appear to have entirely repudiated the idea that the intention of the parties may, in some circumstances, affect the question of the governing law, even with respect to the capacity of the parties. A witness for the trust company testified that he wrote the note and indorsement, that the place of payment was not inserted in the note, and that the note was dated in Maryland for the purpose of making it payable in that state, and that the husband and his attorney agreed that the note and indorsement should be treated as a Maryland contract, and be delivered to him in Maryland for the purpose of avoiding the provision of the New Jersey law. This testimony, however, was not considered, for the reason that it appeared that the counsel for the husband did not represent the wife, and that he never saw her in regard to the matter. It would seem, however, even apart from this testimony, that if the presumed intention of the parties were to be regarded as the criterion, a strong case was made for the application of the law of Maryland, in view of the fact that the note appeared on its face to be dated there, and was actually delivered by the wife to her husband there, and was valid by the law of Maryland, but invalid by the law of New Jersey. This case, therefore, seems to lend considerable strength to the view that the intention of the parties—at least, the presumed intention—is not the criterion of the governing law in relation to the capacity of the parties, and that that question is to be determined by the law of the place where the married woman's contract is made;

that is, the state in which it is finally delivered, so as to become binding upon her, if binding at all. It is to be conceded, however, that the effect, as support for this view, of the declaration of the court in that case that the law of the state in which the contract is made determines the capacity of the parties and the validity of the contract, is somewhat weakened by the fact that the court apparently does not differentiate the element of capacity from the elements which affect the essential validity and construction of the contract; as to which it must be admitted that the rule is subject to exception. The decision in *Union Trust Co. v. Knabe* (Md.) supra, was followed without discussion in *Union Trust Co. v. Schlens* (1914) 122 Md. 611, 89 Atl. 1116.

The soundness or unsoundness of the position taken in the reported case (*POOLE v. PERKINS*, ante, 1509), *Mayer v. Roche* (1909) 77 N. J. L. 681, 26 L.R.A.(N.S.) 763, 75 Pac. 235, supra, and the other cases cited above, that the capacity of a married woman to make a personal contract is, conformably to the presumed intention of the parties, to be referred to the law of the place where the contract is performable (*lex loci solutionis*), rather than to the law of the place where it is made (*lex loci contractus*), especially if she is capable by the former law, but incapable by the latter law, depends upon the broader question whether the principle which refers the governing law to the presumed intention of the parties is to be applied indiscriminately to all the elements of, or questions concerning, the contract, including those which, like that in regard to contractual capacity and that in regard to formal validity, go to the point whether any contractual relation in a legal sense has been created; or, on the other hand, is to be confined to those elements or questions which presuppose the existence of a contract in a legal sense, and are concerned with its essential validity, construction, or effect.

Although the judicial authority on

the specific question now under annotation as to the contractual capacity of a married woman is about equally divided, if regard is had only to those cases which necessarily called for a choice between *lex loci contractus*, as such, and *lex loci solutionis*, as such, the doctrine of the reported case (*POOLE v. PERKINS*, ante, 1509), and *Mayer v. Roche* appears to be opposed to the view of most of the text-writers and to the assumption of the majority of the cases, at least, of those which discriminate between questions which, like that as to capacity to contract, go to the existence of a legal contract as distinguished from the construction, legal effect, or content of the obligation of a contract assumed to have a legal existence.

The court in the reported case (*POOLE v. PERKINS*), though repudiating the view which limits the scope of the principle that accepts the presumed intention of the parties as the criterion of the governing law, recognizes that some courts and text-writers have, in effect, placed such a limitation upon the principle by drawing a distinction in this regard between the different elements of or questions concerning the contract. In that respect the case differs from *Mayer v. Roche* (N. J.) supra, the decision in which it follows, as the opinion in the latter case merely invokes and applies the general principle, without apparently considering the possibility of a limitation or a distinction which would exclude from its operation, and refer to the *lex loci contractus* as a positive and fixed rule, a question like that in regard to contractual capacity, which goes to the point whether the act or transaction (e. g., the signing and delivery of a note) relied upon as creating a contract did, in a legal sense, have that effect. The principle invoked and applied by those cases is supported and exemplified by a multitude of cases. An examination of these cases, however, will disclose that in most of them the question involved did not relate to the capacity of the parties, or to any other matter touching the preliminary question of the existence

of a contract, but involved either the obligation or interpretation of the contract, or the essential validity of particular provisions measuring the rights and duties of the parties, as distinguished from matters affecting the question whether the parties had been brought into contractual relations at all. One of the most prolific sources of confusion in the subject of the conflict of laws is the tendency of the courts, as well as text-writers, to state too broadly principles which they properly apply to a particular state of facts before them, and their failure to distinguish between the different elements or incidents of the contract. This is well illustrated by a comparison of the case of *Scudder v. Union Nat. Bank* (1876) 91 U. S. 406, 23 L. ed. 245, with the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana)* (1889) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469. In the *Scudder Case* the question related to the formal validity of the contract, and the court declares, without any reference whatever to the intention of the parties, expressed or implied, the general rule that matters bearing upon the execution, the interpretation, and the validity of a contract, are determined by the law of the place where the contract was made, and that matters connected with its performance are regulated by the law prevailing at the place of performance. In the *Montana Case* the question related to the validity of a stipulation limiting the liability of a carrier, and the court declared generally, without expressly recognizing any distinction between the different elements of the contract, the general proposition that the nature, the obligation, and interpretation of a contract, are to be governed by the law of the place where it is made, unless the parties, at the time of making it, have some other law in view, thus apparently making the intention of the parties the criterion of the governing law as to all matters affecting its validity. A similar inconsistency, or at least ambiguity, is to

be observed in Judge Story's treatment of the subject.

At § 280 (8th ed. p. 376) of *Story on Conflict of Laws*, he remarked that the rules already considered by him (referring apparently to chapter VIII., of which that section is a part) presuppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication, and that where the contract is either expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. At § 102, page 170 (an earlier chapter), however, he declares, without making any reference to the general proposition just stated, that the law of the place where a contract is made will generally govern in respect to the capacity, state, and condition of persons. It is true, however, that in this connection he was discussing the question whether the *lex domicilii* or *lex loci contractus* governed, and, perhaps, did not have in mind any question as to conflict between *lex loci contractus* and *lex loci solutionis*, and it may be that his reference in § 280 to the rules already considered by him was intended to embrace the rule declared by him in § 102, so as to bring the question of capacity to contract, as well as matters relating to the nature and extent of the obligation or the essential validity of particular provisions, within the exception declared by him, when the contract is to be performed at some place other than that at which it was made. It may be noticed in this connection, however, that the only case (*Andrews v. Pond* (1839) 13 Pet. (U. S.) 65, 10 L. ed. 61) which Judge Story cited in support of the proposition laid down by him in § 280 involved a question of essential validity,—namely, the question of usury. The editor of the 8th edition cites a long list of cases in support of that general proposition, but in nearly, if not quite all, of them, the

question before the court related either to the nature and extent of the obligation, or the essential validity of some particular stipulation.

The principle that accepts the intention of the parties, expressed or presumed, as the criterion of the governing law of the personal contract,—in some of its aspects, at least,—was originally incorporated into the common law by Lord Mansfield (opinion in *Robinson v. Bland* (1761) 1 W. Bl. 234, 96 Eng. Reprint, 129, 2 Burr. 1077, 97 Eng. Reprint, 717) and he apparently borrowed it from the civil law. The entire principle, at least in its relation to the question of validity, formal or essential, has been frequently attacked by writers upon this subject. The principle, however, is so well established, both in England and in this country,—as applied, at least, to the nature, extent, and content of the obligation of the parties, assuming the existence and formal validity of the contract, and also as to the essential validity of particular stipulations or provisions of the contract, measuring the extent of the reciprocal rights and duties of the parties, e. g., stipulations limiting the common-law liability of carriers and usury,—that, to this extent at least, it will probably survive the assaults upon it. Indeed, it may be doubted whether the criticisms of the principle are not in a large part based upon the assumption that the principle is applicable to the question of capacity of parties, formal validity, and other matters going to the very existence of a contract. At all events, those criticisms lose much of their force when the principle is confined within the limits just suggested, and matters like formal validity and capacity to contract, which relate to the existence of the contract in a legal sense, are excluded from its operation.

Dicey, who lends his full approval to the general principle that accepts the intention of the parties, expressed or presumed, as the criterion of the governing law with respect to the essential validity and the interpretation and obligation of the contract, de-

clares generally that the formal validity of a contract is governed by the law of the place where it is made (*lex loci contractus*) (Dicey, *Conf. L.* p. 549), though he suggests tentatively the possibility that a contract made in one country, but intended to operate wholly in, and to be subject to the laws of, another, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required or allowed by the laws of the country where the contract is to operate, and subject to the law whereof it is made. As has been seen *supra*, I. a, he declares that the general rule in England refers the question of capacity to *lex domicilii*, but that, probably, capacity to bind one's self by an ordinary mercantile contract is governed by the law of the place where the contract is made. He does not, in this connection, suggest in either case that the rule is qualified by, or dependent upon, the intention expressed or presumed.

Minor (*Conf. L.* § 171) declares that it is apparent that the capacity of the parties to contract relates to the making of the contract, and that hence the *lex celebrationis*, which he here employs as a substitute for *lex loci contractus*, as meaning the law of the place where the contract is made, necessarily governs. He says: "The only law that can operate to create a contract is the law of the place where the contract is entered into (*lex celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If, by the law of that state, no contract has been made, there is no contract. Hence, if, by the *lex celebrationis*, the parties are incapable of making a binding contract, there is no contract upon which the law of any other state can operate. It is void *ab initio*."

Wharton (*Whart. Conf. L.* § 401) apparently assumed that the principle that a contract made in one place, to be performed in another, is to be governed by the law of the place of performance, applies only to matters

third edition of the last-mentioned work (Whart. Conf. L. § 427e), the writer of this note suggested that when the cases are scrutinized with reference to the particular matter or element of the contract involved, they seem to warrant the conclusion that matters that relate to the preliminary question whether a contract has been made, including the capacity of the party to contract and the formal validity of the contract, are governed by a fixed law which is independent of, and cannot be varied by, the intention of the parties; and that the intention, expressed or presumed, can be accepted as the criterion of the governing law only with respect to the reciprocal rights and duties of the parties thereunder, assuming the existence and formal validity of the contract. At §§ 427h and 427i he cites authority to support the conclusion that the general question as to the capacity, and the specific question as to the capacity, of a married woman, depend upon the law of the place where the contract is made, rather than upon the law of the place of performance. In this connection, however, he calls attention to the distinction between the capacity of a married woman to make a contract and her capacity to perform, and suggests that the law of the place of performance ought to prevail if it renders her incapable of doing the acts essential to the performance of a contract which she was capable of making according to the *lex loci contractus*.

It will be observed that the conclusions of these text-writers are opposed to the position taken in the reported case (*POOLE v. PERKINS*, ante, 1509), *Mayer v. Roche* (N. J.) supra, and the other cases above cited, that the principle which accepts the intention of the parties as the criterion of the governing law applies to the capacity of the parties to contract. That assumption is also opposed in an able opinion of Wallace, J., in *Campbell v. Crampton* (1880) 18 Blatchf. 150, 2 Fed. 417, which, although not on its facts within the

only because the question was discussed upon the assumption, for the purposes of the point, at least, of a conflict between the *lex loci contractus* and *lex loci solutionis*, but also because of the clear distinction which the opinion makes with respect to the different elements or incidents of the contract as affecting the governing law. After alluding to the conflicting rules on the subject, mentioning specifically the rule that, in conformity with the presumed intention of the parties, the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance, if that differs from the law of the place where the contract is made, and the rules of the *Scudder Case* (1876) 91 U. S. 406, 23 L. ed. 245 (already alluded to), the opinion declares that, as to the capacity of parties to enter into a contract, it must be accepted as the general rule that the law of the place where the contract is made must be the test. He says: "Upon principle no reason can be alleged why a contract void for want of capacity of the party at the place where it is made should be held good because it provides that it shall be performed elsewhere, and nothing can be found in any adjudication or textbook to support such a conclusion. It is a solecism to speak of that transaction as a contract which cannot be a contract because of the inability of the persons to make it such. When the authorities which declare that the obligation, interpretation, nature, and validity of a contract made in one place, which is to be performed in another, are to be determined by the law of the place of performance, are examined, it will be found that the term 'validity' refers to the conditions of the contract, and the extent and nature of its obligation, as to which the agreement will be upheld or defeated, according to the sanctions or the prohibitions of the law of the place where the parties have located the transaction." It was accordingly held in this case that the capacity of a nephew and

an engagement to marry was to be determined by the law of Alabama, where the contract was made, by which such a marriage would be incestuous and absolutely void, and by which, therefore, the parties had no capacity to enter into an agreement to contract such a marriage, even assuming that the contract to marry was to be performed in New York, and that by the law of New York such a marriage would not be void or voidable. The court was also of the opinion that Alabama was the place of performance as well as of the making of the contract, since, though they contemplated that the marriage should be performed in New York, they intended to live in Alabama; and further, that, apart from any other consideration, it would be contrary to the public policy of the forum to enforce such an agreement. Notwithstanding these alternative grounds for the decision, however, the case is valuable on the subject under annotation, because the court recognizes the vital point that the principle which refers contracts to the law of the place of performance, in conformity to the presumed intention of the parties, does not apply to all of the elements of the contract, and, specifically, does not apply to the formal validity of the contract, or to the capacity of the parties thereto. It will be observed that the court in this case holds that the law of the place where the contract is made governs as to the capacity, even if, according to that law, the parties are incapable, and according to the law of the place where the contract is to be performed, they would be capable. It is clear, therefore, that the court rejects altogether the intention of the parties as the criterion of the governing law in respect of capacity to contract.

The doctrine of the last case, that the question of contractual capacity is governed by the *lex loci contractus*, and is not affected by the presumed intention of the parties in that regard, is supported by *Voigt v. Brown* (1886) 42 Hun (N. Y.) 394, holding that the law of New York governed as to the

capacity of a married woman domiciled in that state, to become a party to an accommodation note for her husband, it being found that the note was first delivered in New York, although signed in Connecticut, notwithstanding that the note by its terms was payable in Connecticut to the order of a firm of which her husband was a partner, and that, by the law of Connecticut, she would not be authorized to make such a contract. The court said: "We do not see how the place of performance in any way affects the capacity to contract. The law of the place of performance does not forbid her to perform, and, even if it did, that might not affect her capacity. Certainly when the law of this state says that a married woman may make a contract, neither her privilege to contract nor the rights of those with whom she contracts are to be taken away by the law of another state." The decision upon the facts in this case might be reconciled with the theory that the intention of the parties is the criterion even with respect to capacity, and therefore with *Mayer v. Roche* and *POOLE v. PERKINS* (reported herewith), since in this case the law of the place where the contract was made, which was applied, rendered the married woman capable of making the contract, and therefore, if the court had accepted the intention as the criterion, it might have indulged the presumption that she intended to contract with reference to that law rather than to the law of the place of performance, by which she would be incapable. As shown, however, the opinion clearly refers the result to the *lex loci contractus* as such, and by clear implication altogether excludes the intention of the parties as the criterion.

In *United States v. Garlinghouse* (1870) 4 Ben. 194, Fed. Cas. No. 15, 189, the married woman's contract was both made and performable in New York, but the doctrine that the *lex loci contractus* governs was laid down, and the court expressly said that the question of capacity depended upon the law of the place

where the contract was made rather than upon the law of the place where it is, by its terms, to be performed; and further remarked that, in most of the cases that favor the *lex loci solutionis*, the obligation or legal effect of the engagement, rather than the capacity of the parties, was in controversy.

Again, in *Pickering v. Fisk* (1834) 6 Vt. 102, the court said that "the capacity or legal competency of the parties to contract is governed by the law of the place where the contract is made. To this there may be an exception in the case of two citizens of the same community who may be transiently in a foreign country, contracting there with each other, and seeking to enforce the contract in their domestic courts." The court refers to *Thompson v. Ketcham* (1809) 4 Johns. (N. Y.) 285, and states that the decision was afterwards overruled in (1811) 8 Johns. 189, 5 Am. Dec. 332, and adds again: "It is difficult to perceive how the competency of a party to enter into a contract can be made to depend upon the particular place where it is to be performed." Although the question of contractual capacity was not involved in this case, the opinion is especially valuable for the reason that it recognizes the distinctions between the various parts and elements of the contract, and refers the capacity and formal validity to the *lex loci contractus*, and interpretation, requirements, and effect of the contract, as well as the time, mode and manner of performance, and its validity, so far as the validity depends upon the legality of performance, to the *lex loci solutionis*. It may be noted in this connection, however, that the reversal in 8 Johns. 189, of the decision in *Thompson v. Ketcham* (1809) 4 Johns. (N. Y.) 285 (referred to in the last case), can hardly be said to detract from the effect of the first decision as authority for referring the question of capacity to the law of the place of performance, since the reversal was for error in the admission of parol testimony to show that the note, which was made in Jamaica,

was payable in New York; and Kent, Ch. J., who wrote the opinion upon the second appeal, seems to have assumed that the law of New York would have governed if the note had been made expressly payable there, for he said: "The *lex loci* is to govern unless the parties had in view a different place by the terms of the contract." In that case, however, the defense was infancy, and it would seem that there might very well be a distinction between the defense of coverture and the defense of infancy, as bearing on the governing law, since coverture, if it affects the contract at all, ordinarily renders it void, so that in effect no contractual relation at all is created, whereas an infant's contract is at most only voidable, and not void. The defense of infancy, therefore, seems to relate to the question of the obligation or essential validity of a contract assumed to have a legal existence, rather than to the preliminary question whether any contract has in a legal sense been brought into existence. This, however, is only referred to incidentally, and for the purpose of calling attention to the possibility of a distinction, and the question as to the governing law as to infancy is not intended to be covered herein.

The doctrine of the reported case (*POOLE v. PERKINS*, ante, 1509) and *Mayer v. Roche* (1909) 77 N. J. L. 681, 26 L.R.A. (N.S.) 763, 75 Pac. 235, is also directly opposed by *Hager v. National German American Bank* (1898) 105 Ga. 116, 31 S. E. 141, holding that a married woman who executed a note at her place of residence, in Tennessee, by the law of which she was incapable of contracting, could not be held liable thereon, even if it were to be assumed that by the law of Minnesota, where the note was expressly made payable, she would be capable. As a matter of fact, there being no proof of the law of Minnesota, it was presumed that the common law, by which she would be incapable, also prevailed in that state. It is clear, however, that the decision would have been the same even if it had been proved that the disability of

coverture had been removed by statute in that state. The court said: "If a person, having capacity to contract under the laws of the state of his domicil, there executes a contract to be performed elsewhere, its validity and effect would generally be governed by the law of the place where the contract was to be performed. We do not think, however, that the laws of the place of performance of a contract can be called to the aid of a person who is seeking to enforce as a contract something which is absolutely void at the place where it was executed. If the instrument was void as a contract in Tennessee, it is void everywhere."

In *Union Nat. Bank v. Chapman* (1902) 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672, the law of Alabama, by which a married woman is incapable of becoming a surety for her husband, was applied to a note which she signed as such surety and delivered to the payee in that state, although, as against the other makers, the note had no inception until its negotiation in Illinois, where, by its terms, it was payable, and by the law of which she would have been bound. The decision is upon the ground that the contract of the surety was completed as soon as her signature was affixed and the instrument delivered to the payee, she not having authorized it to be discounted in Illinois, or known that it was the intention to negotiate it there, and it not appearing that she clearly understood and intended that her contract should be governed by the law of Illinois. The correctness of this decision, so far as it holds that her contract was to be deemed to have been made in Alabama, where the instrument was signed by her and delivered to the payee, rather than by the law of Illinois, where it had its inception as a binding obligation, may, perhaps, be doubted, but that question is, of course, not within the scope of this note. It will be observed, however, that the court applied the law of the state in which it held that her contract was made, as against the law of the place where the

contract was by its terms performable, notwithstanding that the former law rendered the contract void, whereas by the latter it would have been valid. The opinion, however, as already indicated, does apparently recognize that the result might have been otherwise if it could be fairly said that she intended her contract to be governed by the laws of Illinois; but apparently the real significance of the intention, in the mind of the court was in its bearing on the question as to the place where her contract was to be deemed to have been made, the idea apparently being that her contract would be regarded as made in Illinois if she had known that the paper was to be discounted there. The opinion expressly refers the decision to the first rule of the *Scudder Case*, namely, that "all matters bearing upon the execution, the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the law of the place where the contract is made."

In *Taylor v. Sharp* (1891) 108 N. C. 377, 13 S. E. 138, the court applied the law of New York, by which the married woman was capable of contracting, to a note made in that state, without making any reference to the law of Maryland on the point, although the note was payable in that state. It does not appear from the opinion, however, whether she would have been capable by the law of Maryland or not; so that it is not clear that the court had in mind the case of a conflict between the *lex loci contractus* and *lex loci solutionis*. The court, however, said that if a contract is valid by the law of the place where it is made, it is valid everywhere.

In *First Nat. Bank v. Shaw* (1902) 109 Tenn. 237, 59 L.R.A. 498, 97 Am. St. Rep. 840, 70 S. W. 807, where a note was signed by a married woman in Tennessee, payable in Ohio, the court said the first question to be determined was whether, upon the facts found, it was a Tennessee or an Ohio contract, and held that it was an Ohio contract, apparently because,

bring the case within the exception, with reference to contracts contrary to the public policy of the forum, to the rule that the *lex loci contractus*, rather than the *lex domicilii*, furnishes the test of capacity. The court said in this connection: "It is possible, also, that, in a state where the common law prevails in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." The court held, however, under the circumstances, that there was no reason of public policy which should prevent the maintenance of the action, because, although at the time the guaranty was made the law of Massachusetts did not authorize a married woman to make contracts of that kind, yet even then she had a very extensive power to bind herself by contract, and that power had been extended at the time of the commencement of the action so as to cover guaranty contracts.

In *Thompson v. Taylor* (1900) 65 N. J. L. 107, 46 Atl. 567, the New Jersey supreme court held that it was contrary to the public policy of New Jersey to enforce a contract of suretyship by a married woman domiciled in New Jersey, although the contract was made in another state, by the law of which it was valid. But when the same case afterwards came before the court of errors and appeals (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544), the latter court took the contrary position, and declared that the New Jersey statute regulating the right of married women to make contracts of suretyship was not the declaration of public policy that closes the courts of New Jersey to rights of action arising in other jurisdictions where the law is different. This is doubtless in accordance with the trend of the cases, although

the question as to when, upon principles of comity, a court of one jurisdiction will enforce a contract which, so far as the substantive rights of the parties are concerned, is properly governed by the law of another jurisdiction, is peculiarly one for the courts of the forum, and the decisions of the courts of other jurisdictions on this point have rather less than the ordinary value of foreign decisions as precedents.

In *Law v. Smith* (1904) 68 N. J. Eq. 81, 59 Atl. 327, the court, on the authority of *Thompson v. Taylor* (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544, held that a contract made in New York by a married woman domiciled in New Jersey was enforceable in a court of the latter state, notwithstanding that, by the law of that state, she would be incapable of making the contract.

In *Brigham v. Gilmartin* (1878) 58 N. H. 346, where a contract, made in Massachusetts, was held to be enforceable in New Hampshire, the domicil of the married woman, the court said that the Massachusetts liability of the defendant to pay for the property she bought there is not in conflict with the New Hampshire law of married women, or hostile to New Hampshire interests, or contrary to good morals.

In *Case v. Dodge* (1894) 18 R. L. 661, 29 Atl. 785, it was held that a purchase of goods by a married woman in Massachusetts, being valid according to the law of that state, was enforceable in Rhode Island, although, at the time it was made, it would not be valid according to the law of the latter state. It does not appear in this case whether the married woman was domiciled in Rhode Island or Massachusetts. At the time the action was brought, such a contract would have been valid even according to the law of Rhode Island. The court takes the general position that if a contract is valid by the law of the place where it was made, an action upon it in another forum will be sustained, unless the contract contravenes the law or policy of that forum. It is obvious that the court here distinguishes between a contract which is contrary to

by the *lex loci solutionis*, is persuasive of an intention to contract with reference to the former. It is, therefore, difficult to say what the result would have been if the circumstances had been reversed, and the contract had been invalid by the law of Illinois, where it was made, and valid by the law of the place where it was payable.

That ordinarily the capacity of a married woman is to be determined by the law of the place where her contract was deemed to have been made, rather than by the law of the place of performance, seems to be assumed both in *Freeman's Appeal* (1897) 68 Conn. 533, 37 L.R.A. 452, 57 Am. St. Rep. 112, 37 Atl. 420, and in *First Nat. Bank v. Mitchell* (1899) 34 C. C. A. 542, 92 Fed. 565, though they reached contrary results on the same state of facts. In those cases it appeared that a guaranty signed by a married woman in Connecticut, by the law of which she was incapable of executing it, was delivered in Connecticut to her husband, and through his agency was delivered to the other party in Illinois, which, in the Federal case, was stated to be the place of payment, and in the state court was assumed, for the purposes of this point, at least, to be the place of performance. It was assumed or found in both cases that the contract was made in Illinois, where it was delivered to the other party; but the state court was of the opinion that the contract was invalid, because the agency of the husband to deliver it was attempted to be created in Connecticut, and that, by the law of that state, the wife had no capacity to create such an agency. The Federal circuit court took a contrary position, holding that the law of Illinois, where the contract was made, i. e., was delivered, governed the same as if it had been personally delivered by her in that state. (Though not material for the purposes of this discussion; it may be remarked that the decision of the Federal court was reversed in (1901) 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418, on the ground that the decision of the state court was *res judicata*. The Supreme Court, how-

ever, was not called upon to pass upon the question as to the governing law, as an independent question.)

When the case of *Wood v. Wheeler* was first before the North Carolina supreme court ((1890) 106 N. C. 512, 11 S. E. 590), a note executed by a married woman was held void, in accordance with the law of North Carolina, upon the assumption that the note was executed in that state; but when the case again came before the court ((1892) 111 N. C. 231, 16 S. E. 418) it appeared that the note was executed in South Carolina, and it was held valid, in accordance with the law of that state. It will thus be observed that the result varied with the finding as to the place where the contract was made, and there is no mention of the law of the place of performance. Still, as no place of payment was expressly named, the place of payment would be presumably determined by the place where the contract was made, so that, upon either assumption as to the place where the contract was made, there would perhaps be no conflict between the *lex loci contractus* and *lex loci solutionis*. (Although the point is not within the scope of this note, it may be observed, by way of explanation of the result in this case, that the married woman was domiciled in South Carolina at the time of the contract, and apparently for that reason did not come within the doctrine of the other North Carolina cases, referred to, refusing, on the ground of public policy, to enforce such a contract against a married woman domiciled in North Carolina, even though valid by the law of the place where it was made. The court, however, did not discuss the question of public policy in the *Wood Case*.)

In *Huey's Appeal* (1853) 1 Grant, Cas. (Pa.) 51, involving the law governing defense of infancy, the court said that the general rule is that, in regard to questions of minority or majority, or incapacities incident to coverture and other personal qualities and disabilities, the law of the place where the contract is made or the act done furnishes the rule. The

good morals? We can give no answer to that consistent with respondent's position. It is considered there is none, and that the proposition under consideration must be answered in the affirmative. The decision appealed from is erroneous. The contract of respondent must be held as valid and enforceable here as in the place where it was made."

But in *Union Trust Co. v. Grosman* (1917) 245 U. S. 412, 62 L. ed. 368, 38 Sup. Ct. Rep. 147, the court, upon general principles, took the view that it would be contrary to public policy to enforce in Texas a guaranty by a married woman, void according to the law of that state, although it was made while she was temporarily in Illinois, by the law of which state it was valid; and that a Federal court sitting in Texas should enforce that public policy by refusing to render a judgment to enforce the guaranty.

It is a prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity and incapacity as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid, or not, in the forum of his domicile, as they may infringe, or not, its interests, laws, and policies. *Bank of Louisiana v. Williams* (1872) 46 Miss. 618, 12 Am. Rep. 319.

And in *Hanover Nat. Bank v. Howell* (1896) 118 N. C. 271, 23 S. E. 1005, it was held, following the decision in *Armstrong v. Best* (1893) 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14, that a married woman, domiciled in North Carolina, could not be held liable on a note signed as surety for her husband in North Carolina, although it was payable in New York, according to the law of which she was capable of making such a contract. This decision was on the ground that it would be contrary to the public policy of North Carolina to enforce such a contract against one of its own citizens. In this case it is true that the *lex loci contractus* and

domicil had not been at the forum, the court would, perhaps, have applied the law of the place of performance, upon the ground that, as between the law of the place where a contract is made and that where it is to be performed, the latter should govern, if it does not violate the public policy of the forum.

So, in *Hayden v. Stone* (1880) 13 R. I. 106, holding that an action could not be maintained in Rhode Island upon a note made in Massachusetts by a married woman then domiciled there, the court said: "And a contract valid by the laws of one state cannot be enforced in another, unless such a contract, made between its own citizens, could be enforced there; or, in other words, it depends on the *lex fori*." It was said in the subsequent case of *Brown v. Browning* (1886) 15 R. I. 422, 2 Am. St. Rep. 908, 7 Atl. 403, however, that the court did not, in the former case, mean to make a rule as broad as the language above quoted might imply, and that the reasoning of the court in the former case did not go to the validity of the contract, but to the remedy sought, which is always subject to the *lex fori*. In *Brown v. Browning* a contract made in Connecticut after sunset on Sunday, being valid according to the law of that state, was held to be enforceable in Rhode Island, notwithstanding that it would have been invalid if made in the latter state. The case is distinguished from *Hayden v. Stone* on the ground that the enforcement of the contract violated no law of remedy in force in Rhode Island.

In *Robinson v. Queen* (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, holding that a note executed by a married woman as surety in a state where she resides and the note is payable, if valid in that state, may be enforced in Tennessee, the court said that if the suit were against a married woman, a citizen of Tennessee, on a contract made out of the state, there would be much force in the insistence of counsel that, inasmuch as it was the fixed policy of Tennessee to throw around married

between the *lex loci contractus* and the *lex loci solutionis*, the conflict being between the *lex loci contractus* on one side, and the *lex domicilii* or *lex fori*, on the other. As these cases, however, describe the governing law so far as the substantive rights of the parties are concerned (aside from any question of public policy of the forum) in terms of the law of the place where the contract is made, without referring to the intention of the parties, they carry, perhaps, by their cumulative effect, some implication in favor of the *lex loci contractus* as against the *lex loci solutionis*, in case of a conflict between the two, although they cannot, of course, be regarded as full authority on the point:

United States. — *Bowles v. Field* (1897) 78 Fed. 742, (1897) 83 Fed. 886.

Arkansas. — *Lawler v. Lawler* (1913) 107 Ark. 70, 153 S. W. 1113; *Shane v. Dickson* (1914) 111 Ark. 353, 163 S. W. 1140.

Connecticut. — *Connecticut Mut. L. Ins. Co. v. Westervelt* (1884) 52 Conn. 592.

Illinois. — *Nixon v. Halley* (1875) 78 Ill. 611; *Burchard v. Dunbar* (1876) 82 Ill. 450, 25 Am. Rep. 334.

Indiana. — *Robinson v. Pease* (1902) 28 Ind. App. 610, 63 N. E. 479.

Iowa. — *Nichols & S. Co. v. Marshall* (1899) 108 Iowa, 518, 79 N. W. 282.

Kentucky. — *Gibson v. Sublett* (1885) 82 Ky. 596.

Maine. — *Bell v. Packard* (1879) 69 Me. 105, 31 Am. Rep. 251; *Bond v. Cummings* (1879) 70 Me. 125.

Massachusetts. — *Milliken v. Pratt* (1878) 125 Mass. 374, 28 Am. Rep. 241; *Hill v. Chase* (1883) 143 Mass. 129, 9 N. E. 30.

Missouri. — *Ruhe v. Buck* (1894) 124 Mo. 178, 25 L.R.A. 178, 46 Am. St. Rep. 439, 27 S. W. 412.

New Jersey. — *Bradley v. Johnson* (1884) 46 N. J. L. 271.

Pennsylvania. — *Evans v. Cleary* (1889) 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440.

Rhode Island. — *Case v. Dodge* (1894) 18 R. I. 661, 29 Atl. 785.

Tennessee. — *Pearl v. Hansborough* (1848) 9 Humph. 433.

Texas. — *Merrielles v. State Bank* (1893) 5 Tex. Civ. App. 483, 24 S. W. 564.

Vermont. — *Holmes v. Reynolds* (1883) 55 Vt. 39.

West Virginia. — *Wick v. Dawson* (1896) 42 W. Va. 43, 24 S. E. 587. (The statement in the headnote of the last case, intimating that the *lex loci solutionis* might govern, does not appear in the opinion itself.)

In some instances even such an intimation as may be gathered from the terms in which the governing law is identified is lacking, and the decision is simply referred, as in *Young v. Hart* (1903) 101 Va. 480, 44 S. E. 703, to the general proposition that the contract of a married woman, valid where made and to be performed, is valid everywhere, subject to the public policy of the forum; or the governing law is described by the name of the state which was in fact both the *locus contractus* and *locus solutionis* (see *Walker v. Arkansas Nat. Bank* (1919) 167 C. C. A. 273, 256 Fed. 1; *Young v. Bullen* (1897) 19 Ky. L. Rep. 1561, 43 S. W. 687; *Law v. Smith* (1904) 68 N. J. Eq. 81, 59 Atl. 327; *Benton v. German-American Nat. Bank* (1895) 45 Neb. 850, 64 N. W. 227; *Adams v. Honness* (1872) 62 Barb. (N. Y.) 326); or, as in *Farmers State Bank v. Butler* (1917) 101 Neb. 635, 164 N. W. 563, the contract is merely described as a contract of a certain state ("Minnesota contract" in that instance), and so governed by the law of that state.

In *Barbee v. Bevins* (1917) 176 Ky. 113, 195 S. W. 154, where a married woman residing in Kentucky indorsed notes in that state, and gave the same to her husband, who delivered them to the plaintiff in West Virginia, they being also by their terms payable in the latter state, the decision, referring the question of her capacity to the law of West Virginia, by which she was bound, rather than to the law of Kentucky, by which she would not be bound, was upon the ground that the contract was not consummated

until the note was delivered in West Virginia, where it was also payable, and the contract was both made and to be performed in that state. There was in this case no necessity for choosing between the *lex loci contractus* and the *lex loci solutionis*, and no intimation as to which would prevail in case of a conflict.

Upon the other hand, there are some cases involving the capacity of a married woman to contract, but not involving any actual conflict between the *lex loci contractus* and *lex loci solutionis*, which contain general statements implying that the intention of the parties is the criterion, or that the *lex loci solutionis* is the governing law, apart from objections based on public policy of forum. See *Griswold v. Golding* (1887) 8 Ky. L. Rep. 777, 3 S. W. 535; *Bank of Louisiana v. Williams* (1872) 46 Miss. 618, 12 Am. Rep. 319; *Partee v. Silliman* (1870) 44 Miss. 272; *Thompson v. Taylor* (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544; and *International Harvester Co. v. McAdam* (1910) 142 Wis. 114, 26 L.R.A.(N.S.) 774, 124 N. W. 1042, 20 Ann. Cas. 614.

And in *Dalton v. Murphy* (1855) 30 Miss. 59, a deed of trust executed by a married woman in Alabama, of slaves, who, at the time, were in Mississippi, was held invalid, because not executed in the manner prescribed by the law of the latter state with reference to the execution of contracts by married women, the decision apparently being on the ground that Mississippi was the place of performance, or the situs of the property.

In *Robinson v. Queen* (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, involving the capacity of a married woman, the court said that it is well settled that the validity of a contract, the obligation thereof, and the capacity of the parties thereto, is to be determined by the *lex loci contractus* (in the sense of the place of performance), with the exception as to the public policy of the forum; but in this case also the contract was made and performable in the same state, so that there

was no conflict between the law of the place where it was made and that of the place where it was performable.

In *Baum v. Birchall* (1892) 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620, involving the capacity of a married woman to execute a bond secured by a mortgage on land in Delaware, the court said that, if it were to be conceded that the bond and mortgage were executed in Pennsylvania, yet it appears on their face that they were to be performed in Delaware, where the land was located, and the general rule in such cases is that the instrument is governed, as to its nature, obligation, and interpretation, by the laws of the place where it is to be performed. In this case, however, it was found that the bond was delivered in Delaware, so that there was no conflict between the *lex loci contractus* and *lex loci solutionis*; and, besides, the court was of the opinion that, in any event, the law of Delaware, as the *lex rei sitæ* would govern. See *infra*, III.

In *Dulin v. McCaw* (1894) 39 W. Va. 721, 20 S. E. 681, the court states that, where there are conflicting laws, more or less favorable, respecting capacity, that law may be preferred by which the capacity is enlarged. Here again, however, there was no conflict between the *lex loci contractus* and *lex loci solutionis*.

The decision in *Walling v. Cushman* (1921) 238 Mass. 62, 130 N. E. 175, referring the capacity of a married woman to indorse notes which were dated at Denver, Colorado, and by their terms were payable there, to the law of Colorado, by which she was capable of making the indorsements, rather than to the law of Michigan (her domicile), by which she was incapable,—was on the alternative grounds, first, that there was a presumption, both at common law and under the Negotiable Instruments Law, that the indorsement was made in Colorado, where the notes were dated; and, second, that apart from such presumption, she would be estopped to set up the claim that it was made in Michigan. (citing in this

connection *Chemical Nat. Bank v. Kellogg* (1905) 183 N. Y. 92, 2 L.R.A. (N.S.) 299, 111 Am. St. Rep. 717, 75 N. E. 1103, 5 Ann. Cas. 158). It may be noted that although the opinion states that the notes were "discounted" in Michigan, it also states that it did not clearly appear that the obligation of the intestate (married woman) first became complete by the delivery of the notes in Michigan. The court, in the course of its opinion, stated that, as a general rule, the contract of indorsement, being a new and separate one, is determined by the law of the place where the contract of indorsement is made; that is, where it takes effect by delivery; but that this general rule is not applicable when it appears from the special circumstances that the parties intended otherwise. It did not specifically apply that qualification to the question of capacity, although that was the question involved. As has been shown, however, the decision was upon another ground.

While there are almost numberless cases which state, with slight variations, Story's general proposition that, where the contract is either expressly or tacitly to be performed in some place other than that where it is made, the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance, none of them can be regarded as express authority for the application of that rule to the question of the capacity of a married woman to contract. Few of them can be relied upon for the application of that rule to any question relating to the existence of a contract as distinguished from its interpretation, or obligation, or essential validity. See, however, *Brown v. Gates* (1903) 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, 1 Ann. Cas. 85, holding that the validity of a note (made in New York and payable in Massachusetts), as affected by the fact that it was made on Sunday, was to be determined not by the law of the place where the note was made and

delivered (New York), but by the law of the place where it was payable (Massachusetts), notwithstanding that, by that law, the note was rendered void, whereas, so far as the contrary appears, it would not have been void by the law of the place where it was made.

This case is, of course, beyond the scope of the annotation, and is referred to here merely as an illustration of what seems to the annotator the obvious fallacy of applying the general principle which accepts the intention of the parties as the criterion of the governing law, without regard to the nature of the particular question involved, or recognition of the essential differences in the nature of the various questions as regards the governing law. In this case the result was to refer the effect of an act done on Sunday to the law of the place of performance, rather than to the law of the place where the act itself was done. In *Mayer v. Roche* (1909) 77 N. J. L. 681, 26 L.R.A. (N.S.) 763, 75 Pac. 235, *supra*, the result was to refer to the law of the place of performance the effect of an act done by a married woman, which, by the law of the place where it was done, had no legal effect. The failure of the courts in such cases to consider the possibility of a distinction in this regard detracts seriously from their value as precedents.

c. *As between lex loci contractus (or lex loci solutionis or lex domicilii) and lex situs.*

This subdivision is, of course, concerned only with the distinctive question of capacity to contract in respect of personal property, as affected by the fact that one is a married woman; and the choice as between *lex loci contractus* (or the possible alternatives, *lex loci solutionis* or *lex domicilii*) and *lex situs* as regards other questions common to contracts by married women and other persons—e. g., validity and effect as against creditors—is beyond its scope.

Subject to the exception that a court of a state in which personal property is found may refuse to enforce or give

effect to a contract of a married woman which, by the *lex loci contractus* (or *lex loci solutionis* or *lex domicilii*) she was capable of making, upon the ground that it would be contrary to the public policy of the former state (see *infra*, H. d, 2), the *lex loci contractus* (or *lex loci solutionis* or *lex domicilii*) will prevail over the *lex situs* as to the capacity of a married woman to contract in relation to personal property.

In *Union Nat. Bank v. Hartwell* (1887) 84 Ala. 379, 4 So. 156, the court said that the general rule is that the capacity of a married woman to make contracts in respect to her separate personal property, when it is situated in a country other than that of the domicil of her husband, is that the law of the domicil of the husband governs unless the property, from its peculiar nature, necessarily has an implied locality, *or unless the contract is made in the country where the property was situated*. In this case it was held that the capacity of a woman to give her husband a power of attorney to pledge stock in an Alabama corporation was to be governed by the law of Louisiana, where the woman was domiciled and the transaction took place, rather than by the law of Alabama, where the stock had its situs, there being no rights of creditors involved.

The court, in *Kerr v. Urie* (1897) 86 Md. 72, 38 L.R.A. 119, 63 Am. St. Rep. 493, 37 Atl. 789, while conceding, for the purposes of the argument, that a subscription made in one state to capital stock of a corporation which exists in and carries on its business in another, is a contract to be performed in the latter state, and is governed by the laws of that state, nevertheless held that a transfer of stock in a national bank in another state, made in Maryland to a married woman, who was competent by the law of that state to be a stockholder, is valid, irrespective of the law of the state in which the bank is situated.

The liability of a married woman under an agreement executed in New Jersey, where the parties resided, to repay her husband for advances made

by him in New Jersey for the support of the family, out of her interest in an estate which was being administered in New York, is determined by the law of New Jersey, rather than by the law of New York. *Hendricks v. Isaacs* (1887) 46 Hun (N. Y.) 239. In this case it was held that, as no statute of New Jersey had been proved, the general principles of equity which have been applied to the solution of controversies arising between husband and wife must govern the right of the husband in a proceeding for the enforcement against the estate, as they would a formal action.

As a general rule, the general rights, capacities, and disabilities of a married woman, in regard to her personal property, are governed by the law of her domicil, rather than by the law of the place where the property is situated. *Loftus v. Farmers' & M. Nat. Bank* (1890) 133 Pa. 97, 7 L.R.A. 313, 19 Atl. 347. The point involved was as to the validity of a transfer, by a married woman domiciled in Great Britain, of certificates of loan issued by the city of Philadelphia. The court said that the question how far the *lex loci contractus* might affect the rights of property arising therefrom was not necessary to consider. In this case, however, it was held, by way of exception to the general rule, that the mode of transfer was to be governed by the law of Pennsylvania, it being held that the act regulating the mode of transfer applied to foreign, or non-resident, married women owning such securities. The court said: "But while the general rule, as above stated, is entirely settled, not only in this state, but in every jurisprudence founded on the common law, yet it is subject always to the power of the state to declare otherwise as to any property having an actual or legal situs within its borders. The title and mode of transfer of land are always governed by the *lex loci rei sitæ*; and personal property may be assimilated to land, in these respects, whenever the law of any state so determines."

In *Dalton v. Murphy* (1855) 30 Miss. 59, a deed of trust of slaves, who

were in Mississippi, executed by a married woman domiciled in Mississippi, was held invalid, though valid by the law of Alabama, where it was executed. The decision, however, is not upon the ground of her lack of capacity to contract, but upon the ground that the deed was not executed by her in the manner prescribed by the law of Mississippi, where the performance of the contract was contemplated.

In *Miller v. Campbell* (1893) 140 N. Y. 457, 35 N. E. 651, the court said that while the policy of insurance upon the life of a husband, for the benefit of his wife, was a Massachusetts contract, and, as between the insurance company and the assured, would be governed by the laws of that state, the agreement involved in the case was that of the married woman to assign the policy, and its validity was dependent upon her capacity under the law of New York to make it. Although it is not expressly so stated in the opinion, the married woman was probably domiciled in New York, and the agreement to assign made in that state.

d. As between lex loci contractus (or lex loci solutionis or lex domicilii) and lex fori.

1. In general.

Assuming that a married woman is capable of contracting personally or in regard to personal property, according to the law of the place where the contract is made,—or, if the *lex loci solutionis* or *lex domicilii* is favored over the *lex loci contractus*, according to one or the other of those laws,—there are two possible reasons which may prevent its enforcement in another state or country in which the action is brought: (1) The courts of that state or country may deem it contrary to its public policy to enforce such a contract, even assuming that it was valid by the law of the place where it was made or performable, especially if the married woman in question was domiciled at the forum, though her contract was made and performable elsewhere; or (2) even though there is no objection based on public policy to

the enforcement of such a contract, there may be no remedy available at the forum for the enforcement of such a contract, and it is, of course, a well-settled principle that the *lex fori* governs as to the remedy.

2. Public policy of forum.

While, as already shown, *supra*, the weight of authority establishes the *lex loci contractus*, rather than the *lex domicilii*, as the general test of the capacity of a married woman to make a personal contract, this principle, like all other principles of private international law, is subject to the qualification that the law of another state or country will not be enforced if contrary to the public policy of the forum. It is conceivable, at least, that a court might take the view that it would be contrary to the public policy of the forum to enforce the contract of a married woman, valid according to the *lex loci contractus*, but invalid according to the *lex fori*, although she was not domiciled at the forum. But when the married woman was domiciled at the forum at the time the contract was made, and would have been incapable by the law of the forum, there is so much greater reason for holding that the contract, though valid according to the *lex loci contractus*, is contrary to the public policy of the forum, and therefore will not be enforced. If the court, upon the ground of public policy, refuses to enforce a contract of a married woman not domiciled at the forum, there is, of course, no chance to impute to it an intention to hold that capacity is to be determined by the *lex domicilii*, rather than the *lex loci contractus*. But when the married woman was domiciled at the forum, a decision refusing to enforce the contract is likely, unless careful discrimination is made, to be interpreted as a decision that the capacity is to be determined by the *lex domicilii*, even when the real ground is that it would be contrary to the public policy of the forum to enforce, *against persons domiciled at the forum*, contracts which, though valid where made, are condemned by the *lex fori*. Strictly and

technically speaking, a decision which rests upon this ground does not apply the *lex domicilii* to the question of capacity; but, since the public policy is derived from, and evidenced by, the law of the forum, which, *ex hypothesi*, is also the law of the domicile, it is sufficiently accurate, for the purposes of the disposition of such a case, to say that the capacity is determined by the *lex domicilii*. The use of that term, however, in such a case, is objectionable because it is calculated to create an impression that the court is announcing a general principle of private international law which is applicable wherever the domicile may happen to be. The reality and importance of the distinction here alluded to, between the theory that the *lex domicilii* determines capacity, and the theory that denies enforcement of a contract against a married woman domiciled at the forum, because contrary to its public policy, are shown by the fact that the first theory would operate to validate contracts valid according to the *lex domicilii*, but invalid according to the *lex loci contractus*, as well as to prevent enforcement at the domicile of contracts, valid according to the *lex loci contractus*, but invalid according to the *lex domicilii*; while the second theory would only operate to prevent enforcement at the domicile of contracts, valid according to the *lex loci*, but invalid according to the *lex domicilii* (using the latter term as synonymous with *lex fori*), and never to validate contracts invalid by the *lex loci contractus*, but valid by the *lex domicilii*. Again, according to the first theory, the *lex domicilii* would determine the question of capacity wherever that question might arise, even if in the state where the contract was made, while the second theory leaves the question to be determined by the *lex loci contractus*, if it arises in any state or country other than that of the domicile.

The distinction above discussed is well brought out in *Armstrong v. Best* (1893) 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14. In that case it was held that a contract made

in Maryland by a married woman domiciled in North Carolina (the forum) was not enforceable in the latter state, by the law of which a married woman is incapable of making such a contract, notwithstanding that she would be capable according to the law of Maryland (*lex loci contractus*). The decision is not upon the ground that the capacity of a married woman is, in general, to be determined by the law of her domicile. Upon the other hand, the court expressly says that the weight of authority establishes that such capacity is, in general, to be tested by the law of the place where the contract is made, and that, if the action at bar had been brought in the courts of Maryland, the defendant could not have availed herself of her incapacity under the law of her domicile. The decision is upon the ground that the enforcement of the contract against a married woman domiciled in North Carolina would be contrary to the public policy of the latter state, and that the case therefore falls within the qualification which attaches to all principles of private international law, to the effect that no state or nation will enforce a foreign law which is contrary to its fixed settled policy.

Though reaching a different conclusion on the question of public policy, the distinction is also well illustrated by the opinion in *Thompson v. Taylor* (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544, where a contract of suretyship by a married woman domiciled in New Jersey was made in New York, by the law of which she was capable of making such a contract, although by the law of New Jersey she was incapable of binding herself as surety. The court said in effect that it was necessary to consider two propositions or objections: "First. That the incapacities of a wife under the common law, if not removed by the statute law of her domicile, follow her wherever she goes; so that, if at home she be unable to bind herself as surety, she may nowhere bind herself by such a contract. Secondly. That the retention in our law of so much of the common law as prevented married women from becoming

sureties is a declaration by the legislature of a public policy to which the court should give effect by refusing to enforce obligations of this nature, incurred by its citizens in other states, where this disability no longer exists."

Assuming that a married woman was capable by the law of another state in which the contract was made (*lex loci contractus*),—or by the law of the state where it was performable (*lex loci solutionis*), if that is preferred,—the question whether it would be contrary to the public policy of another state in which she was domiciled, in relation to married women, to enforce it in the courts of that state, depends so much upon considerations that may be peculiar to local conditions,—especially the extent to which the common-law disabilities of married women have been removed,—that decisions in one jurisdiction on this point have rather less than the ordinary value of foreign decisions as precedents in other jurisdictions. Numerically considered, however, the cases in which the courts of the domicile have refused, on the ground of public policy, to enforce or give effect to a contract which the married woman was capable of making according to the *lex loci contractus*,—or *lex loci solutionis*, if that is preferred,—although she would have been incapable by the law of the domicile and of the forum, are in the minority. (The Louisiana cases, of course, are not considered in this connection, since, as above shown, they apply *lex domicilii* as the general test of capacity regardless of the public policy of the forum, and do not merely refuse to enforce a contract against a married woman domiciled at the forum, which would be contrary to its public policy.)

In some of the cases cited *supra*, II. a, which support the rule that the capacity of a married woman to contract is governed by the *lex loci contractus*, the married woman was not domiciled at the forum; at least, at the time the contract was made. See *Connecticut Mut. L. Ins. Co. v. Westervelt* (1884) 52 Conn. 592; *Young v. Bullen* (1897) 19 Ky. L. Rep. 1561, 43 S. W. 687; *Bell v. Packard* (1879) 69 Me. 105, 31 Am.

Rep. 251; *Hill v. Chase* (1886) 143 Mass. 129, 9 N. E. 30; *Smith v. Frame* (1889) 3 Ohio C. C. 587; *Pearl v. Hansborough* (1848) 9 Humph. (Tenn.) 433. And these cases, therefore, did not involve the question of public policy as regards a married woman domiciled at the forum.

In other cases cited *supra*, II. a, in support of the doctrine that the *lex loci contractus*, rather than the *lex domicilii*, governs, the domicile was at the forum; and in each of these cases the contract was upheld and enforced, being valid by the *lex loci contractus*, although invalid by the *lex domicilii* and *lex fori*. *Bowles v. Field* (1897) 78 Fed. 742 (on final hearing in (1897) 83 Fed. 886); *First Nat. Bank v. Mitchell* (1899) 34 C. C. A. 542, 92 Fed. 565, reversing (1898) 84 Fed. 90; *Robison v. Pease* (1902) 28 Ind. App. 610, 63 N. E. 479; *Milliken v. Pratt* (1878) 125 Mass. 374, 28 Am. Rep. 241; *Phoenix Mut. L. Ins. Co. v. Simons* (1893) 52 Mo. App. 357.

Some of these cases do not recognize, or at least do not advert to, any distinction arising from the fact that the domicile of the married woman was, or was not, at the forum. In *Bowles v. Field* (1897) 83 Fed. 886, however, the court said that, upon the assumption that the consideration for the note and mortgage in suit rested upon notes executed and made payable in Ohio, by a married woman domiciled in Indiana, as surety for her husband, their enforcement by a Federal court sitting in Indiana would not be precluded by the public policy of the latter state. The court further said that if there were an irreconcilable conflict in the public policy of the two states on the subject, the Federal court ought to be governed by the more liberal policy indicated by the act of Congress touching the rights of married women in the District of Columbia, rather than by the public policy indicated by the statutes of Indiana. In *Milliken v. Pratt* (1878) 125 Mass. 374, 28 Am. Rep. 241, the court conceded that, under some circumstances, the fact that the married woman was domiciled at the forum at the time the contract was made might

bring the case within the exception, with reference to contracts contrary to the public policy of the forum, to the rule that the *lex loci contractus*, rather than the *lex domicilii*, furnishes the test of capacity. The court said in this connection: "It is possible, also, that, in a state where the common law prevails in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." The court held, however, under the circumstances, that there was no reason of public policy which should prevent the maintenance of the action, because, although at the time the guaranty was made the law of Massachusetts did not authorize a married woman to make contracts of that kind, yet even then she had a very extensive power to bind herself by contract, and that power had been extended at the time of the commencement of the action so as to cover guaranty contracts.

In *Thompson v. Taylor* (1900) 65 N. J. L. 107, 46 Atl. 567, the New Jersey supreme court held that it was contrary to the public policy of New Jersey to enforce a contract of suretyship by a married woman domiciled in New Jersey, although the contract was made in another state, by the law of which it was valid. But when the same case afterwards came before the court of errors and appeals (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544, the latter court took the contrary position, and declared that the New Jersey statute regulating the right of married women to make contracts of suretyship was not the declaration of public policy that closes the courts of New Jersey to rights of action arising in other jurisdictions where the law is different. This is doubtless in accordance with the trend of the cases, although

the question as to when, upon principles of comity, a court of one jurisdiction will enforce a contract which, so far as the substantive rights of the parties are concerned, is properly governed by the law of another jurisdiction, is peculiarly one for the courts of the forum, and the decisions of the courts of other jurisdictions on this point have rather less than the ordinary value of foreign decisions as precedents.

In *Law v. Smith* (1904) 68 N. J. Eq. 81, 59 Atl. 327, the court, on the authority of *Thompson v. Taylor* (1901) 66 N. J. L. 253, 54 L.R.A. 585, 88 Am. St. Rep. 485, 49 Atl. 544, held that a contract made in New York by a married woman domiciled in New Jersey was enforceable in a court of the latter state, notwithstanding that, by the law of that state, she would be incapable of making the contract.

In *Brigham v. Gilmartin* (1878) 58 N. H. 346, where a contract, made in Massachusetts, was held to be enforceable in New Hampshire, the domicile of the married woman, the court said that the Massachusetts liability of the defendant to pay for the property she bought there is not in conflict with the New Hampshire law of married women, or hostile to New Hampshire interests, or contrary to good morals.

In *Case v. Dodge* (1894) 18 R. L. 661, 29 Atl. 785, it was held that a purchase of goods by a married woman in Massachusetts, being valid according to the law of that state, was enforceable in Rhode Island, although, at the time it was made, it would not be valid according to the law of the latter state. It does not appear in this case whether the married woman was domiciled in Rhode Island or Massachusetts. At the time the action was brought, such a contract would have been valid even according to the law of Rhode Island. The court takes the general position that if a contract is valid by the law of the place where it was made, an action upon it in another forum will be sustained, unless the contract contravenes the law or policy of that forum. It is obvious that the court here distinguishes between a contract which is contrary to

the statute of the forum and one which is contrary to its public policy, for in this case the contract, when made, was contrary to the law of Rhode Island, but it was enforced notwithstanding.

In *R. S. Barbee & Co. v. Bevins* (1917) 176 Ky. 113, 195 S. W. 154, it was held not contrary to the public policy of Kentucky to entertain an action against a married woman domiciled in that state, on an indorsement by her as surety, governed by the law of West Virginia, where the contract was made and payable, although her personal estate had not been set apart for that purpose by a deed of mortgage, or other conveyance, which would have been necessary if the contract had been governed by the law of Kentucky. But see *Brown v. Dalton* (1899) 105 Ky. 669, 49 S. W. 443, *infra*, III.

In *Meier & F. Co. v. Bruce* (1917) 30 Idaho, 732, 168 Pac. 5, there was no question that, as a matter of substantive law, the note in question was governed by the law of Oregon, by which it was valid, the note having been made there, being payable there, and the married woman having been domiciled there at the time the note was given, although she subsequently took up her residence in Idaho, by the law of which the note would have been invalid. The question was whether it was contrary to the public policy of Idaho to entertain an action on the note; the majority of the court being of the opinion that it was not, although there was a dissenting opinion.

So, in *International Harvester Co. v. McAdam* (1910) 142 Wis. 114, 26 L.R.A. (N.S.) 775, 124 N. W. 1042, 20 Ann. Cas. 614, the court declared that the contract of a married woman as accommodation maker of commercial paper not having been judicially declared unenforceable in Wisconsin, on grounds of public policy, or prohibited by legislation as pernicious, was enforceable in courts of Wisconsin in case of its having been made in another state, where such contracts are valid, unless such contracts are, in fact, inherently bad, in the sense indicated in the foregoing rules.

While the married woman, at the time the note in question was given, was a resident of South Dakota, where it was made and payable, she was a resident of Wisconsin when the action was commenced, and from the reasoning employed by the court in support of its decision it would seem that the result would not have been different if she had been a resident of Wisconsin when the note was made in South Dakota. The court said: "That such contracts are not to be regarded as inherently harmful is evidenced by the fact that they are permitted by the written law of a large portion of the states, and in most others legislation in that direction is progressive. It is further evidenced by the fact that they are recognized as not inherently bad by substantially all the courts of this country. The exceptions are not significant. This court, except as restrained by principle and the great weight of authority, is free to take its own stand, to declare for the state what shall be, in the particular situation, its public policy, till the source for written law shall have acted in the matter. The court cannot say that such contracts are against public policy merely because they have not the sanction of the common law, as we have seen. . . . How can the court say that it should be so classed,—that it should be located within the broadest possible boundaries of the immoral, the inherently bad? Nearly all the common-law disabilities of women to contract have been removed. They can acquire and enjoy property and make all contracts necessary or convenient in that regard. They can, in equity, charge their property substantially at will. There is little left of a business nature which men can do that they cannot do. They have nearly all the rights of men and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld, not very firmly, or, perhaps, very logically. How can the ordinary business contract in question, so common among men of ordinary perceptions, be said to be contrary to any policy of this state heretofore, or which should now

good morals? We can give no answer to that consistent with respondent's position. It is considered there is none, and that the proposition under consideration must be answered in the affirmative. The decision appealed from is erroneous. The contract of respondent must be held as valid and enforceable here as in the place where it was made."

But in *Union Trust Co. v. Grosman* (1917) 245 U. S. 412, 62 L. ed. 368, 38 Sup. Ct. Rep. 147, the court, upon general principles, took the view that it would be contrary to public policy to enforce in Texas a guaranty by a married woman, void according to the law of that state, although it was made while she was temporarily in Illinois, by the law of which state it was valid; and that a Federal court sitting in Texas should enforce that public policy by refusing to render a judgment to enforce the guaranty.

It is a prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity and incapacity as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid, or not, in the forum of his domicile, as they may infringe, or not, its interests, laws, and policies. *Bank of Louisiana v. Williams* (1872) 46 Miss. 618, 12 Am. Rep. 319.

And in *Hanover Nat. Bank v. Howell* (1896) 118 N. C. 271, 23 S. E. 1005, it was held, following the decision in *Armstrong v. Best* (1893) 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14, that a married woman, domiciled in North Carolina, could not be held liable on a note signed as surety for her husband in North Carolina, although it was payable in New York, according to the law of which she was capable of making such a contract. This decision was on the ground that it would be contrary to the public policy of North Carolina to enforce such a contract against one of its own citizens. In this case it is true that the *lex loci contractus* and

domicil had not been at the forum, the court would, perhaps, have applied the law of the place of performance, upon the ground that, as between the law of the place where a contract is made and that where it is to be performed, the latter should govern, if it does not violate the public policy of the forum.

So, in *Hayden v. Stone* (1880) 13 R. I. 106, holding that an action could not be maintained in Rhode Island upon a note made in Massachusetts by a married woman then domiciled there, the court said: "And a contract valid by the laws of one state cannot be enforced in another, unless such a contract, made between its own citizens, could be enforced there; or, in other words, it depends on the *lex fori*." It was said in the subsequent case of *Brown v. Browning* (1886) 15 R. I. 422, 2 Am. St. Rep. 908, 7 Atl. 403, however, that the court did not, in the former case, mean to make a rule as broad as the language above quoted might imply, and that the reasoning of the court in the former case did not go to the validity of the contract, but to the remedy sought, which is always subject to the *lex fori*. In *Brown v. Browning* a contract made in Connecticut after sunset on Sunday, being valid according to the law of that state, was held to be enforceable in Rhode Island, notwithstanding that it would have been invalid if made in the latter state. The case is distinguished from *Hayden v. Stone* on the ground that the enforcement of the contract violated no law of remedy in force in Rhode Island.

In *Robinson v. Queen* (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, holding that a note executed by a married woman as surety in a state where she resides and the note is payable, if valid in that state, may be enforced in Tennessee, the court said that if the suit were against a married woman, a citizen of Tennessee, on a contract made out of the state, there would be much force in the insistence of counsel that, inasmuch as it was the fixed policy of Tennessee to throw around married

women the shield of disability, a court of that state should not, under any supposed obligation of comity, entertain a suit based upon such a contract.

And in *First Nat. Bank v. Shaw* (1902) 109 Tenn. 237, 59 L.R.A. 498, 97 Am. St. Rep. 840, 70 S. W. 807, it was held that a married woman domiciled in Tennessee may avail herself of the protection of its statute, allowing her to plead coverture as a defense to her contracts, when sued there on a note delivered and payable in another state, where such defense is not recognized.

In *Holmes v. Reynolds* (1883) 55 Vt. 39, while it was held that the validity of a contract of a married woman was to be determined by the law of Massachusetts, where it was made, the court said that contracts are not proprio vigore of any efficiency beyond the territory of the state where made; the effect given them elsewhere is from comity, and not of strict right; and that how far comity ought to extend is left to the courts in the jurisdiction where the remedies are sought. It does not prevail where the contract is in violation of the laws of that jurisdiction, of God, or nature, against good morals, religion, public rights, or public policy. The case, however, was held not to fall within any of the foregoing exceptions. It appeared that, after the contract in question, the legislature of Vermont passed a statute authorizing such contracts. It does not appear where the married woman was domiciled when she made the contract.

When the married woman was not domiciled at the forum at the time the contract was made in the other state, there is less reason for raising an objection to the enforcement of the contract, based on the public policy of the forum.

Thus, while, as already shown, the court in *Armstrong v. Best* (1893) 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14, held it contrary to the public policy of North Carolina to enforce the contract of a married woman, domiciled in that state, although valid by the law of another state, where it was made, it

was held in *National Exch. Bank v. Rook Granite Co.* (1911) 155 N. C. 43, 70 S. E. 1003, that it was not contrary to public policy to enforce such a contract by a married woman not domiciled in North Carolina, the *Armstrong Case* being distinguished upon the ground that the married woman was domiciled in North Carolina. And see *Robinson v. Queen* (Tenn.) *supra*.

The provision of the Alabama Code, that the separate estates of married women shall be liable for all contracts for certain articles of comfort and support of the household, does not apply to a contract made and to be performed outside of Alabama by a husband and wife not domiciled in Alabama. *Judge v. Wright* (1882) 73 Ala. 324.

In *Wright v. Remington* (1879) 41 N. J. L. 43, 32 Am. Rep. 180, holding that the enforcement of a contract of a married woman, valid by the *lex loci contractus*, was not contrary to the public policy of New Jersey, the married woman was apparently not domiciled in New Jersey.

As already intimated, while the public policy of the forum has sometimes been given effect to prevent the enforcement of a contract valid by the *lex loci contractus* (or *lex loci solutionis*), it has never been given the effect to validate the contract of a married woman which was invalid according to the *lex loci contractus* (or according to the *lex loci solutionis* or *lex domicilii*, if either is held to prevail over the *lex loci contractus*).

The observation in *Moody v. Barker* (1920) 188 Ky. 401, 222 S. W. 89, that it may be stated without exception that if, under the *lex loci contractus*, the contract is void for any reason, it will be invalid everywhere, and will not be enforced, although it would be valid if executed at the forum, is clearly correct when qualified so as to admit the effect of *lex loci solutionis* in jurisdictions in which that is preferred as the general test of contractual capacity of a married woman, or of *lex domicilii* in Louisiana, where that is preferred as the general test over *lex loci contractus* and *lex loci solutionis*.

It will be observed that though a Louisiana court may hold a married woman domiciled in that state bound by a contract which, by the law of another state, where it was executed and performable, she was incapable of making, that result is due to the general rule in that state that the *lex domicilii* governs, and not to an exception, based on public policy as regards married women domiciled in Louisiana, to a general rule which, in the absence of any obligation based on the public policy of the forum, refers the contractual capacity of a married woman to *lex loci contractus* or *lex loci solutionis* over *lex domicilii*.

3. Matters relating to the remedy.

The general rule that the *lex fori* governs as to matters of remedy (5 R. C. L. 1042) applies, of course, to the contracts of married women, not only as regards matters of remedy that are common to contracts generally, and which are therefore beyond the scope of the annotation, but also as regards matters of remedy that are distinctive to the contracts of married women, and so within its scope.

And so, even when it is admitted, or conceded, that the capacity of a married woman is to be tested by the law of some place other than that of the forum, and that, by the law of that place, she had the requisite capacity to make the contract in question, and that there is no fundamental objection arising from the public policy of the forum, there may still be a difficulty in the way of enforcing the contract at the forum, with the same effect as if the action had been brought at the place whose law determines the married woman's capacity, either because the *lex fori* furnishes no remedy at all, or a remedy which is too broad or too restricted to protect the rights of the parties as fixed by the law of the place which determines the existence and extent of the capacity of the married woman, it being impossible to borrow the remedy from the latter place.

It is to be observed, however, that the application of the *lex fori* to a contract which, so far as the substantive

question of the capacity of a married woman to make it is concerned, is governed by the law of another jurisdiction, e. g., the law of another state, where it was made,—or the law of the state where it was performable, or where the married woman was domiciled, if either is chosen over the law of the place where the contract is made,—may produce a different result from that which would follow from its application to a contract which, as regards the capacity of a married woman to make it, is also governed by the law of the forum. And so the fact that the *lex fori* would have furnished an adequate remedy for the enforcement of the contract in question if it had been made at, and governed by the law of, the forum, as regards the capacity of a married woman to make it, does not have the effect to render enforceable a contract which according to the law of another state, where it was made, the married woman had no capacity to make. Upon the other hand, it does not follow from the fact that the contract could not have been enforced if made at, and governed by the law of, the forum as regards the capacity of the married woman to make it, that it must necessarily fail of enforcement if made in, and governed by the law of, another state, by which the married woman was capable, since the remedy at the forum may be adequate to the enforcement of a contract which a married woman is capable of making by the law of another state where it was made, or perhaps performable, though incapable by the law of the state where the action is brought (*forum*). In other words, the principle that the *lex fori* governs matters relating to the remedy contemplates only laws that are distinctive to the remedy, as distinguished from those that relate to matters of substance, like the capacity of a married woman to contract, and recognizes that the result of the application even of those laws of the forum that relate distinctively to the remedy may be affected by the character impressed upon the contract by the law of another jurisdiction, which governs as to matter of substance.

Notes of a married woman, being valid by the law of the state where they were made (Pennsylvania), and by the law of the state where they were payable (Kentucky), will be enforced by the courts of this state (Virginia) in the manner provided by its laws; for as to the remedy upon foreign contracts, the law of the forum governs. *Young v. Hart* (1903) 101 Va. 480, 44 S. E. 703.

Although a contract between a married woman and her husband is governed by the law of another state, in which it was made, the remedy is governed by the law of the forum; and so a rule of the forum that an action on such a contract must be in equity, and not at law, governs. *Lawler v. Lawler* (1913) 107 Ark. 70, 153 S. W. 1113; *Shane v. Dickson* (1914) 111 Ark. 353, 163 S. W. 1140.

In *Shane v. Dickson* (Ark.) *supra*, an action by the executor of the wife, upon a contract made between her and her husband, the court, while conceding that the validity of a contract between husband and wife was governed by the law of Missouri, where it was executed, said that the remedy was controlled by the law of Arkansas (*lex fori*), and that the wife, if living, could not have instituted an action at law in that state, her remedy being in equity, but that there was no error in proceeding to trial in the circuit court, as there was no motion to transfer the cause to equity.

In *Halley v. Ball* (1872) 66 Ill. 250, it was held that the question whether an action against a married woman should be at law or in equity must be determined by the law of the forum, rather than by the law of the place where the contract was made. In this case, however, the contract was enforceable at law in both states. The court said that a party seeking to enforce a contract valid by the laws of another state must avail himself of the remedy provided by the laws of the forum.

The law of the state in which a contract is executed by a married woman must be resorted to, to determine the nature of the obligation it imposes. But if it only constitutes a charge

against her separate property, and does not bind her personally, the question whether it is enforceable in an action at law, or only by suit in equity, is governed by the *lex fori*. *Burchard v. Dunbar* (1876) 82 Ill. 450, 25 Am. Rep. 384. In this case the contract was made in New York, and, by the law of New York, did not bind her personally, but was a charge upon her separate property. It was held that an action at law would not lie on the contract in Illinois, since by the law of that state the remedy would be exclusively in equity, notwithstanding that by the law of New York an action at law might be brought. It does not appear where the married woman was domiciled.

So, in *Bank of Louisiana v. Williams* (1872) 46 Miss. 618, 12 Am. Rep. 319, the court, while conceding the general principle that the validity of a contract is to be determined by the law of the place where it is made, or by the law of the place of performance, held that, notwithstanding that a note made by a married woman would be a personal charge against her by the law of the place where it was made and was payable, it would not support an action in Mississippi, her domicile, for a personal judgment, but that the remedy would be limited, as in case of a contract made in that state, to her personal property.

In *Dulin v. McCaw* (1894) 39 W. Va. 721, 20 S. E. 681, it was held that while the capacity of a woman to bind herself and her property was to be determined by the law of Pennsylvania, where the contract was made, the form of the judgment, whether against her generally or against her separate property in that state, was to be determined by the law of West Virginia (*lex fori*); and in this case it was held that the judgment ought to be limited to her separate property, according to the law of West Virginia at the time the suit was commenced, although, according to the law of Pennsylvania, a personal judgment could have been entered against her.

In *Coombes v. Knowlson* (1916) 193 Mo. App. 554, 182 S. W. 1040, it was apparently assumed that the contract

in question, having been made in Illinois, would be governed by the law of that state; but assuming the premise of the defendant, that, there being no proof of the law of Illinois in regard to the rights of a married woman to contract and prosecute suits in her own name, it must be presumed that the common law was in force there, it was held that the common law must be interpreted according to the decisions at the forum, and as the facts in the case disclosed a liability on behalf of defendant toward the plaintiff (a married woman), even at common law, she might maintain an action at law thereon in her own name, since the common-law rule that she might not maintain such an action had been changed by statute in Missouri, which, as the *lex fori*, would govern, the matter being one as to forum or procedure; and this position was adhered to upon a subsequent appeal in (1918) — Mo. App. —, 200 S. W. 743.

In *Robinson v. Queen* (1889) 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, it was said that the courts of Tennessee would recognize and enforce so much of the law of Kentucky as determined and fixed the liability of a married woman domiciled in that state, upon a contract made and payable in that state; yet, with respect to the necessity of joining her husband as a defendant, the law of Tennessee, rather than that of Kentucky, governed.

But that the result of the application of the *lex fori*, as regards joinder, may be affected by the character impressed on the contract by the law of another state, is illustrated by *Evans v. Cleary* (1889) 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440, where, in reply to the objection of the nonjoinder of a husband as the defendant in an action on a contract made and performable in Illinois at a time when, by the law of Pennsylvania, such joinder was necessary, the court said that, by the law of Illinois, the married woman was competent to contract and liable to sue without regard to her husband, and that, while it is true that in all matters relating to remedy merely the *lex fori* prevails, the liability of a

party to contract depends upon the *lex loci contractus*.

In *Ruhe v. Buck* (1894) 124 Mo. 178, 25 L.R.A. 178, 46 Am. St. Rep. 439, 27 S. W. 412, it was held that notwithstanding that a married woman, by the law of Dakota, where the matrimonial domicile was established and the contract was made, might bind herself by contract, yet her real estate in Missouri was not subject to attachment for the debt created by such contract. The decision is not upon the ground that the validity of the contract was to be determined by the law in Missouri, but upon the ground that the creditor was only entitled to the remedies allowed by the law of Missouri, and that, at the time the suit was commenced, the property of a married woman could not be attached in that state. There was an able dissenting opinion in this case in which the position was taken that while the *lex fori* governs as to the remedy, yet the status of the party with reference to the contract was established by the *lex loci*, and that, relatively to such contract, she had the status of a *feme sole*.

Johnston v. Gawtry (1882) 11 Mo. App. 322, affirmed in (1884) 83 Mo. 339, involving a note which a woman had indorsed with a statement that the intention was to charge her separate estate, the court said that whenever a married woman, having a separate estate in lands in Missouri, makes a contract which, if made in Missouri, would be enforced in equity against her separate estate there, her capacity to make it, and its validity, when the attempt is made in Missouri to enforce it against her separate estate there, are governed by the laws of Missouri. The court added, however, that the contract of the married woman was made in New York, and there was no evidence that, according to the New York system of jurisprudence, that contract would not be enforceable against her separate property.

The decision in *Hayden v. Stone* (1880) 13 R. I. 106,—where it was held that neither real nor personal property in Rhode Island, belonging to a

married woman domiciled in Massachusetts, could be attached in an action upon a promissory note made by her in Massachusetts, and valid in that state, but invalid according to the law of Rhode Island,—as explained in the subsequent case of *Brown v. Browning* (1886) 15 R. I. 422, 2 Am. St. Rep. 908, 7 Atl. 403,—seems to rest on substantially the same ground as the decision in the preceding case.

In *Wick v. Dawson* (1896) 42 W. Va. 43, 24 S. E. 587, which proceeded upon the assumption that the validity of a contract was to be determined by the law of Ohio, where it was made, and to be performed, and that, by the law of such place, it was valid, it was held that the law of the state where land, the separate property of a married woman, is situated, must determine the question of its liability to be subjected to the payment of claims against her, without reference to where the contract upon which the claim was based was made. This language is broad enough to make the *lex rei sitæ* govern, even if it operates to prevent the enforcement against real property of a contract made in a state by the law of which it would be enforceable against such property; but, as a matter of fact, the *lex rei sitæ* was applied in this case so as to hold the contract enforceable against real property in West Virginia, although it was executed and to be performed in Ohio.

The court in *Gibson v. Sublett* (1885) 82 Ky. 596, however, seems to take subsequently the same position that was taken in the dissenting opinion in *Ruhe v. Buck* (Mo.) *supra*. In the *Gibson* Case it was held that a contract made in Louisiana by a married woman domiciled in that state, and which was valid by the law of that state, and enforceable against her separate property there, could be enforced against her real property in Kentucky, notwithstanding that the obligation was not one which, by virtue of the Kentucky statute, could be enforced against such property. The decision is upon the ground that, when it is ascertained that a contract made by a married woman in another state

is valid and binding, the remedy provided for the satisfaction of judgments should be applied as though the judgment were against a feme sole, or a married woman invested with the rights, and subject to the responsibilities, of a feme sole. The same position was taken in *Young v. Bullen* (1897) 19 Ky. L. Rep. 1561, 43 S. W. 687.

So, in *State Bank v. Maxson* (1900) 123 Mich. 250, 81 Am. St. Rep. 196, 82 N. W. 31, the court sustained a writ of attachment on land in Michigan, owned by a married woman—a resident of Kansas, in an action to enforce her note for her husband's debt, given and payable in Kansas, by the law of which a wife's property is subject to seizure for her debts, although not specifically bound, notwithstanding that, if the contract had been made in Michigan, it could not have been enforced against her property there, because the property was not specifically bound thereby. And to the same effect is *National Exchange Bank v. Rook Granite Co.* (1911) 155 N. C. 43, 70 S. E. 1003.

So, the laws of Iowa, providing that a married woman may create a liability against her separate real estate, are properly applied in an action in Texas to attach the separate real property of a married woman residing in Iowa, upon a promissory note executed by her in the latter state. *Merrielles v. State Bank* (1893) 5 Tex. Civ. App. 483, 24 S. W. 564.

A promissory note given in Louisiana by a married woman domiciled in that state, as surety for her husband, although void according to the law of Louisiana, will nevertheless be enforced in Mississippi against her separate real property in that state, where she contracted with reference to such estate and intended to charge it by the note, although the note purported, on its face, to be merely the personal obligation of the wife. *Friereson v. Williams* (1879) 57 Miss. 451. The decision is upon the ground that, while the capacity of a married woman to make a personal contract will be determined by the law of her domicil, yet her capacity to contract with ref-

terminated by the *lex rei sitæ*, and that the note in question was a contract with reference to her real property. It was conceded in this case that the note, as a personal obligation of the wife, would have been adjudged void, out of comity to Louisiana, even if it were not so by the law of Mississippi.

In *Wood v. Wheeler* (1892) 111 N. C. 231, 16 S. E. 418, it was held that a personal judgment may be rendered in North Carolina against a married woman upon a note signed by her in South Carolina, where she was domiciled at the time, it being valid according to the law of that state, notwithstanding that it would have been invalid if executed in North Carolina, because her husband did not assent thereto, and notwithstanding that it was secured by a mortgage upon land in North Carolina, which is void because not executed in the manner required by the law of North Carolina. The married woman became a resident of North Carolina after the contract was made.

So, notes executed by a husband and wife jointly, as makers in Missouri, where they were then domiciled, by the law of which a married woman may bind herself as a *feme sole*, are enforceable against her in Louisiana whither she subsequently removed, in the same manner and to the same extent as they could be enforced in Missouri. *Baer Bros. v. Terry* (1902) 108 La. 597, 92 Am. St. Rep. 394, 32 So. 353.

And in *Benton v. German-American Nat. Bank* (1895) 45 Neb. 850, 64 N. W. 227, it was held that an action would lie in Nebraska to recover a personal judgment against a married woman domiciled in Missouri, upon an indorsement, in the latter state, of a note executed and delivered and payable in such state, notwithstanding that it would have been invalid if governed by the law of Nebraska, because it was not made with reference to, or upon the faith and credit of, her separate estate or business, as required by the Nebraska statute. In this case it will be observed that the place where the contract was made,

indorser was domiciled, was the same, and the conflict was merely between the law of that state and the law of the forum.

That the principle which refers matters of remedy to the *lex fori* is not to be applied so as to give a greater or different substantive effect to the contract of a married woman than it has by the law of another jurisdiction which properly governs as to matters of substance, is illustrated by the cases which follow:

Thus, in *Hinkson v. Williams* (1879) 41 N. J. L. 35, it was held that an action could not be maintained in New Jersey against a husband and wife for goods sold to the wife in Pennsylvania upon her credit, by virtue of a statute of Pennsylvania which provides, in effect, that suit may be brought and judgment recovered against both husband and wife upon such liability, but that, after judgment, execution must first issue against the husband alone, and shall issue against the wife only in case no property of his is found. The decision is upon the ground that there was no mode of procedure by which the wife's right, under the Pennsylvania statute, to have the judgment satisfied out of the husband's property before resorting to hers, could be preserved, since, under the law of New Jersey, the effect of a judgment in the action would be merely that of a common-law judgment against two defendants, to be carried into effect by execution against both, and the wife's separate property might thus be made primarily liable for the entire debt,—a result manifestly repugnant to the policy of the Pennsylvania act.

And, in *Bradley v. Johnson* (1884) 46 N. J. L. 271, it was held that an action would not lie in that state to recover a personal judgment against a married woman upon a contract made in New York, notwithstanding that such an action would lie if the contract had been made in New Jersey. The decision is upon the ground that, as no statute of New York on the subject was proved, it must be presumed that the equity rule is in force in New

York, by which a liability assumed by a married woman will be enforced against her separate estate, but will not render her personally liable.

So, an action cannot be maintained in Colorado to obtain a personal judgment against a married woman domiciled in Missouri upon a contract made by her in that state, where, by the law of Missouri, as it was at the time of the contract, the contract would only constitute a charge against her separate property. *Hochstadter v. Hays* (1887) 11 Colo. 118, 17 Pac. 289. The decision is upon the ground that, by the law of Missouri, which governs the effect of the contract, there was no personal obligation.

In *Griswold v. Golding* (1887) 8 Ky. L. Rep. 777, 3 S. W. 535, however, it was held that a note executed in Missouri, by a woman domiciled there, and which, by the law of Missouri, was not chargeable against her personally, or against her general estate, was not chargeable against real property in Kentucky belonging to her general estate, although the note, if made and payable in Kentucky, would have been chargeable against such property.

In *Spearman v. Ward* (1887) 114 Pa. 634, 8 Atl. 430, it was held that a note given in Ohio by a married woman domiciled in that state could not be enforced against her personally, or even against her separate property (real estate) in Pennsylvania, notwithstanding that it would be enforceable against her separate estate in Ohio. The decision is upon the ground that the proceeding on a married woman's contract in Ohio is practically a proceeding in rem, not against the feme covert personally, but against her property; and that the law which authorized it has no extra-territorial effect. *Whitehurst's Estate* (1884) 7 Pa. Co. Ct. 12, is to the same effect.

But a charge by a married woman in Tennessee, of her separate estate at the place of contract or elsewhere, for the payment of notes given for her own debt, may be enforced in Mississippi, although the contract might not uphold a personal judgment in Ten-

nessee against her. *Read v. Brewer* (1894) — Miss. —, 16 So. 350.

III. *Contracts relating to real property or immovables.*

The question whether real estate in one state is subject to the liability created by a contract, governed as to matters of substance by the law of another state, which does not relate directly or specifically to such real estate, is considered *supra*, II. d. 3.

The capacity of a married woman to contract with reference to real property is determined by the law of the place where the property is situated; at least, so far as her capacity depends upon a law which operates directly on such property, as distinguished from one which operates on the person.

Thus, it has been held or declared that the capacity of a married woman, with or without the assent of her husband, to convey or mortgage real property, is determined by the law of the place where the property is situated (*lex rei sitæ*), irrespective of the place where the deed or mortgage was executed, or the married woman was domiciled. *McDaniel v. Grace* (1855) 15 Ark. 465; *Thompson v. Kyle* (1897) 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12; *Walling v. Christian & C. Grocery Co.* (1899) 41 Fla. 479, 47 L.R.A. 608, 27 So. 46; *Sell v. Miller* (1860) 11 Ohio St. 331; *Otis v. Gregory* (1887) 111 Ind. 504, 13 N. E. 39; *Swank v. Hufnagle* (1887) 111 Ind. 453, 12 N. E. 303, 13 N. E. 105; *Cochran v. Benton* (1890) 126 Ind. 58, 25 N. E. 870; *Doyle v. McGuire* (1874) 38 Iowa, 410.

Not only the form of execution of a power of attorney executed by a married woman domiciled in Louisiana, authorizing her husband to convey real property in Arkansas, but her capacity to give such a power of attorney at all, is to be determined by the law of Arkansas (*lex loci sitæ*), and not by the law of Louisiana, where she was domiciled and where the power of attorney was executed. *McDaniel v. Grace* (Ark.) *supra*.

So, the capacity of a married woman to convey land to her husband (*Duffy*

W. 368), or to receive a conveyance directly from him (*Rush v. Landers* (1902) 107 La. 549, 57 L.R.A. 353, 32 So. 95; *Polson v. Stewart* (1897) 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737), is to be determined by reference to the law of the place where the land is situated, irrespective of the domicil or the place where the deed was executed.

In *Wood v. Wheeler* (1892) 111 N. C. 231, 16 S. E. 418, the court, while, as already shown *supra*, upholding and enforcing a note given in South Carolina by a married woman then domiciled in that state, by the law of which she was capable of contracting, held that a mortgage on land in North Carolina, given to secure it, was void because executed without the written assent of the husband, and without privy examination, as required by the law of North Carolina.

In *Bender v. Bailey* (1912) 130 La. 341, 57 So. 998, where a resident of Texas willed all his property to his wife and four children, and appointed his wife executrix, with power to sell all his property at private sale, and she, individually and as executrix, sold real property in Louisiana at private sale, it was held that, although the sale would have been valid in Texas, it was not valid in Louisiana, the law of which governed.

In *Conner v. Elliott* (1920) 79 Fla. 513, 524, 85 So. 164, where a husband and wife domiciled in Alabama executed in that state a deed to land in Florida, and subsequently executed in Florida another deed to correct an error in the description in the first deed, and in a subsequent suit the conveyance had been decreed to create a mortgage lien, the court, applying the general principle that contracts in relation to real property are governed by the *lex rei sitæ*, referred the question of the married woman's capacity to give the mortgage as security for a debt of the husband to the law of Florida, by which it was valid; and said that the asserted provision of the law of Alabama, where the first instrument was executed, was not material in a proceeding in a court of

that was valid under the Constitution and statutes of Florida, where the land was situated.

In *Morris v. Linton* (1905) 74 Neb. 411, 104 N. W. 927, where a suit to foreclose a mortgage on real estate in Nebraska was defended by the children of the mortgagor, upon the ground that, under the terms of an antenuptial settlement, the children of the marriage were to take, as purchasers, any property which the mother (the mortgagor) subsequently acquired, the court, in reliance on a previous Nebraska decision to the effect that a married woman cannot contract with reference to her subsequently acquired property, held that the antenuptial agreement was ineffectual to affect the rights of the mortgagee, it having been executed when the mortgagor was a minor, and not ratified and carried out by a deed of settlement until after the execution of the mortgage in question. It was contended by counsel for the children that the contract, the mortgage, and the notes were all governed by the laws of Great Britain, the place where the contract was entered into, and not by the laws of Nebraska, the situs of the real estate; but the court referred to the general principle, as stated by Judge Story in his *Conflict of Laws*, § 428, that the law of the situs shall exclusively govern in regard to all rights, interests, and titles in and to immovable property; and said that it followed that the execution of the mortgage and the contract under which the minors claim title to the real estate must be determined by the laws of Nebraska, and not by the laws of England.

Sometimes, however, while a contract of a married woman with reference to real property would be invalid if executed in the state where the property is situated (or by a person domiciled in that state, if, as in Louisiana, the *lex domicilii* rather than the *lex loci contractus* governs as to personal capacity), it would be so, not because of a law which operates directly on the property, but because of one which operates on the person; or, to use the language of the civil jurists

which has been adopted in Louisiana, it would be because of a personal statute, and not because of a real statute. When that is so, if the contract would be valid by the law of the place where it was made (or by the law of the domicile), it is at least a serious question whether it should not be upheld, even as affecting real property, at another place. Such a case was presented in *Augusta Ins. & Bkg. Co. v. Morton* (1848) 3 La. Ann. 417. In that case a mortgage executed in Maryland, by a married woman domiciled there, upon immovables in Louisiana, to secure a debt of her husband, was upheld in the latter state, notwithstanding an article of the Louisiana Code which provided that a wife could not bind herself for the debts of her husband. The decision is upon the ground that, by the law of Maryland, a married woman could bind her separate property to secure a debt of her husband, and that article of the Code above referred to was a personal, and not a real, statute; i. e., that it operated on persons rather than on property, and that her personal capacity was governed by the law of Maryland. In *Swank v. Hufnagle* (1887) 111 Ind. 453, 12 N. E. 303, 13 N. E. 105, a contrary result was reached. It was there held that a mortgage on land in Indiana to secure a debt of the husband was invalid, although executed in Ohio, because by the statute of Indiana, a married woman was prohibited from mortgaging her land as surety for her husband. This case, however, is distinguishable from the preceding case, because the Indiana statute expressly related to property, and was therefore real, and not personal. It was held in *Thomson v. Kyle* (1897) 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12, however, that a mortgage executed by a married woman on her separate real estate in Florida, as security for a debt of her husband, was valid and enforceable, notwithstanding that, by the law of Alabama, where the mortgagor was domiciled, the mortgage was executed, and the debt payable, a wife could not bind herself, or her property, for the debt of the husband. As the statute of Ala-

bama was evidently a personal statute, it would seem that the principle of the decision in the Louisiana case would have made the law of Alabama govern. In *Evans v. Beaver* (1893) 50 Ohio St. 190, 40 Am. St. Rep. 662, 33 N. E. 643, it was held that a mortgage upon land in Ohio, executed by a married woman domiciled in Indiana, to secure notes given by her husband in Indiana and payable in that state, was invalid because, by the law of Indiana, she was not capable of becoming surety for her husband, although she was by the law of Ohio. The decision, however, does not rest upon the theory adopted in the Louisiana case, but upon the ground that a mortgage was only security for the performance of the personal obligation; and, that obligation being invalid by the law of Indiana, which governed it, there was nothing to support the mortgage. This result was avoided in *Thomson v. Kyle* (Fla.) supra, by holding that the personal obligation of the husband, which was valid by the *lex loci contractus*, was sufficient to support the wife's mortgage, notwithstanding that she was not personally bound because of her incapacity by the *lex loci contractus*.

Apparently upon the same principle that controlled the decision in *Augusta Ins. & Bkg. Co. v. Morton* (1848) 3 La. Ann. 417, it was held in *Kelly v. Davis* (1876) 28 La. Ann. 773, that the capacity of a married woman to take a deed of real property situated in Louisiana from her husband was to be determined by the law of Mississippi, where the parties resided, though its effect on real property in Louisiana would be determined by the law and policy of Louisiana. In this case the deed, which was executed in Mississippi, was held invalid in accordance with a law of Mississippi, making such a deed void as to existing creditors. The court said that, even if tested by the law of Louisiana, the deed would be invalid; but the decision is clearly on the ground that the law of Mississippi governed; apparently because it was personal.

It is further to be observed that a deed or mortgage executed by a mar-

a personal contract by which, according to the law of another state where it was made (*lex loci contractus*), she was incapable of binding herself, and so the deed or mortgage may fail or be defeated, if there is no other personal obligation to support it, although, according to the law of the place where the real property is situated, she is not only capable of executing a deed or mortgage, but would also have been capable of binding herself by the personal contract if it had been made in that state. Theoretically this result does not involve a repudiation of the general principle that the validity of contracts in relation to real property (executed contracts, at least), including the question of capacity, is governed by the *lex rei sitæ*, since, upon the present hypothesis, the deed or mortgage fails not because the married woman was incapable of executing it, but because of the invalidity of the contract in connection with which, or on the basis of which, the particular deed or mortgage in question was given.

Thus, in *Lamkin v. Lovell* (1912) 176 Ala. 334, 58 So. 258, a suit by a married woman to cancel her note and mortgage on land in Mississippi, on the ground that they were given to secure a debt of her husband, it was held that the law of Alabama, where the parties lived and the note was made and was payable, by which a married woman is incapable of contracting to secure a debt of the husband, governed both as to the note and mortgage. The court conceded, for the sake of the argument, that if the contract were a Mississippi contract, it might be enforced and the mortgage foreclosed in the courts of that state; but, being an Alabama contract, it would be assumed that, upon proof in Mississippi of the law of Alabama the courts of Mississippi would interfere to prevent a foreclosure of the mortgage in that state.

So, it was held in *Burr v. Beckler* (1914) 264 Ill. 230, L.R.A.1916A, 1049, 106 N. E. 206, Ann. Cas. 1915D, 1132, that even though a trust deed is valid

is governed by another law, and is invalid by that law because of the lack of capacity of the married woman.

In *Post v. First Nat. Bank* (1891) 138 Ill. 559, 28 N. E. 978, it was held that the capacity of a married woman to mortgage her real property in Illinois to secure a note of her husband was governed by the law of Illinois, where the property was situated, by which she was capable, and not by the law of Texas, where the mortgage was executed, by which she was incapable. The husband's note, which, so far as appears, was valid even by the law of Texas, would apparently support the wife's mortgage, without regard to any personal liability on her part.

In *Myers v. Steenberg* (1921) — Ala. —, 90 So. 302, a suit to foreclose a mortgage on real estate in Alabama, belonging to a married woman domiciled in Illinois, in which state the mortgage and the notes secured thereby were executed, the decision turned upon the question whether the debt secured was the joint debt of husband and wife, or the debt of the husband for which the wife was surety only. The mortgage in this case expressly stipulated that it, and the notes secured thereby, were made under, and were to be construed by, the laws of Alabama. It is also provided by statute that all contracts concerning real property in the state, entered into by married women who are not residents, will have the same force and validity as if such contracts were made by married women residing in the state. The court said that, when the facts were found from the evidence, the law of Alabama must be applied to them.

See, further, as to the effect upon a mortgage upon real property in one jurisdiction of the invalidity of the personal obligation which it was given to secure by the law of another jurisdiction, where the contract was made. *Thomson v. Kyle* (1897) 39 Fla. 582, 63 Am. St. Rep. 193, 28 So. 12, and *Evans v. Beaver* (1893) 50 Ohio St. 190, 40 Am. St. Rep. 666, 33 N. E. 643, *supra*.

The principle that the *lex rei sitæ*, as

such, governs as to real property, is also subject to an exception as to personal covenants or obligations which, although in relation to real property, do not directly affect the title to or an interest in the property itself. It will be observed that this exception to, or qualification of, the principle which refers contracts in relation to real property to the *lex rei sitæ*, as such, may apply to a contract that is wholly executory, e. g., a contract to convey real property, or to a personal covenant in a deed or mortgage.

In *Polson v. Stewart* (1897) 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737, the court, speaking by Holmes, J., said: "But it is said that the laws of the parties' domicil could not authorize a contract between them as to lands in Massachusetts. Obviously this is not true. It is true that the law of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res. *Ross v. Ross* (1880) 129 Mass. 246, 37 Am. Rep. 321; *Hallgarten v. Oldham* (1883) 135 Mass. 7, 46 Am. Rep. 433. But the same reason, inverted, establishes that the *lex rei sitæ* cannot control personal covenants not purporting to be conveyances between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract."

A rather curious result was reached by the Massachusetts supreme court in *Polson v. Stewart*. The court there held that a covenant executed by a husband in North Carolina, where the parties were domiciled, to "surrender, convey, and transfer" his marital rights in certain property of the wife and her heirs, could be specifically enforced in Massachusetts, with reference to real property in Massachusetts. Holmes, J., admitted that a deed directly from the husband to the wife

would have been invalid, although it had been executed, and the parties had been domiciled, in North Carolina, according to the law of which the wife would have been capable of receiving such a deed, she having been made a "free trader." He also apparently conceded what is expressly stated in the dissenting opinion of Field, Ch. J., that the covenant would have been invalid and unenforceable if the parties had been domiciled in Massachusetts and the contract had been made there, for he said that the competency of the wife to receive the covenant is established by the law of her domicil and of the place of the contract. Then, starting with the competency of the parties to make the covenant, he holds that it can be specifically enforced in Massachusetts because everything essential to its performance can be done consistently with the law of Massachusetts. Proceeding evidently on the theory that the parties must be regarded as having contemplated the enforcement of the covenant in a manner which would be consistent with the law of Massachusetts (which, as already shown, forbade a conveyance directly from the husband to the wife), he summarizes the undertakings of the husband as follows: First, not to disturb his wife's enjoyment while he kept her property; secondly, to execute whatever instrument was necessary in order to release his rights if she conveyed; and thirdly, to claim no rights on her death, but to do whatever was necessary to clear the title from such rights. He then says all these were as capable of performance in Massachusetts as they would have been in North Carolina. The suit was brought by the wife's administrator; but the opinion says that all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited. To revert again to the distinction based on domicil and the place of the contract, it would seem, from the reasoning of the opinion, that the reason the covenant could not have been enforced if the parties had been domiciled in

Massachusetts and the covenant had been made there, would have been that the parties would have no capacity to make the covenant at all, and therefore that, though everything which was necessary to its performance might be voluntarily performed by the husband, he could not be compelled to do any of such acts, because, in legal effect, the covenant was as if it had never been executed. Field, Ch. J., says in his dissenting opinion: "It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife wherever they may have their domicil, and yet say that they make a contract to convey such land from one to the other, which our courts will specifically enforce." If he meant a contract to convey directly from one to another, the quotation does not represent the position of the majority for it is impliedly admitted, in the prevailing opinion, that such a contract could not have been enforced because it would call for an act which would be contrary to the law of Massachusetts. The position of the majority on this point seems practically to amount to this: That the capacity of the parties to contract to do any act with reference to real property that might be done voluntarily consistently with the *lex rei sitæ*, is to be determined by the law of their domicil and of the place of the contract; and, if capable according to that law, the contract may be enforced, although they would not be capable by the *lex rei sitæ* of binding themselves to do such act. (Logically, the hypothesis need only include capacity according to the law of the place, where the contract is made in jurisdictions (see *supra*, II. a) in which *lex loci contractus* is held to prevail over *lex domicilii* and *lex loci solutionis*; or according to *lex domicilii*, or *lex loci solutionis*, in jurisdictions in which either is held to prevail over *lex loci contractus*.)

In *Alexander v. Shillaber* (1882) 64 How. Pr. (N. Y.) 530, the *lex loci contractus*, and not the *lex rei sitæ*, was held to govern the capacity of a married woman to make an executory

contract to convey the real property; at least, where she is not a resident of the state or territory in which the property is situated. This was an action at law by the purchaser to recover the amount he had paid under the contract, the defendant having failed and refused to convey.

In *Brown v. Dalton* (1899) 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443, it was held that an action would not lie in Kentucky against a married woman, domiciled in that state, upon her covenant in a deed to land in Virginia, executed by her husband to herself in Kentucky, whereby she assumed the payment of a note executed and payable in Virginia, which had been given by the husband in part payment of the land. The decision is not upon the ground that the deed was made in Kentucky, but apparently upon the ground that it would be contrary to the public policy of Kentucky to enforce such a covenant against a married woman domiciled in that state. The court said: "The wife was entitled, not only to the protection of the husband, but to his counsel and guidance in the management of her affairs, and she had learned that it was her duty to submit to him. If, when the law had imposed this duty upon her, it shall allow him to make contracts with her to pay his debts, and enforce these contracts against her because the debt is payable in another state, it will defeat the purposes of the statute framed to protect married women and prevent their property being wasted."

The law of Illinois, where the deed was delivered, governs with respect to the interpretation and validity of a married woman's covenant, in a deed of her husband's land in that state, to pay and discharge a certain trust deed or mortgage on the property, notwithstanding that the deed was acknowledged by her in Kentucky. *Western Springs v. Collins* (1900) 40 C. C. A. 33, 98 Fed. 933. It did not appear in this case where the woman was domiciled.

But in *Bank of Africa v. Cohen* [1909] 2 Ch. (Eng.) 129, 78 L. J. Ch.

N. S. 767, 100 L. T. N. S. 916, 25 Times L. R. 625, the court, upon the ground that the capacity of a married woman to make a contract with regard to an immovable is governed by the *lex situs*, refused to grant either specific performance, or damages for breach, of a contract executed in England by a married woman, whose domicile was English, whereby, to secure a debt of her husband, she agreed to mortgage to a bank carrying on business in England and in the Transvaal a certain immovable in the Transvaal, it appearing that, by the law prevailing in the Transvaal, a married woman was incapable of becoming surety for her husband unless she expressly renounced the benefit of the provisions of the Roman-Dutch law on the subject after having been informed of her rights,—a condition that had not been complied with in this case. The opinions in this case do not seem to recognize the possible distinction between the governing law as to the capacity to make an executory contract to convey or mortgage the property, and the governing law as to the capacity to convey or mortgage, although that distinction was urged in the briefs of counsel, which, among other cases, cite *Polson v. Stuart* (1897) 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737. The opinion of Buckley, L. J., distinguishing *Ex parte Pollard* (1840) Mont. & C. Bankr. (Eng.) 239, ob-

served that in that case the mortgagor was capable, and had purported to mortgage the land; and while, according to the *lex situs*, his mortgage was ineffectual in rem, yet, even according to the *lex situs*, his contract to mortgage could have been enforced in personam, but a judgment for specific performance in the case at bar would mean that the court should order the defendant, after having her rights explained to her, to renounce the provisions of the Roman-Dutch law, whereas the law to be applied is that she, after explanation of her rights, may refuse to renounce them.

In *Baum v. Birchall* (1892) 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620, reversing (1891) 11 Pa. Co. Ct. 222, it was held that the law of Delaware governed with respect to the capacity of a married woman domiciled in Pennsylvania to execute a bond for the purchase price of land in Delaware. There were three alternative grounds of decision. The first was that, the bond being payable by its own terms in Delaware, the law of that state governed without reference to where the contract was made; but it was further held that the contract was really made in Delaware, although signed in Pennsylvania, since it was delivered to the obligee in Delaware. The third ground was that, as it was a contract relating to real property, it was governed by the *lex rei sitæ*.

G. H. P.



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